IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Respondent, v. RAHEEM JEFFERSON BRENNERMAN, Petitioner/Movant,	Case No.: 17-cr-155 (LAK)

OMNIBUS MOTION INCLUDING MOTION FOR COLLATERAL ATTACK RELIEF PURSUANT TO 28 UNITED STATES CODE SECTION 2255 AND OTHER RELIEFS

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I. RELIEF SOUGHT

Petitioner/Movant Pro Se Raheem Jefferson Brennerman ("Brennerman") respectfully submits this Omnibus Motion (the "Omnibus Motion") and will move this Court before Honorable Lewis A. Kaplan, United States District Judge, at 500 Pearl Street, New York, New York 10007 for an order: (a.) Granting Brennerman's collateral attack motion pursuant to 28 United States Code Section 2255 (the "Collateral Attack Motion") to set-aside the judgment of conviction and vacate the sentence; (b.) Granting Brennerman's motion to stay enforcement of the judgment of conviction and sentence pending determination of the collateral attack motion pursuant to Rule 38 of the Federal Rule of Criminal Procedure; (c.) Granting Brennerman's motion to disqualify and/or seek recusal of the Court (Kaplan, J.) to consider and determine the omnibus motion pursuant to 28 United States Code Section 455(a), or any other relief which this Court may deem just, necessary or appropriate including evidentiary hearing.

II. JURISDICTION

The Court of Appeals judgment affirming Petitioner's conviction and sentence was entered on June 9, 2020. Brennerman's motion for rehearing en banc was denied on September 9, 2020. See 18-1033, EFC No. 314; 318. Brennerman filed Petition for writ of certiorari to the Supreme Court of the United States. See *Brennerman v. U.S., S. Ct. No. 20-6895 (EFC Dec. 30, 2020).* The Supreme Court of the United States denied to grant certiorari on February 22, 2021. A one-year limitation for Brennerman to bring collateral attack motion challenging his judgment of conviction and sentence expires on February 21, 2022. This omnibus motion was presented prior to the one-year time limitation.

III. ISSUES PRESENTED

BACKGROUND

The history of this matter began in 2014 when ICBC (London) PLC ("ICBC London") 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, after ICBC London had reneged on the original $1.35 Billion dollars financing agreed with Blacksands. Significantly, Petitioner Raheem J. Brennerman, the CEO of Blacksands, was not named as a defendant in that action. *ICBC (London) PLC v. The Blacksands Pacific Group*, Inc., Notice of Removal; Cv. Cover Sheet, No. 15 Cv. 70 (LAK), EFC Nos. 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. *ICBC*, 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. *ICBC*, 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." *ICBC*, Order, No. 15 Cv. 70 (LAK), EFC No. 87).

Subsequently, ICBC London moved for contempt and coercive sanctions against Blacksands. *ICBC*, 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. *ICBC*, 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. *ICBC*, Pl.'s Decl., No. 15 Cv. 70 (LAK), EFC. No. 123, pp. 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. *ICBC*, Pl.'s Decl., No. 15 Cv. 70 (LAK), EFC No. 123, pp. 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. *ICBC*, 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. *ICBC*, 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. *ICBC*, 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. *ICBC*, 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. *ICBC*, 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. *ICBC*, 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. *Brennerman,* Bail Hr.'g Tr., 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. *United States v. Brennerman*, 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. *Brennerman*, 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. *Brennerman*, 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?" *Brennerman*, 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). *Brennerman*, 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). 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. *Brennerman*, Order to Show Cause, No. 17 Cr. 155, EFC No. 52.

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. *Brennerman*, Mem. & Order, No. 17 Cr. 155 (LAK), EFC No. 76.

In November 2017, prior to trial for the fraud case, Mr. Brennerman made request to Judge Sullivan in his motion-in-limine requesting that the Court exclude the testimony of any witness from ICBC London because he had been unable to obtain the complete ICBC records including the underwriting files, which he required to engage in cross-examination of the witness and that

the government will be able to elicit testimony from such witness while he would be deprived of the ability to engage in any meaningful cross-examination of the witness as to substance and credibility on the issues. Mr. Brennerman argued that his Constitutional rights including his right to a fair trial will be deprived. Mr. Brennerman also argued that he would be deprived of his ability to present a complete defense, thus depriving his Sixth Amendment right. However Judge Sullivan denied his request. *Brennerman*, Mem. in Opp'n; Mot. in Lim.; Mem. In Supp., No. 17 Cr. 337 (RJS), EFC Nos. 54, 58, 59.

THE TRIAL AND POST-TRIAL PROCEEDINGS
CRIMINAL CONTEMPT OF COURT CASE AT NO. 17 CR. 155 (LAK)

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. *Brennerman*, 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. 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. 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. 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. 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
CRIMINAL CONTEMPT OF COURT APPEAL AT,
NOS. 18 1033(L); 18 1618(CON)

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).

ERROR(S) WITH THE COURT OF APPEALS' DECISION
CRIMINAL CONTEMPT OF COURT APPEAL AT, NOS. 18 1033(L); 18 1618(CON)
ARISING FROM CRIMINAL CASE AT DISTRICT COURT
AT, NO. 17 CR. 155 (LAK)

A. THE SECOND CIRCUIT ERRED IN APPROVING 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 OF EXCEPTIONAL IMPORTANCE. THIS CASES RAISES ISSUES OF IMPORTANT SYSTEMIC CONSEQUENCES FOR THE DEVELOPMENT OF THE LAW AND THE ADMINISTRATION OF JUSTICE.

I. 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, United States v. Brennerman, 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 orders and deprived Petitioner of his Constitutional right to an equal protection guarantee.

II. 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.*

III. 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 issue, 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.

IV. REASONS FOR GRANTING COLLATERAL ATTACK MOTION

STANDARD OF REVIEW

A federal prisoner may challenge his detention under 28 U.S.C. §§ 2241 and 2255. 28 U.S.C. § 2255: *Adams v. United States, 372 F.3d 132, 134 (2d Cir. 2004)*; *Chambers v. United States*, *106 F.3d 472, 474 (2d Cir. 1997).* Section 2255 is proper mechanism for a prisoner to attack the imposition of a sentence. *Adams*, 372 F.3d at 134; *McQueen v. Shult*, No. 9:08-cv-903 (GLS/GHL), 2008 U.S. Dist. LEXIS 87668 at *2 (N.D.N.Y. Oct 28, 2008). A motion pursuant to U.S.C. § 2255 must be brought in the sentencing court. *Boumediene v. Bush*, 553 U.S. 723, 774-75 (2008) ("Section 2255 directed claims challenging a federal sentence on the ground that it was imposed in violation of the Constitution or law of the United States "not to the court that had territorial jurisdiction over the place of the petitioner's confinement but to the sentencing court, a court already familiar with the fact of the case."); *Williams v. Winn*, 2005 U.S. Dist. LEXIS 12966 at *1 (D. Mass Jun 30, 2005).

ARGUMENTS

A. GROUND ONE: THE CONVICTION WAS OBTAINED AND SENTENCE IMPOSED IN VIOLATION OF THE RIGHT TO A FAIR TRIAL AND PROCEEDINGS.

I. JUDICIAL MISCONDUCT, BIAS AND PARTIALITY WITH THE COURT (JUDGE LEWIS A. KAPLAN) WHO PRESIDED OVER THE TRIAL AND ENTIRE CRIMINAL PROCEEDINGS INTENTIONALLY DEPRIVING PETITIONER OF THE RIGHT TO A FAIR TRIAL AND PROCEEDINGS.

After ignoring the federal rule to conduct extra-judicial research into 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), and realizing that he is a black man. The Court (Judge Lewis A. Kaplan) was determined to convict and imprison Brennerman.

The Court (Judge Kaplan) invited the plaintiff in the civil case in ICBC (London) plc v. The Blacksands Pacific Group, Inc., 17 Cv. 70 (LAK), to pursue Brennerman personally, thereby illegally piercing through the corporate veil of the company, The Blacksands Pacific Group, Inc. ICBC's counsel then, at the Court's invitation, turned its attention to Brennerman.

Without even filing a motion to compel against Brennerman, on Wednesday, December 7, 2016, ICBC sought a finding of civil contempt against Brennerman personally by Order to Show Cause. *ICBC (London) plc v. The Blacksands Pacific Group, Inc., 15 Cv. 70 (LAK), EFC No. 121*. In this year-old proceeding, Judge Kaplan granted ICBC's Order to Show Cause, scheduling a hearing for December 13, 2016, only 4 business days later, and requiring that opposition papers be filed by 4 p.m. on Sunday, December 11, 2016. Id. When Brennerman received notice of the Order to Show Cause, he promptly informed the Court that he was out of the country in Switzerland and was trying to retain counsel, and requested additional time to respond. (The law firm, Paul Weiss LLP that represented Brennerman at the time could not appear before Judge

Kaplan as Judge Kaplan was previously a partner at that law firm, hence Brennerman needed to engage a new law firm to answer the Order to Show Cause). *ICBC (London) plc v. The Blacksands Pacific Group, Inc., 15 Cv. 70 (LAK), EFC Nos. 127-128*.

The Court (Judge Kaplan) denied Brennerman's request the next day. *ICBC (London) plc v. The Blacksands Pacific Group, Inc., 15 Cv. 70 (LAK), EFC No. 134*. Judge Kaplan then proceeded with the contempt hearing on December 13, 2016, in the absence of Brennerman or his counsel, and found Brennerman personally to be in contempt. *ICBC (London) plc v. The Blacksands Pacific Group, Inc., 15 Cv. 70 (LAK), EFC No. 140*. While Brennerman had provided discovery responses and a substantial document production in November 2016, immediately after the Court's civil contempt order directed to Blacksands, the Court made no mention of it and appeared not to have reviewed or considered that production in its determination that Brennerman was himself, in contempt.

In the contempt order, the Court (Judge Kaplan) did not provide citation to legal support for applying the theory it adopted. In particular, the order did not explain how Brennerman could be transformed into a party for discovery purposes but not for any other part of the litigation. Additionally, the order does not provide enough information on the precise legal theories it invoked in adjudging the civil contempt against Brennerman. *ICBC (London) plc v. The Blacksands Pacific Group, Inc., 15 Cv. 70 (LAK), EFC No. 140*. The Court also ignored the law in "*OSRecovery, Inc., v. One Groupe Int'l, Inc., 462 F.3d 87 (2d Cir. 2006)*" and Second Circuit Court instructions regarding adjudicating civil contempt order against non-party.

Following the adjudication of the civil contempt order against Brennerman, the Court (Judge Kaplan) then referred Brennerman to the Manhattan federal prosecutors (United States Attorney

Office for the Southern District of New York "USAO, SDNY"), when the initial prosecutors refused to prosecute, Judge Kaplan sought more willing prosecutors.

In response to the criminal referral from Judge Kaplan, the prosecutors on March 3, 2017 filed a Petition seeking to initiate criminal proceedings to hold Brennerman in criminal contempt. Rather than properly filing the Petition as a new criminal or miscellaneous proceeding, subject to random assignment, the prosecution filed that Petition in the pending civil case. *ICBC (London) plc v. The Blacksands Pacific Group, Inc., 15 Cv. 70 (LAK), EFC No. 146*.

After the prosecutors filed the Petition and Order to Show Cause, Judge Kaplan, on March 7, 2017, summoned the prosecutors to his robing room. *Ex Parte Tr., United States v. Brennerman et. ano, 17 Cr. 155 (LAK), EFC No. 12 Ex 2 ("THE COURT: "I asked you to come in.....")*. Acknowledging that the Petition constituted a new proceeding - but that the AUSAs had not properly filed it - the Court told the prosecutors that he would "direct the clerk to assign a criminal docket number to require all subsequent filings in the contempt proceeding to bear the criminal caption." Id at 8. Judge Kaplan thereby circumvented the process that applies to any new action, i.e., the random assignment of the action by the clerk. Judge Kaplan insisted on presiding over the criminal case which he initiated.

The transcript of the ex parte proceeding in the robing room demonstrates that Judge Kaplan successfully sought to influence, and substantially alter, the approach that the prosecutors had taken relating to the contempt charge. The prosecution had prepared and filed not only the Petition but also an Order to Show Cause that, consistent with FRCP 42, directed Blacksands and Brennerman simply to appear before the Court on a future date. But rather than ruling on the application that was before him, Judge Kaplan insisted that the prosecutors adopt a far more aggressive approach as to Brennerman. As the ex parte conference began, Judge Kaplan advised

the prosecutors that the Court should issue an arrest warrant for Brennerman, putting forth the entirely invalid assumption that "the United States can't find him." Id. at 2. In response, the prosecutors repeatedly expressed their view that execution of an arrest warrant was not warranted under the circumstances. Id. at 3. The prosecutors advised, first, that Brennerman had actually called them on Friday, March 3, 2017, the same day that the Petition was filed, to talk with them about that Petition. Id. The prosecutors advised Brennerman that he could not speak with them, and Brennerman then advised his phone number so, the prosecutor explained, "there may be a way for the prosecution to be in touch with him via that telephone number." Id. The prosecutor then proposed to the Court that the Order to Show Cause could be issued to require Brennerman to attend the conference and "should he not appear [] a summons or arrest warrant be issued to secure his appearance." Id.

Judge Kaplan continued to press the issue, asking "[w]hy shouldn't I, given the history in this case, issue a warrant." Id. at 5. The prosecutor reasoned:

> Mr. Brennerman did try to contact the government on Friday...[W]e don't know that he's absconded or seeks to abscond. He's already knowledgeable about the petition. 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 prosecutors went on to say that, even if the Court issued an arrest warrant, "the government would likely provide Brennerman an opportunity to surrender rather than dispatching law enforcement to apprehend him without providing that opportunity." Id.

Judge Kaplan persisted, stating: "I'm inclined to issue an arrest warrant" (Id. at 7) and pushed back against the prospect that Mr. Brennerman would 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 vanish." 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. Judge Kaplan continued to argue that the prosecution should effectuate the arrest warrant and apprehend Brennerman. Id. at 7-8.

The Court then presented the prosecution with documents that it had already prepared: a revised Order to Show Cause directed only to Blacksands, an arrest warrant for Brennerman, and an order to the clerk to initiate the criminal action. Id. at 8-9. Notably, the Court and the prosecutors discussed the fact that there was no appropriate "box to check" on the arrest warrant in terms of the document that charged the offense. Id. at 9. The Court decided to alter the arrest warrant to state that the charging document was the Petition - a document that does not charge an offense but rather only requests that the Court issue the proposed Order to Show Cause. Id. at 9-10.

Thus on April 19, 2017, Brennerman was arrested at his Las Vegas residence at the behest of Judge Kaplan even though there was no outstanding indictment, complaint or Order to Show Cause. The Court issued no subpoena or motion-to-compel. There was therefore no reason to arrest Brennerman other than Judge Kaplan's insistence.

Prior to trial, Brennerman sought recusal of Judge Kaplan from presiding over the case, however he refused to recuse himself from the case even though he was the complainant and had initiated the case. Brennerman's trial counsel then made request that the Court issue a subpoena to compel for the pertinent evidence (complete ICBC transaction files), which Brennerman required for his defense, and served the papers on ICBC's New York based counsel. Judge Kaplan denied the request stating that the Court could not grant the issuance of the subpoena

because it was served on the ICBC New York based counsel and that ICBC (London) plc was 3,500 miles from the courthouse hence the Court could not issue a subpoena to compel the bank, ICBC (London) plc. *United States v. Brennerman et. ano., 17 Cr. 155 (LAK), EFC No. 76*.

In denying the request, Judge Kaplan refused and failed to conduct any permissible analysis as to determine whether ICBC's New York based attorney held the pertinent evidence/documents. In fact, had Judge Kaplan conducted the necessary analysis he would have discovered that the pertinent evidence/documents were already with ICBC's New York based counsel because Government sole witness from ICBC (London) plc, Mr. Julian Madgett later testified in open court that the bank, ICBC (London) plc had already provided all the pertinent evidence/documents to their New York based counsel who corresponded with the prosecution and that he [Julian Madgett] was not aware whether all the evidence/documents were provided to Brennerman for his defense, particularly the pertinent files which Brennerman required at trial. *United States v. Brennerman, 17 Cr. 337 (RJS), trial tr. 552 at 15-25*. Judge Kaplan intentionally deprived Brennerman access to the pertinent evidence/document because it was/is exculpatory and so that he [Brennerman] would not posses it for his defense.

Having already intentionally denied and deprived Brennerman access to the pertinent evidence/documents from the bank, ICBC (London) plc, Judge Kaplan was fully aware during trial that Brennerman lacked the very evidence which he required to confront witnesses against him and to present his complete defense.

For the trial, conviction and punishment, Judge Kaplan then exacerbated the severity and punitive nature of this case by empaneling [sic] a jury even though the prosecution took no position on the issue *United States v. Brennerman et. ano., 17 Cr. 155 (LAK), EFC No. 49*. An impartial judge would not have empaneled a jury in such a manner as it thereby elevated an

otherwise misdemeanor case into a felony case, allowing Judge Kaplan to impose a harsher punishment on Petitioner. Judge Kaplan abused and misused his authority so as to achieve his desire and vendetta against Petitioner. Moreover, Judge Kaplan intentionally escalated a misdemeanor case (with maximum penalty of six (6) months imprisonment or $100,000 fine) to a felony case in order to classify the case as "a crime of moral turpitude," by imposing a sentence of more than one year, so as to cause significant legal consequences for the Petitioner.

During the criminal contempt of court trial, Judge Kaplan, who had an obligation to protect the Constitutional rights of Brennerman, a criminal defendant, permitted the prosecution witnesses to testify knowing that Brennerman would be unable to challenge their testimony because he had been unable to obtain the very evidence - complete ICBC transaction files which he required to challenge (impeach) the testimony of prosecution witness and present his complete defense. Judge Kaplan had previously denied Brennerman's request for the complete ICBC transaction files. *United States v. Brennerman et. ano., No. 17 Cr. 155 (LAK), EFC No. 76.*

Judge Kaplan also encouraged and permitted the prosecution to present the civil contempt order which was erroneously adjudged against a non-party in violation of the OSRecovery law, to the jury. *United States v. Brennerman et. ano., No. 17 Cr. 155 (LAK), Trial Tr. 3-7*, causing significant prejudice to Brennerman. The jury were swayed by the civil contempt order to find Brennerman guilty of the criminal contempt. See copy of Law Journal, *Law 360 article, United States v. Brennerman, No. 17 Cr. 337 (RJS), EFC No. 236 Ex. 3 at 17*.

Through action, words and deeds, Judge Lewis A. Kaplan exhibited partiality in the outcome of the criminal contempt case for Brennerman to be convicted and imprisoned. At sentencing for the criminal contempt of court conviction, Judge Kaplan exhibited his influence over Judge Richard J. Sullivan *Sentencing Tr. United States v. Brennerman et. ano., 17 Cr. 155 (LAK), EFC*

No. 152. Judge Sullivan had presided over the interrelated criminal case, which was initiated by the same prosecutors whom Judge Kaplan sought to prosecute Brennerman criminally. In the interrelated criminal case, similar to the partiality and egregious conduct exhibited by Judge Kaplan, Judge Sullivan intentionally misrepresented evidence to falsely satisfy the law to convict and imprison Brennerman among other deliberate Constitutional rights violation.

II. THE JUDICIAL MISCONDUCT, BIAS AND PARTIALITY WAS SO EGREGIOUS AND SIGNIFICANT AS TO CALL INTO QUESTION THE INTEGRITY AND FAIRNESS OF THE ENTIRE PROCEEDINGS.

Brennerman contends that he was denied his Constitutional rights to a fair trial. Further that, his Constitutional rights were intentionally abridged due to the significant partiality by the presiding judge (Kaplan, J.) as highlighted above.

Defendants in the American judicial system have the right to a fair trial, and part of this right is fulfilled by a judicial officer who impartially presides over the trial. See e.g., Bracy v. Gramley, 520 U.S. 899, 904-05 (1997).

However, "most questions concerning a judge's qualifications to hear a case are not constitutional ones, because the Due Process Clause of the Fourteenth Amendment establishes a constitutional floor, not a uniform standard." Id. at 904. A judge will, however, violate a defendant's due process right if he is biased against the defendant or has an interest in the outcome of the case. Id. at 905. A likelihood or appearance of bias can disqualify a judge as well. Taylor v. Hayes, 418 U.S. 488, 501 (1974). "A criminal defendant tried by a partial judge is entitled to have his conviction set aside, no matter how strong the evidence against him. "Edwards v. Balisok, 520 U.S. 641, 647 (1997) (citations omitted)".

Judge Kaplan acted as the chief complainant, prosecutor and judge by transforming a non-party, Brennerman, into a party but solely for the purpose of discovery, so that he [Judge Kaplan] may propound civil contempt against him. Following which Judge Kaplan then actively persuaded the prosecutors to prosecute Brennerman and he [Judge Kaplan] circumvented the process for assigning criminal cases by improperly assigning the criminal case to himself so that he may rule to achieve his endeavor to convict and imprison Brennerman for criminal contempt, thereby clearly exhibiting an interest in the outcome of the criminal case. "No-one should be a judge of his or her own cause." Congress laid down that principle in 1782. Moreover, Judge Kaplan's actions is a per se misconduct by abusing his [Judge Kaplan] judicial authority to pursue a non-party after improperly (against federal rule) conducting extra-judicial research into him and realizing that he is a black man.

Because the judge (Kaplan, J.) who presided over the entire criminal proceeding demonstrated partiality, first by ignoring the federal rule to research Brennerman, upon realizing that Brennerman is a black man, he [Judge Kaplan] ignored the law in OSRecovery to transform Brennerman, a non-party into a party but solely for the purpose of discovery so as to adjudge civil contempt against him.

Judge Kaplan adjudged the civil contempt order against Brennerman with the deliberate intent to actively persuade the federal prosecutors to arrest and prosecute him for criminal contempt of court. Judge Kaplan then permitted the prosecution witness to testify at trial as to issues, knowing that Brennerman had been denied access to the very evidence which he required to confront (impeach) the prosecution witnesses or present his complete defense. Judge Kaplan also permitted the prosecutors to present the civil contempt order adjudged against Brennerman to the jury during trial. The jury were swayed by the civil contempt orders to find Brennerman

guilty of criminal contempt of court. *See law journal, Law 360, United States v. Brennerman, No. 17 Cr. 337 (RJS), EFC No. 236 Ex. 3 at 17*.

Because Judge Kaplan exhibited partiality through his actions which demonstrated his interest in the outcome of the case. Brennerman is entitled to have his conviction set-aside.

B. GROUND TWO: THE CONVICTION WAS OBTAINED AND SENTENCE IMPOSED IN VIOLATION OF THE RIGHT TO AN EFFECTIVE ASSISTANCE OF COUNSEL

APPLICABLE LAW

Kimmelman v. Morrison, 466 U.S. 365, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986) reads, in pertinent parts, as follows:

> The right for counsel is a fundamental right of criminal defendants, it assumes the fairness and their legitimacy of our adversary process. E.g. Gideon vs. Wainwright, 372 U.S. 335, 344 83 S. Ct. 792, 796 9 L. ED 799 (1963). The essence of an effective assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect. See, e.g., Strickland v. Washington, 466 U.S. at 686, 104 S. Ct. at 2064, United States v. Cronic, 466 U.S. 648, 655-657, 104 S. Ct. 2039, 2044-2046, 80 L. Ed. 2d 657 (1984). In order to prevail, the defendant must show both that counsel's representation fell below an objective standard of reasonableness. Strickland, 466 U.S. at 688, 104 S. Ct. at 2064, and that there exists a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different, Id at 694 104 S. Ct. at 2068, 477 U.S. at 372, 106 S. Ct. at 2574
>
> The right of an accused to counsel is beyond a fundamental right. See, e.g. Gideon, 372 U.S. at 344, 83 S. Ct. at 796 ("The right to one charged with a crime to counsel may not be deemed fundamental and essential to fair trials in other countries, but it is in ours."). Without counsel, the right to a fair trial would be of little consequences...for it is through counsel that the accused secures his other rights...477 U.S. at 377, 106 S. Ct. at 2584.

Strickland recognized that an attorney's duty to provide reasonably effective assistance includes "the duty to make reasonable investigations or make a reasonable decision that makes particular investigations unnecessary. "Strickland, 466 U.S. at 691, 104 S. Ct. at 2052; see also ABA Standards for Criminal Justice. Prosecution Function

and the Defense Function, 4-4. 1(a) (3rd Edition 1993) ("Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case...."). See also Rompilla v. Beard, 545 U.S. 374, 387, 125 S. Ct. 2456, 162 L ED 2d 360 (2005) (finding ABA standard useful guide to determining what is reasonable" quoting Wiggin, 539 U.S. at 524, 123 S. Ct. 2527)

The right to effective assistance of counsel includes the right to have the lawyer adequately investigate the facts and prepare the case for plea or for trial. Powell v. Alabama, 287 U.S. 45, 57-58, 53 S. Ct. 55, 77 L. Ed 158 (1932) (Presuming prejudice where there was "no attempt made to investigate" noting that "consultation, thorough-going investigation and preparation are vitally important" in providing effective representation), United States v. Baynes, 622 F.2d 66 (3rd Cir. 1980) (failure to investigate voice exemplars), United States v. Gray, 878 F.2d 702 (3rd Cir. 1989), Couch v. Booker, 632 F.3d 241, 246 (6th Cir. 2011), Kenley v. Armontrout, 937 F.2d 1298 (8th Cir. 1991), Crisp v. Duckworth, 743 F.2d 580 (7th Cir. 1984), House v. Balkom, 725 F.2d 608 (11th Cir. 1984), Langone v. Smith, 682 F.2d 282 (2d Cir. 1982)

Other Circuits agree that the failure to conduct a reasonable investigation constitutes deficient performance. The third Circuit has held that "ineffectiveness is generally clear in the context of complete failure to investigate because counsel can hardly be said to have made a strategic choice when s/he [sic] has not yet obtained the facts on which such a decision could be made." See United States v. Gray, 878 F.2d 702, 711 (3rd Cir. 2011). A lawyer has a duty to "investigate what information...potential eye-witnesses possess[], even if he later decides not to put them to the stand." Id at 712. See also Hoots vs. Allsbrook, 785 F.2d 1214, 1220 (th Cir. 1986) ("Neglect even to interview available witnesses to a crime simply cannot be ascribed to trial strategy and tactics."); Brit v. Montgomery, 709 F.2d 690, 701 (7th Cir. 1983) cert. denied,

469 U.S. 874 (1984) ("Essential to effective representation...is the independent duty to investigate and prepare."), Mosley v. Atchison, 689 F.3d 838 (7th Cir. 2012)

Defense counsel has a duty to investigate the fact, learn the law, and evaluate the application to the facts of the case. Everett v. Beard, 290 F.3d 500, 509 (3rd Cir. 2002), United States v. Bui, 769 F.3d 831, 835 (3rd Cir. 2014), Correale v. United States, 479 F.2d 944 (1st Cir. 1973), Hill v. Lockhart, 894 F.2d 1009 (8th Cir. 1990), Cooks v. United States, 461 F.2d 530 (5th Cir. 1972). Government of Virgin Islands v. Vanderpool, 767 F.3d 157, 169 (3rd Cir. 2014) ["[a]n attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under Strickland." Hinton v. Alabama, 134 S. Ct. 1081, 1089, 188 L. Ed 2d I (2014), Medina v. DiGuglielmo, 461 F.3d 417, 428 (3rd Cir. 2006).

I. TRIAL COUNSEL DEPRIVED PETITIONER AN EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE THEIR FAILURE SIGNIFICANTLY PREJUDICED PETITIONER WHERE THEY FAILED TO OBTAIN AND PRESENT EVIDENCE (COMPLETE ICBC PERTINENT TRANSACTION FILE INDUCING UNDERWRITING FILE) WHICH PETITIONER REQUIRED TO ENGAGE IN MEANINGFUL CROSS-EXAMINATION (IMPEACH) OF WITNESSES AGAINST HIM AND TO PRESENT A COMPLETE DEFENSE.

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 where 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)*. Highlighting trial counsel's errors and deficient performance which significantly prejudiced Petitioner.

Prior to trial, Petitioner's trial counsel, Thompson Hine LLP through Attorneys Maranda Fritz Esq. and Brian Waller Esq. filed an order to show cause to compel for the pertinent

evidence (complete pertinent ICBC transaction files) which Petitioner required to prepare for trial, confront (impeach) witnesses against him and present a complete defense during trial. In response, district court issued a ruling stating in relevant parts: "In this case, defendants (Brennerman and Blacksands) did not seek, and this Court did not issue, an order authorizing the issuance of this subpoena. Nor would the Court authorize its issuance nunc pro tunc because it is undisputed that ICBC is "a foreign bank located approximately 3,500 miles from the courthouse." DI 69. It is not "a national of the United States who is in a foreign country." Accordingly Section 1783(a) does not authorize issuance of a subpoena to it. See Aristocrat Leisure, 262 F.R.D. at 305; United States v. Korolkov. 870 F. Supp. 60, 65 (S.D.N.Y. 1994) (citing Fed. R. Crim. P. 17(e)(2), 28 U.S.C. Section 1783, and United States v. Johnpoll, 739 F.2d 702, 709 (2d Cir. 1984)); accord WRIGHT, supra, Section 2462. For the foregoing reasons, defendants' motion to compel ICBC [DI 59] to respond to the subpoena dated August 22, 2017 is denied in all respects."

Notwithstanding the ruling by district court, trial counsel still failed to compel district court for the pertinent evidence (complete pertinent ICBC transaction files) pursuant to the appropriate federal rule for obtaining evidence located overseas including "Letter Rogatory" pursuant to 28 United States Code Section 1781 or appropriate Federal Rule of Criminal Procedure governing evidence located abroad thus significantly prejudiced Petitioner. The resulting prejudice, because of trial counsel's professional error Petitioner was deprived of the very evidence (complete pertinent ICBC transaction files) which he required to prepare for trial and confront (impeach) witnesses against him and present his complete defense during trial.

The complete ICBC transaction file would have demonstrated that agents of ICBC (London) plc repeatedly advised agents of The Blacksands Pacific Group, Inc., including Petitioner that

they were not interested in discovery but in settlement on which Blacksands and Brennerman focused their attention, thereby negotiating and presenting a draft settlement agreement. *Draft Settlement Agreement, United States v. Brennerman et. ano., No. 17 Cr. 155 (LAK), EFC No. 12 Ex. 10*. Thus, Petitioner and Blacksands did not willfully disobey any Court orders because by prioritizing the negotiation of the settlement agreement rather than providing more discovery, they (Blacksands and Petitioner) assumed that they were complying with the Court order, particularly the second court order which stipulated for the parties to settle or provide discovery, and given the discussion with agents of ICBC (London) plc (during the meeting at the Exotix London office) that settlement was preferred to discovery. Petitioner was however deprived of the very evidence (complete pertinent ICBC transaction files which includes records of discussions and minutes of meetings between agents of ICBC and Blacksands) during trial to confront (impeach) witnesses against him and to present his complete defense, thereby violating his Constitutional rights including his right to an effective assistance of counsel. The existence and importance of the evidence (complete pertinent ICBC transaction files) was highlighted through testimony of prosecution sole witness from ICBC (London) plc, Julian Madgett. *United States v. Brennerman,* No. 17 Cr. 337 (RJS), at Trial Tr. 551-554. This conclusively demonstrates that Petitioner was significantly prejudiced where he was deprived of very important evidence which existed at the time of trial however was not obtained or presented by this trial counsel for his defense. Thus highlighting that [but for] trial counsel's ineffectiveness and deficient performance and the outcome of the criminal proceeding and trial would have been vastly different.

C. GROUND THREE: THE CONVICTION WAS OBTAINED AND SENTENCE IMPOSED IN VIOLATION OF THE RIGHT TO EQUAL PROTECTION OF THE LAW

I. THE COURT (JUDGE LEWIS A. KAPLAN) INTENTIONALLY IGNORED THE LAW IN OSRECOVERY TO ADJUDGE CIVIL CONTEMPT ORDER AGAINST A NON-PARTY THEN PERMITTED THE PRESENTMENT OF THE ERRONEOUSLY ADJUDGED CIVIL CONTEMPT ORDER TO THE JURY AT TRIAL OF THE CRIMINAL CONTEMPT OF COURT CASE, THEREBY SWAYING THE JURY TO PREJUDICE PETITIONER.

The history of this matter began in 2014 when ICBC (London) PLC ("ICBC London") sued The Blacksands Pacific Group, Inc ("Blacksands") in New York Supreme Court primarily alleging inter alia that Blacksands has failed to repay approximately $4.4 million dollars extended to Blacksands pursuant to a Bridge Loan Agreement, after ICBC London had reneged on the original $1.35 Billion dollars financing agreed with Blacksands.

Significantly, Defendant Brennerman, the CEO of Blacksands, was not named as a defendant in that action. (Notice of Removal; Cv. Cover Sheer, 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 move for contempt and coercive sanctions against Blacksands (Order to Show Cause; P1.'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. 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 P1's Decl., No. 15 Cv. 70 (LAK), EFC No. 123, 9, 11-12). 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 P1.'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 Brennerman personally, even though he was not a named defendant in the matter and was not personally named in any discovery orders. (Order; Mem.; P1.'s Decl. No. 15 Cv. 70 (LAK), EFC Nos. 121-123). A contempt hearing was scheduled for December 13, 2016, less than a week later. (Corrected Order, No. 15 Cv. 70 (LAK), EFC No. 125)

Brennerman, however, did not have counsel. In fact, Latham repeatedly and consistently communicated to the Court, and to Brennerman that they did not represent Brennerman personally. (See e.g., Letter, No. 15 Cv. 70 (LAK), EFC No. 124). Although 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. 127-128) (Judge Kaplan was previously a partner at Paul Weiss LLP which represented Brennerman at the time thus the law firm could not appear before Judge Kaplan hence why Brennerman had to retain another law firm to represent him for the contempt proceedings). Judge Kaplan denied Brennerman's request on December 12, 2016 (Order, No. 15 Cv. 70 (LAK), EFC No. 134), and found Brennerman personally in contempt on December 13, 2016 (Orders, No. 15 Cv. 70 (LAK), EFC Nos. 139-140). While Brennerman had provided a substantial document production in November 2016, 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 Brennerman was himself in contempt (Orders, 15 Cv. 70 (LAK), EFC. No. 139-140.

The document (at Order, 15 Cv. 70 (LAK), EFC No. 139) was drafted by the plaintiff and presented to the Court. That document was later supplanted by the Court's findings in its Memorandum and Order (at Memorandum and Order, 15 Cv. 70 (LAK), EFC No. 140). In holding Brennerman in contempt the Court stated in its Memorandum and Order the basis for propounding the contempt order against Brennerman, stating:

"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" - moved by order to show cause to hold Brennerman in civil contempt of court and to impose coercive sanctions. 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....."

(See Memorandum and Order, 15 Cv. 70 (LAK), EFC No. 140 at. 18 - 19)

Following the civil contempt order propounded against Brennerman, Judge Kaplan referred Brennerman to the Manhattan federal prosecutors (United States Attorney Office for the Southern District of New York "USAO, SDNY") and persuaded the prosecutors to arrest Brennerman and prosecute him criminally (See No. 17 Cr. 155 (LAK), EFC No. 12 Ex. 2)

Reasons for application of "*OSRecovery, Inc., v. One Groupe Int'l, Inc., 462 F.3d 87 (2d Cir. 2006)*":

In "*OSRecovery, Inc., v. One Groupe Int'l, Inc., 462 F.3d 87 (2d Cir. 2006)*" in a written opinion, the Second Circuit Court promulgated a new law which instructed all lower Courts in the Circuit's jurisdiction about contempt orders against non-party. The law has been cited in numerous cases since its promulgation.

Brennerman now highlights the analogous aspects of the civil contempt adjudged against him and the Second Circuit court promulgations in OSRecovery:

In OSRecovery, the Court stated that the civil contempt determination against a non-party in that case exceeded the Court's discretion because the district court (Judge Lewis A. Kaplan) treated a non-party "as a party - for discovery purposes only - despite the fact that [the non-party] was not actually a party" and "without sufficient explanation or citation to legal authority supporting the bases upon which" it did so. OSRecovery, 462 F.3d at 93.

Here, Judge Lewis A. Kaplan (the same district judge whose contempt order the Second Circuit court 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 Order; Mem. & Order. No. 15 Cv. 70 (LAK), EFC No. 140 at 18-19). No court orders, subpoenas or motion to compel were ever directed at Brennerman personally nor was he present during the civil case's various proceedings.

Notwithstanding the identical situation between the civil contempt adjudged against Brennerman and the OSRecovery ruling, the Court (Judge Kaplan), insinuates that OSRecovery should be viewed narrowly to apply solely to Clare Gray. (see Memorandum & Order, 17 Cr. 155 (LAK), EFC No. 207). This is inaccurate. The Court instead cites to another case from 10 years earlier - "People of the State of New York v. Operation Rescue, 80 F.3d 64, 70 (2d Cir. 1996)", however the Court (Judge Kaplan) did not rely on that case in adjudging the civil contempt order against Brennerman, nor did the Court cite the case or any other case[s] in its Memorandum and Order (at 15 Cv. 70 (LAK), EFC No. 140). In fact the case which the Court now cites was available to the Second Circuit Court, when that Court adjudicated ten years later in OSRecovery, the Second Circuit court did not adopt that case and found contempt order against non-party, to be inappropriate.

The Court further states: "In the Civil case, the plaintiff, in support of its motion to hold Brennerman in civil contempt, made a detailed evidentiary and legal showing that Brennerman has aided and abetted and/or was legally identified with The Blacksands Pacific Group, Inc., in its disobedience of the Court's order to comply with discovery obligations."

This was an unchallenged allegation by the plaintiff because the Court had denied Brennerman's request for more time to engage new counsel to represent him, due to the fact that Judge Kaplan was previously a partner at Paul Weiss LLP (the law firm that represented Brennerman at the time). Moreover, because the plaintiff made such representation does not

make it accurate or appropriate, and the Court in its adjudication of the civil contempt order against Brennerman stated:

"On December 7, 2016, ICBC - based on a reasonably documented assertion that Brennerman "controls ever aspect of Blacksands' existence and operation," is "legally identified" with it, and "has directed its continuing contempt of court" - moved by order to show cause to....."

demonstrating that the Court made no fact-finding, nor was Brennerman or his counsel present at the time. Instead the Court adopted the assertion by the Plaintiff to hold Brennerman in civil contempt, based on an alter-ego theory.

Relying on the Second Circuit court's promulgation in OSRecovery, that court rejected similar basis which the Court cited in adjudicating the civil contempt order against Brennerman, stating: "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. 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.

The same is similar in the civil contempt adjudicated against Brennerman. Here, the court did not provide citation to legal support for applying the theory it adopted. In particular, the order did not explain how Brennerman could be transformed into a party for discovery purposes but not for any other aspect of the litigation. Additionally, the order does not provide enough

information on the precise legal theories it invoked in adjudging the civil contempt order against Brennerman.

For the reasons cited above, OSRecovery is the most analogous law and case in reviewing and adjudicating the appropriateness of the civil contempt order against Brennerman. Brennerman asserts his reliance on OSRecovery, that the civil contempt order adjudged against him by Judge Kaplan was erroneous.

The Court (Judge Kaplan) then stated: Second, Brennerman's contention that the receipt of the civil contempt evidence in the Criminal case was error already has been rejected by the Second Circuit, and certiorari has been denied. Brennerman, 816 Fed. App'x at 587 ("with respect to the admission of the redacted contempt order, we find no error")

Here, the Court highlights the affirmation of the Second Circuit court however ignores the fact that the Second Circuit narrowly considered the issue of admission of the civil contempt order from an evidentiary perspective. That is, whether the redaction was adequate to satisfy Rule 403 and 404(b). The Second Circuit court however failed to engage in a comprehensive review of the contempt adjudication and the Constitutional implications of its presentment to the jury particularly in light of the similarities with the civil contempt adjudication in OSRecovery. Likewise, the issue was not considered on its merit by the Supreme Court of the United States because that court only accepts 1% - 2% of cases on certiorari hence the court denied to hear Brennerman's case (rather than deny it on its merits).

Furthermore, the Court appears to mistake Brennerman's contention. Brennerman does not intend to relitigate the adjudication of the civil contempt orders but rather he argues as to the Constitutional implications and prejudice suffered from the presentment of an erroneously adjudged (in violation of the law) civil contempt order to the jury during the trial of the Criminal

contempt case. The resulting prejudice is well documented by the Law journal, Law 360, where a juror advised that the civil contempt order adjudged against Brennerman swayed the jury to find him [Brennerman] guilty of criminal contempt of court.

For all the reasons cited above, a reasonable jurist will more than likely conclude that the adjudication of the civil contempt order in this case was erroneous and Brennerman was significantly prejudiced when the Court permitted the presentment of an erroneously adjudged civil contempt order to the jury during trial in the Criminal contempt case.

D. GROUND FOUR: THE CONVICTION WAS OBTAINED AND SENTENCE IMPOSED IN VIOLATION OF THE RIGHT TO CONSTITUTIONAL DUE PROCESS

APPLICABLE LAW

Prosecutorial misconduct can cause constitutional error in two ways. Underwood v. Royal, 894 F.3d 1154, 1167 (11th Cir. 2018). First, it can prejudice a specific constitutional right amounting to a denial of the right. Id. Second, "absent infringement of a specific constitutional right, a prosecutor's misconduct may in some instances render a....trial so fundamentally unfair as to deny [a defendant] due process." Id. (quoting Donnelly v. DeChristoforo, 416 U.S. 637, 645 (1974); see United States v. Anaya, 727 F.3d 1043, 1052-53 (10th Cir. 2013) ("Prosecutorial misconduct violates a defendant's due process if it infects the trial with unfairness and denies the defendant's right to a fair trial." (quotations and alterations omitted).

I. VIOLATION OF DUE PROCESS GUARANTEE ARISING FROM THE GOVERNMENT'S DELIBERATE VIOLATION OF PETITIONER'S CONSTITUTIONAL RIGHTS

The entire prosecution was commenced with the deliberate endeavor to violate the Due Process Clause with the prosecution conspiring with Attorney Paul S. Hessler who represented ICBC (London) plc while working at Linklaters LLP, to deprive Petitioner of the very exculpatory evidence which he [Petitioner] required to prove his innocence and present his complete defense.

As evident from the testimony of Government sole witness from ICBC (London) plc, Mr. Julian Madgett during trial in the interrelated criminal case where Mr. Madgett testified that the bank, ICBC (London) plc had provided all documents related to the bridge loan transaction between the bank, ICBC (London) plc, The Blacksands Pacific Group, Inc., and Blacksands Pacific Alpha Blue, LLC, to their New York based counsel, Linklaters LLP and that Linklaters LLP were expected to turn over all those documents to the prosecution ("U.S. Attorney Office").

Through Mr. Madgett's testimony it became apparent that Mr. Hessler had withheld the pertinent documents and did not provide those documents to the prosecution in an endeavor to deprive petitioner of those documents for this complete defense particularly the underwriting file which documents the basis for the bank approving the bridge loan transaction at issue and all notes related to the settlement discussion which Petitioner required to present his complete defense. United States v. Brennerman, 17 Cr. 337 (RJS), trial tr. 551-554; 552 at 15-25; see also United States v. Brennerman, 17 Cr. 337 (RJS), EFC No. 272 Ex. 1.

Prior to trial, Petitioner through his counsel, Thompson Hine LLP had repeatedly requested for the missing evidence for his defense, however the prosecution repeatedly refused and denied his request. The testimony highlighted and demonstrated that the prosecution commenced this prosecution without obtaining or reviewing the complete evidence and pertinent documents related to the conduct which was being prosecuted. More importantly the prosecution refused to

obtain the evidence even after learning of its importance to this prosecution and that those documents were missing from the production received from Linklaters LLP. The prosecution's refusal to obtain the documents was done with the deliberate endeavor to deprived Petitioner of those evidence for his defense.

Government's deliberate refusal and failure to obtain and learn of the complete evidence deprived Petitioner of his Due Process right. Furthermore, it deprived Petitioner of the very evidence which he required to present his complete defense and to confront witnesses against him thereby significantly violating his Constitutional rights to a fair trial and proceeding.

V. REASONS FOR GRANTING STAY OF ENFORCEMENT OF JUDGEMENT OF CONVICTION AND SENTENCE PENDINGDETERMINATION OF COLLATERAL ATTACK MOTION

DISCUSSION

This motion is submitted pursuant to Fed. R. Crim. P. 38 to stay the enforcement of Judgment ("Judgment of Conviction") entered in the United Stated District Court for the Southern District of New York, arising from the criminal case in United States v. The Blacksands Pacific Group, Inc., et. al., No. 17 Cr. 155 (LAK)

This motion to stay enforcement of judgment presents an opportunity for this Court to rectify the fundamental miscarriage of justice given the extraordinary circumstance where trial Court deliberately abridged and abrogated the fundamental rights of criminal defendant conferred by the U.S. Constitution, thus violating his Fourth, Fifth, Sixth, Thirteenth and Fourteenth Amendment rights of the United States Constitution. The issue for consideration here is not whether Petitioner is entitled to reprieve from the deliberate civil and Constitutional rights

deprivation but rather whether the continued infringement on his Constitutional rights and civil liberties affects the very fabric of United States democracy.

The Supreme Court precedents require recusal where the "probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Rippo v. Baker*, 580 U.S. --------- (2017) (per curium) (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)). The operative inquiry is objective: whether, "considering all the circumstances alleged," *Rippo*, 580 U.S. at ___. "the average judge in [the same] position is likely to be neutral, or whether there is an unconstitutional potential for bias" Williams v. Pennsylvania, 579 U.S. ___, ___, 136 S. Ct. 1899, 195 L. Ed 2d 132 at 134 (2016) (internal quotation marks omitted). The Supreme Court has acknowledged that "[a]llowing a decisionmaker to review and evaluate his own prior decision raises problem." *Withrow*, 421 U. S. at 58, n.25, perhaps because of the risk that a judge might "be so psychologically webbed to his or her previous position" that he or she will "consciously or unconsciously avoid the appearance of having erred or changed position." *Williams,* 579 U. S., at ____. (quoting *Withrow*, 421 U. S., at 57). And it has warned that a judge's "personal knowledge and impression" of a case may sometimes outweigh the parties' arguments. *In re Murchison, 349 U. S. 133, 75 S. Ct. 623, 99 L. Ed 942 (1955).*

Rule 38 of the Federal Rule of Criminal Procedure authorizes a court to enter a stay appeal or collateral attack of judgment of conviction and sentence in a criminal proceeding. A stay pending appeal or collateral attack "is not a matter of right," and "[t]he party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion. Nken v. Holder, 556 U.S. 418, 433-34 (2009). The traditional factors that govern whether to grant a stay of court order pending appeal are "(1) whether the stay applicant has made strong showing that he is

likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of a stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." Id. at 434; Hilton v. Braunskill, 481 U.S. 770, 776 (1987); see Cooper v. Town of East Hampton, 83 F.3d 31, 36 (2d Cir. 1996).

Petitioner submits that the judge (Judge Lewis A. Kaplan) who presided over the entire criminal case acted as the chief complainant, prosecutor and judge thereby exhibiting his partiality and interest in the outcome of the entire proceeding as more succinctly highlighted above within the "Reasons for granting collateral attack motion". A stay of enforcement of judgment of conviction and sentence in warranted in the interest of justice and to promote the rule of law.

VI. REASONS FOR GRANTING RECUSAL / DISQUALIFICATION OF THE COURT (KAPLAN, J.)

DISCUSSION

There are a few characteristics of a judiciary more cherished and indispensable to justice than impartiality. By enacting 28 U.S.C.S. 455(a) Congress has mandated that justice must not only be impartial but also that it must reasonably be perceived to be impartial. To that end, the Supreme Court held in Liljeberg v. Health Servs. Corp., 486 U.S. 847 (1988), that judges must apply an objective, "reasonable person" standard in deciding whether disqualification is mandated by section 455(a), rather than making a subjective assessment of whether the facts and circumstances warrant disqualification. If a judge's impartiality "reasonably might be questioned" in a case, the judge must disqualify himself or herself "even though no actual partiality exists because the judge does not recall the facts, because the judge actually has no interest in the case or because the judge is pure in heart and incorruptible." Liljeberg, 486 U.S. at 860 (quoting Health Servs. Acquisition Corp. v. Liljeberg, 796 F.2d 796, 802 (5th Cir. 1986)).

See also Chase Manhattan Bank v. Affiliated FM Ins. Co., 343 F.3d 120, 127 (2d Cir. 2003). Indeed, in that case the Court held that the judge should have recused himself even though he was unaware of the circumstances that gave rise to the conflict, because a reasonable person could conclude that the judge should have been aware. Liljeberg, 486 U.S. at 861. Only in this manner can the congressional purpose underlying section 455(a) be achieved, namely, "to promote public confidence in the integrity of the judicial process." Liljeberg, 486 U.S. at 859-60.

Judge Kaplan is disqualified from continuing to preside over this matter because a reasonable person who is aware of the Court's actions would conclude that Judge Kaplan's impartiality in this case "reasonably might be question." 28 U.S.C. Section 455(a), where Judge Kaplan ignored the federal rule to conduct extra-judicial research into a non-party, Petitioner, then upon realizing that he is a black man, ignored the law in OSRecovry to transform him [Petitioner] into a party but solely for the purpose of discovery and not other part of the litigation to adjudicate civil contempt order against him. Following which Judge Kaplan then referred him [Petitioner] for criminal prosecution and actively sought willing prosecutors, then persuaded the prosecutors to arrest and prosecute Petitioner as well, assigning the criminal case to himself to preside over it. During trial for the criminal contempt case, Judge Kaplan permitted the prosecution to present the erroneously adjudged civil contempt order to the jury (which swayed the jury to find Petitioner guilty of criminal contempt) and also failed to protect the Constitutional rights of Petitioner by allowing prosecution witness to testify as to issues at trial, knowing that Petitioner will be unable to challenge their testimony because he (Judge Kaplan) had denied Petitioner access to the very evidence (complete ICBC files) which he required to confront (impeach) witness against him and present a complete defense. "No-one should be a judge of his or her own cause." Congress laid down that principle in 1792.

The Supreme Court precedents require recusal where the "probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." Rippo v. Baker, 580 U.S.____, ____, 137 S. Ct. 905, 197 L. Ed 2d 167 at 168 (2017) (per curiam) (quoting Withrow v. Larkin, 421 U.S. 35, 47, 95 S. Ct. 1456, 43 L. Ed 2d 712 (1975)). The operative inquiry is objective: whether, "considering all the circumstances alleged," Rippo, 580 U.S. at ___, 137 S. Ct. 905, 197 L. Ed 2d 167 at 168 (2017) "the average judge in [the same] position is likely to be neutral, or whether there is an unconstitutional potential for bias" Williams v. Pennsylvania, 579 U.S. ___, ___, 136 S. Ct. 1899, 195 L. Ed 2d 132 at 134 (2016) (internal quotation marks omitted). The Supreme Court has acknowledged that "[a]llowing a decisionmaker to review and evaluate his own prior decision raises problem." Withrow, 421 U. S. at 58, n. 25, perhaps because of the risk that a judge might "be so psychologically webbed to his or her previous position" that he or she will "consciously or unconsciously avoid the appearance of having erred or changed position." Williams, 579 U. S. at ___, 136 S. Ct. 1899, 195 L. Ed 2d 132 at 142) (quoting Withrow, 421 U. S., at 57). And it has warned that a judge`s "personal and impression" of a case may sometimes outweigh the parties' arguments. In re Murchison, 349 U. S. 133, 75 S. Ct. 623, 99 L. Ed 942 (1955).

For all the reasons cited above, Judge Lewis A. Kaplan is disqualified from continuing to preside over this matter or considering this omnibus motion including collateral attack motion, because a reasonable person who is aware of the Courts actions would conclude that Judge Kaplan`s impartiality in this case "reasonably might be question." 28 U.S.C. Section 455(a).

VII. LEGAL AUTHORITY GOVERNING PRO SE PETITIONER

Petitioner Raheem J. Brennerman, is a pro se petitioner, therefore his pleadings are generally liberally construed and held to a less stringent standard than pleadings drafted by an attorney. *Hughes v. Rowe*, 449 U.S. 6, 9 (1980) (per curiam); *Estelle v. Gamble*, 429 U.S. 97 (1976).

VIII. CLOSING STATEMENT

The history of the partiality, judicial misconduct and bias commenced after Judge Lewis A. Kaplan ignored the federal rule to conduct extra-judicial research into Brennerman by Googling him *Bail Hr.'g. Tr. United States v. Brennerman, No. 17 Cr. 155 (LAK), EFC No. 12 Ex 1 at 28*. Judge Kaplan became determined to cause maximum reputational damage, convict and imprison Brennerman after becoming aware that he [Brennerman] is a black businessman with business interests outside the United States. See Bail Hr.'g. Tr. United States v. Brennerman, No. 17 Cr. 155 (LAK), EFC No. 12 Ex 2 at 6, with Judge Kaplan stating: ("I think the record is reasonably clear that he spends a great deal of time and has business interests outside of the United States, and in all circumstances. I'm inclined to issue an arrest warrant"). see also ICBC (London) plc v. The Blacksands Pacific Group, Inc., No. 15-cv-0070 (LAK), EFC Nos. 127-128.

The arrest warrant clearly demonstrates that the basis for its issuance was erroneous. First, the arrest warrant was issued from the civil case as it bore the civil case No. 15-cv-00700 (LAK), rather than from any criminal cases (See Bail Hr.'g. Tr. United States v. Brennerman, No. 17 Cr. 155 (LAK), EFC No. 12 Ex 3). Second, the arrest warrant states: "There is probable cause to believe that defendant has committed criminal contempt of court, in violation of 18 U.S.C. Section 401(3), all as more fully set forth in the petition filed by the Government, a copy of which is incorporated herein and attached hereto." The petition was not attached because the Government had not filed any petition and the Court had failed to execute the order to show cause presented by the Government as it related to Brennerman, meaning there was no criminal

allegation for Brennerman to answer at the time of his arrest. Third, there was no proper basis for the issuance of the arrest warrant other than Judge Kaplan's insistence on causing maximum reputational damage and Constitutional rights violation to Brennerman. Because no basis existed for the issuance of the arrest warrant, Judge Kaplan actually amended one of the check boxes and wrote-in his own desire for arresting Brennerman, which was not based on the facts.

For the trial, conviction and punishment, Judge Kaplan then exacerbated the severity and punitive nature of this case by empaneling [sic] a jury even though the prosecution took no position on the issue *United States v. Brennerman et. ano., 17 Cr. 155 (LAK), EFC No. 49*. An impartial judge would not have empaneled a jury in such a manner as it thereby elevated an otherwise misdemeanor case into a felony case, allowing Judge Kaplan to impose a harsher punishment on Petitioner. Judge Kaplan abused and misused his authority so as to achieve his desire and vendetta against Petitioner.

Moreover, the parties in the underlying civil case, ICBC (London) PLC and The Blacksands Pacific Group, Inc., from which the criminal contempt of court case arose, had negotiated a settlement agreement to resolve the dispute at the time Judge Kaplan insisted on arresting, convicting and imprisoning Brennerman (See Bail Hr.'g. Tr. United States v. Brennerman, No. 17 Cr. 155 (LAK), EFC No. 12 Ex 10)

The above among other conducts conclusively demonstrated Judge Kaplan's partiality and interest in the outcome of the criminal proceedings. See United States v. Brennerman, No. 17 Cr. 155 (LAK), EFC Nos. 205, 209.

At Sentencing for the criminal contempt of court case, Judge Kaplan exhibited his influence over Judge Richard J. Sullivan (See Sentencing Tr. United States v. Brennerman, No. 17 Cr. 155 (LAK), EFC No. 152). Judge Sullivan had presided over the interrelated criminal case, which

was initiated by the same prosecutors whom Judge Kaplan had sought to prosecute Brennerman criminally. In the interrelated criminal case at 17 Cr. 337 (RJS), similar to the partiality and egregious misconduct exhibited by Judge Kaplan, Judge Sullivan exhibited partiality by ignoring the evidence at United States v. Brennerman, No. 17 Cr. 337 (RJS), EFC No. 167 and intentionally misrepresented evidence to falsely satisfy the law to convict and imprison Brennerman among other deliberate Constitutional rights violation (See Sentencing Tr. United States v. Brennerman, No. 17 Cr. 337 (RJS), EFC No. 206 at 19; see also *United States v. Brennerman, No. 17 Cr. 337 (RJS), EFC Nos. 269, 270, 272*.

Because "A criminal defendant tried by a partial judge is entitled to have his conviction set aside no matter how strong the evidence against him. "Edwards v. Balisok, 520 U.S. 641, 647 (1997) (citation omitted), this Court should grant Brennerman's motion in its entirety.

Given the extraordinary circumstances highlighted above, grant of the relief requested in its entirety is warranted as a matter of public interest to promote the rule of law and emphasize conformity and uniformity with the law and Constitution and to avoid the continued attack on the civil rights and liberties of Petitioner.

CONCLUSION

The Omnibus motion for an order of this Court granting: (a.) Collateral attack motion to set-aside the judgment of conviction and vacate the sentence; (b.) Stay of enforcement of the judgment of conviction and sentence pending determination of the collateral attack motion; (c.) Recusal and/or disqualification of the Court (Kaplan, J.) from considering and determination of the Omnibus motion, should be granted in its entirety. In addition to any other relief which this Court may deem just, necessary and appropriate, including granting an evidentiary hearing.

Dated: White Deer, Pennsylvania
January 17, 2022

Respectfully submitted

/s/ Raheem J. Brennerman
RAHEEM JEFFERSON BRENNERMAN
Reg. No. 54001-048
FCI Allenwood Low
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EXHIBIT

Petition for writ of certiorari and Appendix at
The Supreme Court of the United States in
Brennerman v. United States,
S. Ct. No. 20-6895 (EFC Dec 30, 2020) ..... Exhibit 1

No. 20-6895

ORIGINAL

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

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III. Table of Authorities

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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

CERTIFICATE OF COMPLIANCE

No. 20-

RAHEEM JEFFERSON BRENNERMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent,

As required by Supreme Court Rule 33.1(h), I certify that the petition for a writ of certiorari contains 6,479 words, excluding the parts of the petition that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 28, 2020

/s/ Raheem J. Brennerman

RAHEEM JEFFERSON BRENNERMAN
Petitioner

No. 20-_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 2020

RAHEEM JEFFERSON BRENNERMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent,

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

APPENDIX - PETITION FOR A WRIT OF CERTIORARI

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

APPENDIX A

Order of the United States Court of Appeals for the Second Circuit in *United States v. The Blacksands Pacific Group, Inc., et. al* (Brennerman) No. 18 1033 Cr. EFC No. 286 (Affirming Conviction and Sentence)

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.

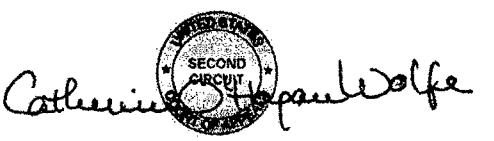
V. Ineffective Assistance of Counsel

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



APPENDIX B

Judgement of Conviction of the United States District Court for the Southern District of N.Y. in United States v. The Blacksands Pacific Group, Inc., et. al (Brennerman), No. 17 Cr. 155 (LAK), EFC No. 145

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

UNITED STATES DISTRICT COURT

Southern District of New York

UNITED STATES OF AMERICA
v.
RAHEEM J. BRENNERMAN

JUDGMENT IN A CRIMINAL CASE

Case Number: 1:17-CR-155-001(LAK)

USM Number: 54001-048

Raheem J. Brennerman, Pro Se
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s)

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

☑ was found guilty on count(s) One and Two after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. 401(3)	Criminal Contempt	9/27/2016	One
18 U.S.C. 401(3)	Criminal Contempt	3/3/2017	Two

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

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

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

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

5/21/2018
Date of Imposition of Judgment

Signature of Judge

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: MAY 23 2018

Hon. Lewis A. Kaplan, U.S.D.J.
Name and Title of Judge

5/23/18
Date

DEFENDANT: RAHEEM J. BRENNERMAN
CASE NUMBER: 1:17-CR-155-001(LAK)

IMPRISONMENT

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

24 Months on each count, the terms to run concurrently.

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

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

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

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

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

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: RAHEEM J. BRENNERMAN
CASE NUMBER: 1:17-CR-155-001(LAK)

SUPERVISED RELEASE

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

3 Years subject to the following special conditions:

The defendant shall follow all directions of the Bureau of Citizenship and Immigration Services in any proceedings it may institute.

If the defendant is removed or deported from the United States, he shall not reenter the United States illegally.

The defendant shall provide the probation officer with any financial information he or she may request.

The defendant shall not incur new credit charges or open additional lines of credit without the approval of the probation officer.

MANDATORY CONDITIONS

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

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

DEFENDANT: RAHEEM J. BRENNERMAN
CASE NUMBER: 1:17-CR-155-001(LAK)

STANDARD CONDITIONS OF SUPERVISION

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

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

U.S. Probation Office Use Only

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

Defendant's Signature _____ Date _____

DEFENDANT: RAHEEM J. BRENNERMAN
CASE NUMBER: 1:17-CR-155-001(LAK)

CRIMINAL MONETARY PENALTIES

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

	Assessment	JVTA Assessment*	Fine	Restitution
TOTALS	$ 200.00	$	$ 10,000.00	$

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

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

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

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

TOTALS $ 0.00 $ 0.00

☐ Restitution amount ordered pursuant to plea agreement $ _____

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

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

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

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

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

AO 245B (Rev. 02/18) Judgment in a Criminal Case
Sheet 6 — Schedule of Payments

DEFENDANT: RAHEEM J. BRENNERMAN
CASE NUMBER: 1:17-CR-155-001(LAK)

SCHEDULE OF PAYMENTS

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

A ☑ Lump sum payment of $ 10,200.00 due immediately, balance due

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

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

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

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

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

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

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

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

☐ Joint and Several

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

☐ The defendant shall pay the cost of prosecution.

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

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

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

APPENDIX C

Motion for Rehearing en banc at the United States Court of Appeals for the Second Circuit, in *United States v. The Blacksands Pacific Group, Inc., et. al* (Brennerman), No. 18 1033 Cr., EFC No. 314

18-1033(L)

Consolidated with 18-1618

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

RAHEEM BRENNERMAN,

Defendant-Appellant,

THE BLACKSANDS PACIFIC GROUP, INC.,

Defendant.

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

PETITION FOR REHEARING *EN BANC* OF DEFENDANT-APPELLANT

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Counsel for Defendant-Appellant

PRELIMINARY STATEMENT

Defendant-Appellant Raheem Brennerman respectfully petitions this Court under Rule 35 of the Federal Rules of Appellate Procedure for rehearing *en banc* of the panel's decision dated June 9, 2020, affirming Brennerman's conviction for criminal contempt. The panel decision on which rehearing *en banc* is requested, *United States v. Brennerman*, ---Fed. Appx.--- No. 18-1033, 2020 WL 3053867 (2d Cir. June 9, 2020) (Summary Order) is attached hereto as Exhibit A.

Brennerman argues that the full Court should rehear the case and examine the panel's decision upholding Brennerman's conviction and approving the district court's 1) admission of a civil contempt order against Brennerman; 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 questions of exceptional importance. *See Watson v. Geren*, 587 F.3d 156, 160 (2d Cir. 2009) (per curiam) (en banc) ("En banc review should be limited generally to only those cases that raise issues of important systemic consequences for the development of the law and the administration of justice.").

STATEMENT OF PROCEDURAL HISTORY AND PERTINENT FACTS

Brennerman relies on the statement of facts in the briefing previously filed in this case and incorporates it herein but presents the below facts that are specifically pertinent to the issue of a rehearing.

I. *Blacksands* Lawsuit and Civil Contempt

Brennerman was the CEO and indirect majority shareholder of Blacksands Pacific Group ("Blacksands"), a Delaware-based oil and gas development corporation. In 2015, Blacksands was sued by a London-based bank, ICBC (London) PLC ("ICBC") in connection to a $20

million, 90-day loan agreement entered into between ICBC and Blacksands' subsidiary, Blacksands Alpha Blue, LLC, in 2013. *ICBC London PLC* v. *Blacksands Pacific Group,* 15-CV-70 (LAK) (S.D.N.Y. 2015). ICBC alleged that Blacksands, the loan guarantor, never paid back $5 million withdrawn from the loan. Blacksands had maintained that the loan agreement was just one part of a larger financial arrangement between Alpha Blue and ICBC and that the principal of the loan was supposed to roll over into a 5-year, $70 million revolving credit facility. The district court granted ICBC's motion for summary judgment in lieu of a complaint and a judgment was entered against Blacksands. *ICBC London PLC* v. *Blacksands Pacific Group,* 15-CV-70 (LAK) (S.D.N.Y. 2015) at Dkt. #39.

As part of post-judgment discovery in an effort to locate the company's assets, ICBC served requests and interrogatories on Blacksands on March 24, 2016. Blacksands objected and ICBC filed a motion to compel, which was granted by the district court on August 22, 2016 (the "First Order"). The Order directed Blacksands to comply with all discovery requests within 14 days of the Order. *Id.* at Dkt. #87. Blacksands and ICBC were actively engaged in settlement negotiations at this time, so on September 6, 2016, the deadline of compliance with the First Order, Blacksands' counsel alerted the district court in writing that it had agreed to pay the monetary judgment pending appeal. In anticipation of the payment, ICBC did not immediately seek Blacksands' compliance with the First Order. The district court held two conferences to determine the owed judgment. At the conclusion of the second conference, however, on September 27, 2016, the Court entered an Order (the "Second Order") that Blacksands must either settle or comply with the discovery requests on or before October 3, 2016. It warned that failure to comply might result in the imposition of sanctions as well as civil contempt. *Id.* at Dkt. #92.

The parties failed to reach a settlement and Blacksands failed to comply with the Second Order's discovery request so ICBC filed a motion to hold Blacksands. On October 20, 2016, the district court held Blacksands in civil contempt. The Court did not elect to commence criminal proceedings, but notified the parties that it would refer the matter to the United States Attorney's Office to consider whether to pursue criminal charges against Blacksands as well as Brennerman, the corporation's principal and non-party. ICBC expressed an intention to initiate civil contempt proceedings against Brennerman.

In November 2016, Brennerman and Blacksands provided substantial document production to ICBC. Despite this production, on December 7, 2016, ICBC moved by order to show cause to hold Brennerman in civil contempt. *Id.* at Dkt. #121. On December 13, 2016, a hearing was held outside the presence of Brennerman and counsel, which found Brennerman in civil contempt. *Id.* at Dkt. 139.

II. Criminal Trial of Raheem Brennerman

Subsequently, Brennerman was indicted for criminal contempt in violation of 18 U.S.C. § 401(3). *See United States v. The Blacksands Pacific Group, Inc.*, 17-CR-155 (LAK). In preparation for trial and in support of his defense that he did not willfully disobey court orders but rather was negotiating a settlement with ICBC, Brennerman subpoenaed ICBC for all documents related to Blacksands as well as any communications between ICBC and the Department of Justice. ICBC did not comply. Brennerman filed a motion to compel which was denied on the bases that the subpoena was unenforceable against a foreign bank, ICBC had not been served, and that the documents were already in defendants' possession. The trial commenced on September 6, 2017 and concluded on September 12, 2017, when a jury returned a guilty verdict for two counts of criminal contempt.

III. Appeal of Conviction

Brennerman filed a *pro se* brief with this Court appealing his conviction. Undersigned counsel was appointed to represent Brennerman in connection with the filing of a supplemental reply brief and for oral argument. On May 27, 2020, this Court held telephonic oral argument and on June 9, 2020 issued a summary order denying Brennerman's appeal. *See United States v. Brennerman*, ---Fed. Appx.--- No. 18-1033, 2020 WL 3053867 (2d Cir. June 9, 2020).

This Court 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. *Id.* at *1. 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, this Court 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. This Court found that "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." *Id.*

In regard to the admission of the civil contempt order against Brennerman, this Court 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.*

REASONS FOR GRANTING *EN BANC* RECONSIDERATION

I. Applicable Law

Federal Rule of Appellate Procedure 35(a) provides that an en banc rehearing "will not be ordered unless (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance." Fed.R.App.P. 35(a). "En banc review should be limited generally to only those cases that raise issues of important systemic consequences for the development of the law and the administration of justice." *Watson v. Geren*, 587 F.3d 156, 160 (2d Cir. 2009) (per curiam) (en banc).

II. Discussion

A. Failure to Compel ICBC Production

Brennerman's central argument concerning the ICBC production requests is that there existed exculpatory materials that were not provided to him and could not otherwise be compelled due to Rule 17 limitations regarding foreign entities. This Court did not address Brennerman's arguments 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 v. Maryland*, 373 U.S. 83 (1963).

Because Brennerman 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 this Court, 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. The sanctity of *Brady* obligations cannot be interpreted as anything less than a question of exceptional importance warranting rehearing en banc to permit further reconsideration on this point.

B. Failure to Permit Full Settlement Negotiation Evidence

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

Although Brennerman was permitted certain lines of questioning concerning settlement negotiations, the admitted evidence was woefully inadequate to set forth his complete defense. Brennerman 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 his discovery obligations. This evidence was not permitted, could not be elicited through cross-examination of witnesses, and was not a part of the jury instructions. *See United States v. The Blacksands Pacific Group, Inc.*, 17-CR-155 (LAK) Tr. 236-277. Although such evidence was plainly relevant to the issue of Brennerman`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 defendant`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 requirement to comply. Tr. 509-510; 538-544.

The limitation on evidence of settlement negotiations was not merely an evidentiary issue, but rather, a constitutional one which violated Brennerman'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 Brennerman was guilty of criminal contempt. The panel's decision failed to address the manner in which the district court's evidentiary rulings precluded Brennerman's right to present a complete defense and rehearing *en banc* is warranted to permit a full examination of this point.

C. Admission of the Civil Contempt Order

The question of whether the civil contempt order was improperly 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 implications, above and beyond an abuse of discretion analysis.

This Court has 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 sufficient legal support for treating him, a non-party, as a party but only for the purposes of discovery." *OSRecovery, Inc. v. One Groupe Int'l, Inc.*, 462 F.3d 87, 94 (2d Cir. 2006). In *OSRecovery,* this 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 bases 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 court judge whose contempt order this Court 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. *Blacksands Pacific Group,* 15-CV-70 (LAK) (S.D.N.Y. 2015) at Dkt. #139-140. No court orders, subpoenas, or motions 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 this Court's instructions concerning contempt orders against non-parties. To affirm the district court's rulings would create a disparity with this Court's treatment and review of such orders and would place exceptional burdens on non-parties. Therefore, the Court should rehear the case *en banc* to reconsider this issue.

CONCLUSION

For the foregoing reasons, the Court should grant Brennerman's request for rehearing *en banc*.

Dated: New York, NY
July 17, 2020

s/ John Meringolo
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Attorney for Defendant-Appellant
Raheem Brennerman

APPENDIX D

Order of the United States Court of Appeals for the Second Circuit denying motion for Rehearing en banc in *United States v. The Blacksands Pacific Group, Inc., et. al* (Brennerman), No. 18 1033 Cr., EFC No. 318

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 8th day of September, two thousand twenty.

United States of America,

Appellee,

v.

The Blacksands Pacific Group, Inc.,

Defendant,

Raheem Brennerman,

Defendant - Appellant.

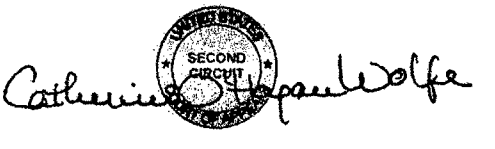
ORDER

Docket Nos: 18-1033, 18-1618

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

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk



APPENDIX E

Motion and Order of the United States District Court for the Southern District of N.Y. in *ICBC (London) PLC v. The Blacksands Pacific Group, Inc.*, No. 15 Cv. 70 (LAK) (EFC Nos. 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 the RESPECTS 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.,

15 Civ. 0070 (LAK)

Defendant-Counterclaimant,

-and-

BLACKSANDS PACIFIC ALPHA BLUE, LLC,

Additional Counterclaimant.

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).

3 DI 1, Ex. 6, at 5.

4 *Id.*; DI 13 ¶ 15.

5 DI 1, Ex. 6, at 4-5.

6 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).

7 *See* N.Y. C.P.L.R. 3213.

8 DI 11.

9 *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

APPENDIX F

Opinion and Decision of the United States Court of Appeals for the Second Circuit in *OSRecovery, Inc., v. One Groupe Int`l, Inc.*, 462 F.3d 87, 90 (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

APPENDIX G

Petition, Opinion and Order of the United States District Court for the Southern District of N.Y. in *United States v. The Blacksands Pacific Group, Inc., et. al.* (Brennerman), No. 17 Cr. 155 (EFC No. 59, 76)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES,

- against -

BLACKSANDS PACIFIC GROUP INC. and RAHEEM BRENNERMAN,

Defendants.

17-cr-0155 (LAK) [15-cv-0070 (LAK)]

~~[PROPOSED]~~ ORDER TO SHOW CAUSE TO COMPEL ICBC (LONDON) PLC TO RESPOND TO SUBPOENA

Upon the declaration of Miranda E. Fritz, sworn to August 25, 2017, and the Memorandum of Law in Support of the Motion to Compel, it is

ORDERED, that ICBC (London) PLC and the government show cause before ~~a motion term of~~ this Court, ~~[illegible]~~ on August 30, 2017 ~~at which time any party may be heard~~, why an order should not be issued compelling ICBC (London) PLC to respond to the subpoena dated August 22, 2017; ~~It is further~~

~~ORDERED that [illegible] Memorandum of Law together with [illegible] ICBC (London) PLC [illegible] Paul Manafort [illegible] on or before 5:00 p.m. [illegible] the motion. [illegible] be deemed good and sufficient service thereof upon ICBC (London) PLC and it is further~~

~~Dated: New York, New York [illegible] August [illegible], 2017~~

~~[illegible]~~

OK

[follows "August 22, 2017,"]

a copy of which is attached to the Fritz declaration as Exhibit A (assuming that said subpoena has been or hereafter is duly served on it). It is further

ORDERED that delivery of a copy of this Order and the papers upon which it is based shall be made upon ICBC (London) PLC's counsel, Paul Hessler, by email, on or before 5 p.m. today, which shall be deemed good and sufficient service thereof. It is further

ORDERED, that the motion will be taken on submission, without any personal appearance, and any opposing and reply papers with respect to the motion shall be filed electronically no later than August 29, 2017, and August 30, 2017, in each case by 5 p.m.

SO ORDERED.

Dated: August 28, 2017

Lewis A. Kaplan
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

-against-

17-cr-0155 (LAK)

RAHEEM BRENNERMAN, et ano.,

Defendants.

----------x

MEMORANDUM AND ORDER

LEWIS A. KAPLAN, *District Judge.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

SO ORDERED.

Dated: September 1, 2017

/s/ Lewis A. Kaplan

Lewis A. Kaplan
United States District Judge

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

APPENDIX H

Transcript of Proceedings and Oral Ruling
United States District Court for the Southern District of N.Y. in *United States v. The Blacksands Pacific Group, Inc., et. al.* (Brennerman), No. 17 Cr. 155 (LAK)
(Trial Tr. 3-7; 269-277; 236-249; 509-510; 538-544)

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.

Q. Mr. Hessler, does the document reference the fact that the settlement discussions are ongoing?

THE COURT: The document speaks for itself. Next question.

I'm sure the members of the jury are fully capable of reading it.

Q. All right. During that time period, September of 2016, did the settlement discussions continue between you and Blacksands?

MR. LANDSMAN-ROOS: Objection.

THE COURT: Sustained.

Q. During the period September 27th through and continuing on from there, did the settlement -- did the discussions continue between you and Blacksands regarding payment of the judgment?

MR. LANDSMAN-ROOS: Objection.

THE COURT: Sustained.

MS. FRITZ: If we could pull up Exhibit Y.

Q. As of on or about Monday, September 26th, did you communicate over to Chris Harris certain terms pursuant to which ICBC would accept -- would agree to a settlement of the matter?

A. Bear with me.

(Pause)

Yes.

Q. And did you communicate that by email over to Mr. Harris?

A. Yes.

Q. OK. And is that the email that you are looking at there, Exhibit Y?

A. Yes.

Q. OK.

MS. FRITZ: I offer into evidence Exhibit Y.

MR. LANDSMAN-ROOS: Objection.

THE COURT: Ground?

MR. LANDSMAN-ROOS: It is the 403 connection issue that we have discussed.

THE COURT: Sustained.

BY MS. FRITZ:

Q. Did you communicate to Mr. Harris in that same email that ICBC has agreed --

MR. LANDSMAN-ROOS: Objection.

THE COURT: Ms. Fritz, I just sustained the objection to the document.

MS. FRITZ: Yes.

THE COURT: And you know that it is inappropriate to refer in a question to the contents of a document that is not in evidence, and your question is embarking on embodying the content of the document I just excluded and thereby bringing it to the attention of the jury, in violation of my ruling. The objection is sustained. It's not to happen again.

BY MS. FRITZ:

Q. On or about September 26th, did you also confirm to Chris

Harris that ICBC was forbearing its further --

MR. LANDSMAN-ROOS: Objection.

Q. -- discovery -- demand for the discovery at that point?

THE COURT: Answer that yes or no.

A. I don't recall.

Q. I understand. If you could take a look at the document and see if that refreshes your recollection, particularly paragraph 2.

(Pause)

A. So, I'm sorry, can I have your question again?

Q. Did you communicate to Mr. Harris, on or about September 26th, that ICBC was forbearing pressing its discovery demands at that point?

A. No.

Q. Did you state to Mr. Harris that ICBC will not seek further relief --

MR. LANDSMAN-ROOS: Objection.

THE COURT: Are we talking about a telephone conversation, a meeting, or the document I've excluded?

MS. FRITZ: We're talking about the communication that did occur in writing in the document.

THE COURT: Sustained.

Q. At the time September 26th, were you continuing to pursue the discovery demands relating to the Court's order dated August 22nd?

A. My client and I had no need to pursue discovery if we were going to receive payment of the judgment. The entire point of discovery was to enable us to enforce the judgment. On September 6th, when Mr. Harris represented to the Court that Blacksands agreed to pay the judgment, we put some faith in that because of the standing in which we held Latham & Watkins and Mr. Harris. And in reliance on his representation to the Court that Blacksands had agreed to pay the judgment, we unilaterally took the position that we would not continue to litigate to obtain the responses that we were entitled to on September 6th because we didn't want to waste the money doing that because we had been led to believe, by Mr. Harris, that we would imminently receive payment.

Q. With respect to the settlement discussions, or discussions regarding payment of the judgment, I believe you stated during your direct examination that Blacksands had not provided specific information about its proposal for payment of those -- of the judgment?

MR. LANDSMAN-ROOS: Objection.

THE COURT: Sustained.

Q. Did Blacksands during this period of time provide specific proposals -- specific information regarding how it could pay the judgment?

MR. LANDSMAN-ROOS: Objection.

THE COURT: Sustained.

Q. Did Blacksands --

THE COURT: It is not an accurate summary. Let's just go on.

Q. Did Blacksands, during this period of time, provide information regarding how it intended to pay the judgment?

A. In vague terms we received sort of very, you know, sort of 10,000-foot level explanations of where the money would come from. For example, I don't recall if it was this proposal, but there was one proposal that some unrelated party had proposed to put up a residential apartment in Manhattan as security pending payment of the judgment, for example. We had a lot of communications from Blacksands about potential financings from which we would be paid. None of them had come to fruition. We were now three years into this litigation, and we were not going to put our faith in those further vague statements.

So, we asked for specific information, for example, who owned the property, were there any security, were there any liens on the property, was there a mortgage on it, how was the financing proposed to work, how was the grant of security proposed to work. And other than the initial high-level description of what was planned or proposed, we never received the concrete details that we had asked for that would have given us the assurances we would have needed to forbear from enforcement.

Q. You mentioned this issue of security. Was that an issue

that ICBC had raised, that it wanted security if the proposal was that its judgment would be paid sometime in the future?

MR. LANDSMAN-ROOS: Objection.

THE COURT: Ground?

MR. LANDSMAN-ROOS: The same objection, 403.

THE COURT: Anything else?

MR. LANDSMAN-ROOS: I think there is also perhaps a form objection there.

THE COURT: Sustained at least as to form.

BY MS. FRITZ:

Q. Let's just take a step back.

The proposal that Blacksands made with respect to paying the judgment, did that involve a project that Blacksands was currently involved in?

MR. LANDSMAN-ROOS: Objection.

THE COURT: Sustained.

Q. Was the discussion that was going on relating to providing information about a project from which Blacksands intended to pay the judgment?

MR. LANDSMAN-ROOS: Objection.

THE COURT: Sustained.

Q. Based on the conversations that occurred, was there discussion, now moving into the November timeframe, regarding a meeting, Blacksands and ICB attending a meeting to further discuss the proposal that Blacksands was making?

MR. LANDSMAN-ROOS: Objection.

THE COURT: Sustained.

Q. Did a meeting then occur in London?

MR. LANDSMAN-ROOS: Objection.

THE COURT: Sustained.

Q. In connection with the document production that was provided by Mr. Brennerman, the one that you looked at earlier, you had indicated that it included documents regarding some contracts, things like that. Do you recall that?

MR. LANDSMAN-ROOS: Objection.

THE COURT: Sustained. It is not an accurate summary of what he said. He said, as I remember, notably, though there may have been other things, two unsigned leases for office space, or something like that.

MS. FRITZ: OK.

Q. Do you have a recollection of whether that discovery that was provided also included documentation relating to the project that Blacksands was involved in at that point?

MR. LANDSMAN-ROOS: Objection.

THE COURT: Sustained. That assumes that there was in fact a project that Blacksands was involved in.

MS. FRITZ: Not assuming that, again --

THE COURT: Of course it does. The question says, "Do you have a recollection of whether that discovery that was provided also included documentation to the project that

Blacksands was involved in at that point?" That was your question.

BY MS. FRITZ:

Q. At the meeting in London, was there an extensive presentation done for ICBC regarding Blacksands' project?

MR. LANDSMAN-ROOS: Objection.

THE COURT: Sustained. There was no evidence of any meeting in London, there are simply questions, to which objections have been sustained.

The jury is reminded that the questions are not evidence.

MS. FRITZ: If we could pull up Defendant AI.

Q. OK. So let me just ask you, Mr. Harris, was there a meeting in London at the offices of Exotic --

MR. LANDSMAN-ROOS: Objection.

THE COURT: I believe you already asked if there was a meeting in London. I sustained that objection. Am I mistaken, Ms. Fritz?

MS. FRITZ: Your Honor just indicated that I needed to prove that there was a meeting.

THE COURT: I didn't say that at all. I said your question assumed that there was one. I didn't say you had to prove it. I sustained the objection to your attempt to do so, if indeed there ever was a meeting.

Now, let's get on with it.

Q. Mr. Hessler, if you could take a look at Exhibit AI. Is that a communication that you had with Chris Harris during the period November 2016?

A. Yes, it is.

Q. OK. And does this relate to the discussions that were occurring between --

MR. LANDSMAN-ROOS: Objection.

THE COURT: Sustained.

Now, I don't want to do this, but if you can't ask proper questions from this point onward, I'm going to have to consider terminating your examination.

I have made the ruling. This material is not relevant. You are going to go on to a different subject, or you are going to sit down.

MS. FRITZ: If we could pull up Government Exhibit 309.

Q. Did there come a time on or about October 14th when ICBC filed an order to show cause for an adjudication of contempt against Blacksands?

A. Yes.

Q. And is Exhibit 309 a copy of the document filed by Blacksands but also with entries by the Court?

A. Yes. This is a copy of the order to show cause that commenced that motion, yes.

Q. All right. And can you briefly explain what is meant by

Q. OK. And those continued through the period September and October, is that correct?

A. No. I believe that discussion ended prior to the end -- prior to the beginning of October.

MS. FRITZ: All right. If we could pull up Defendant's Exhibit X.

THE COURT: F as in Frank or S as in Sam?

MS. FRITZ: X as in x-ray.

THE COURT: I can't get it right.

BY MS. FRITZ:

Q. And if you could take a look at that, Mr. Hessler. Let me know when you have had a chance to review it.

(Pause)

A. Can this be enlarged? Or is it in the binders? It is in the binders.

(Pause)

It was enlarged and it shrank. I'm not sure who is doing that. Is it in these binders? May I look?

May I look at it here?

Q. Yes.

A. Thank you.

(Pause)

OK. I see it.

Q. All right. Does this relate to the discussions that were being had between ICBC and Blacksands regarding payment with

respect to the judgment?
A. This refers to exactly what I just said. It was Blacksands' promise to pay the judgment on September 6th and then the parties' attempt to agree on the amount that would be due in order to satisfy the judgment, yes.
Q. Does this also reflect the fact that there were a couple of conferences in front of the Judge during this period --
MR. LANDSMAN-ROOS: Objection.
Q. -- with respect to that issue of payment on the judgment?
THE COURT: What is the objection?
MR. LANDSMAN-ROOS: First of all, the document is not in evidence.
MS. FRITZ: I'm not introducing it.
THE COURT: Can I have the question read back, please.
(Record read)
THE COURT: The objection is sustained. You are asking for the content of the document.
BY MS. FRITZ:
Q. During this period of time, were there also a couple of conferences with the Court regarding payment of the judgment?
A. Yes.
Q. And did you in this -- in a letter to the Court update the Court regarding what was going on with respect to those settlement discussions?
A. Yes. That's what this letter is.

Q. Yep. And during this period of time, did you also agree, on behalf of ICBC, to not continue to seek enforcement of the discovery order while these discussions were continuing?

MR. LANDSMAN-ROOS: Objection.

THE COURT: Sustained.

Q. Was there -- if you could go to page 2.

Did you agree during this period of time, while discussions were continuing, that you were not seeking to enforce the Court's order?

MR. LANDSMAN-ROOS: Objection.

THE COURT: Sustained.

Q. And did you advise the Court --

THE COURT: You are asking for the content of the document.

MS. FRITZ: No. I'm asking whether --

THE COURT: Yes, you are.

Q. Mr. Hessler --

THE COURT: You told your colleague to put up page 2 and in substance asked him what's on page 2.

Q. The question is do you recall whether during that period you had agreed not by letter to the Court, did you agree with Mr. Harris that you were not pressing enforcement of that August order while the parties were trying to resolve it?

MR. LANDSMAN-ROOS: Objection.

THE COURT: Ground?

MR. LANDSMAN-ROOS: 401, 403.

THE COURT: Sustained.

Q. Did you also advise the Court during this period that ICBC had refrained from pursuing enforcement of the order?

MR. LANDSMAN-ROOS: Objection.

THE COURT: Sustained.

MS. FRITZ: I offer into evidence Defendant's X.

MR. LANDSMAN-ROOS: Objection.

THE COURT: Sidebar.

(Continued on next page)

(At the sidebar)

MS. FRITZ: Count One of the petition asserts that the failure to produce during the period August 22nd through September 27th constitutes a willful deliberate violation of the Court's order. I'm trying to get out the fact that Mr. Harris and Mr. Hessler had discussed something that, one, that might reasonably have been interpreted by the company as believing that this was an acceptable delay in production, that they were not -- they used the words "refrained."

MR. LANDSMAN-ROOS: I think the same relevancy objection previously that we discussed applies and, also, there is a hearsay issue with it.

THE COURT: Well, certainly there is a problem from the period September 6th to whenever there is any such agreement, if there was such an agreement. That's the first problem.

MS. FRITZ: I would --

THE COURT: It's all or any part. And even if there were such an agreement, it is simply not a defense to Count One.

MS. FRITZ: I think it would be because it has to be a willful violation of a known legal duty.

THE COURT: Right. Known legal duty created by the August 22 order to produce on or before September 6th, and from September 6th to whatever the date of any hypothetical

agreement there is a willful disagreement -- a willful failure.

MS. FRITZ: They might have misunderstood. They might have been wrong that the parties themselves could agree that this was -- that this production --

THE COURT: When did this putative agreement happen?

MS. FRITZ: It started right -- this is an update on events that had been occurring.

THE COURT: When?

MS. FRITZ: During -- I think I have September 7th on.

THE COURT: What is the evidence of that?

MS. FRITZ: It is in my binder. Do you want me to go through it?

THE COURT: Yep.

MS. FRITZ: OK.

(Pause)

MS. FRITZ: OK. It references -- I don't know if your Honor remembers, but this all came out in the September 15th conference in front of your Honor that turned into almost a settlement conference. There were two different conferences that were held over that period.

THE COURT: There were two conferences and I'm not sure I remember it all in detail, but my general recollection is that Harris was putting forward a position as to what the amount of interest was and Hessler was putting forth a different position on the amount of interest. And I sent after

the first conference, at the end of the first conference, I sent them away to see if they could agree. And then I think I got this letter, Defendant's X. I think the second conference may have been the day after this, perhaps not, but that's my general recollection, and they haven't agreed.

And I'm not aware of any evidence that anybody said they had agreed on anything in the interim. I'm not aware of any evidence, other than what you are now showing me, X, where Hessler said something about refraining from doing something earlier than the date of this letter.

MS. FRITZ: Your Honor, whatever the time period is that's covered by this, what I want in evidence is the fact that during this period, where the government wants to convict him of a crime, there were these events going on that could have caused Blacksands' lack of production to not necessarily be a willful violation of a known legal duty. Obviously, to the extent that there were days -- you know, that there is a day or a week where it should have been done, that's different and the government will argue that, but this becomes relevant to the time period that is their first charge.

THE COURT: What about it, Mr. Landsman-Roos?

MR. LANDSMAN-ROOS: It is after September 6th. I don't see the relevance. And if it is in reference to conversations prior to September 6, they are being offered for their truthfulness and it would be hearsay.

MS. FRITZ: It's not being offered for truth. Honestly, it's being offered for the fact that this is the information that was being conveyed throughout the case to determine whether Mr. Brennerman's conduct was willful.

THE COURT: Well, look --

MS. FRITZ: Can I say one more thing?

THE COURT: Yeah. Sure.

MS. FRITZ: It seems to me that there is something very unfair about trying to convict a guy if there is a standdown on this basis. If these two lawyers sat around and said, look, we're going to stand down and see if we can settle this, then the effort to convict him during that period, I should at least be able to argue that that is not a willful violation.

THE COURT: Is there anything in the document, Mr. Landsman-Roos, to which you object on grounds other than relevance?

MR. LANDSMAN-ROOS: Aside from a hearsay objection, no.

THE COURT: What is the hearsay?

MR. LANDSMAN-ROOS: Just the extent to which if it is being offered in terms of what the defendant knew -- and, by the way, there has been no proffer of that type of evidence -- or that this was ever conveyed to him, that's one thing. Here, it's being offered for the truth of what's set forth in the

letter, meaning there were these conversations on this date.

MS. FRITZ: I would argue it is being offered for the fact that this communication was made to the Court in a document that was filed with the Court. And, honestly, if I go back to the computer, you know, certainly Mr. Brennerman received the pleadings.

THE COURT: Look, this witness says in the letter: "I write on behalf of ICBC," blah, blah, blah. In paragraph 3, he complains that the documents were to have been produced earlier. They hadn't produced anything. And then he says, quote, In reliance on Blacksands' representation to the Court that it will promptly pay the judgment, we have refrained, for the time being, from seeking relief from the Court."

Now, the representation to the Court that they would pay the judgment occurred when? And by what means? It had to have been a written communication.

MS. FRITZ: September 6th is what starts it, when Mr. --

THE COURT: I didn't ask that question.

MS. FRITZ: OK. Mr. Harris sends the Court a letter.

THE COURT: There is a letter on the date of this, September 6th, from Harris?

MS. FRITZ: Yes. Saying a judgment -- that they will pay the judgment.

THE COURT: Do you disagree with that?

MR. LANDSMAN-ROOS: I don't know, your Honor. I am fairly confident it was communicated to the Court on September 15th in a conference, but I don't know about the letter, though.

THE COURT: You had better show me the letter.

MS. FRITZ: He just described it on September 6th, when the production was due, instead -- do you want me to go get it?

THE COURT: I would like to see the letter, yeah. Sorry to bother you.

(Pause)

MS. FRITZ: (Handing).

THE COURT: Thank you.

MR. LANDSMAN-ROOS: Thank you.

THE COURT: All right. I am being shown a copy of Defendant's Exhibit DN, for identification, a letter dated September 6, in which Mr. Harris says, "Blacksands agrees to pay the amount due under the judgment pending appeal." And then indicates a desire to avoid a dispute over the amount of the interest.

Thank you for getting the letter.

Now, Mr. Hessler's letter of September 21 says, "In reliance on Blacksands' representation" -- obviously Defendant's Exhibit DN -- "we have refrained, for the time being, from seeking relief from the Court."

It seems reasonably clear to me that the "we" who have refrained were the only people who had the power not to refrain, which was Linklaters and ICBC, a unilateral act on their part.

MS. FRITZ: Mm-hmm. They may have been wrong. They may well have been wrong, but that doesn't necessarily change the fact that it would impact someone --

THE COURT: How do you get over the question of the period from September 6th to September 21st, during which I have heard no evidence and no offer of proof that Mr. Brennerman had any idea that Hessler and his client, who are not seeking further relief in reliance on the promise to pay, or that there was any agreement not to seek relief?

MS. FRITZ: You are right, your Honor, I may not have an argument for September 4th, but if I have an argument --

THE COURT: How about September 6, 7, 8, 9, 10, right down to 21?

MS. FRITZ: Exactly. My view is this is what was going on at the time. Ladies and gentlemen of the jury, you decide --

THE COURT: What's the this that was going on at the time?

MS. FRITZ: He is updating -- September 6th is the communication -- sorry -- the communication over to the Court. It's unlikely that that happened in a vacuum, and so it is more

likely that there were discussions going on since, honestly, since the Court issued the order, which triggered --

THE COURT: Well, what do you say, gentlemen?

MR. LANDSMAN-ROOS: Unless the defense is representing that there is evidence that upon the receipt of these initial communications, they were conveyed by Latham & Watkins to Mr. Brennerman and told him we don't need to comply with the Court's order pause of X, Y, Z, I don't understand the relevance of the documents.

MS. FRITZ: And obviously our position is that's exactly what we are not going to be doing is disclosing exactly what the communications were between counsel, but given the fact that this is part of the record that existed at the time, it is arguable, it is an appropriate argument to make.

THE COURT: Move on to something else. I will think about it some more.

MS. FRITZ: Your Honor, the next exhibits I think -- they are all about the settlement discussions.

THE COURT: What settlement discussions?

MS. FRITZ: Here.

THE COURT: You mean the quarrel about the interest?

MS. FRITZ: No. They are all about the fact that every day in every way these gentlemen are talking about the settlement.

There is another component to this, Judge, and that is

as of the next order that the jury is about to hear, your Honor --

THE COURT: You mean, the September 27th order?

MS. FRITZ: Correct. That order specifically says produce documents unless you settle by a particular date. The settlement conversations that were going on were very real, and so what I'm trying to show is that there are genuine efforts to seek to resolve this --

THE COURT: What it all sounds like to me at the moment is that maybe you have an argument as to the period September 21st to September 27th that would not be probative as to the period September 6th to September 21, and all of it is irrelevant to Count Two.

MS. FRITZ: No, it becomes all the more relevant to Count Two when the Court specifically in the order says either produce or settle.

THE COURT: And then he did neither.

MS. FRITZ: Exactly. But this is the framework in which he was operating.

And so, your Honor, he is being accused of willful defiance of a Court order.

THE COURT: Look --

MS. FRITZ: If this individual is making every effort he can -- and your Honor would say he's not, but if he is continuously responding -- and your Honor had no way of knowing

this at the time. If he is every single day seeking to respond in relation to the Court orders, that's something that the jury should know to determine whether this is a willful defiance as opposed to -- it is a very different story if he just say forget about it, and that's the kind of thing that this gentleman is trying to suggest: Forget about it. Not interested.

(Pause)

Your Honor, it's probably not going to work anyway but I will at least give it a try.

THE COURT: Well, I think what I will do is I'll take Defendant's X subject to connection, and if you can't connect it to Brennerman and with respect to the full time period, it may well go out.

MS. FRITZ: Your Honor, what if the connection isn't a conduit communication? What if instead Mr. Harris would be in a position to say of course I talked to him about this, but we can't do that without waiving privilege. That's putting us in a box.

THE COURT: Well, I can exclude it.

MS. FRITZ: I'll take it. I'll take it and take your offer up.

THE COURT: OK. Thank you.

(Continued on next page)

First, the orders are short, clear, specific. They are easy to understand. We have been through them a number of times with the witnesses. The second element, Christopher Harris testified that, among other things, the particular orders in question were communicated to the defendant. Third, they were clearly disobeyed. By September 6th, there was no compliance with the Court's order. By October 4th, there was no compliance with the Court's order. The jury heard evidence that the ultimate production was insufficient. And there is ample evidence that it was willful and knowing and that includes, among other things, the time period that went by, the fact that the defendant had all these documents in his possession and we went through that at length, and his production indicates that -- and his responses to discovery indicate that he understood an obligation and just chose to do something differently.

THE COURT: OK. The motion is denied.

OK. Now, I have a draft charge which my law clerk will distribute to you and it is short, and we'll start the charge conference at 5 o'clock so that we are in a position to sum up tomorrow morning and get the case fully to the jury.

Now, I'm in the process of preparing what will be an addition -- you can distribute them -- an addition to the charge that isn't in there already. And in the most general terms, and subject to it being reduced to writing in a form

satisfactory to me, it will go something like this -- in substance like this. It will address the evidence with respect to settlement discussions and it will address the evidence with respect to the purported responses in November -- purported responses.

The substance of what I'll say about the settlement discussion argument will be that they've heard evidence about what one side characterizes as settlement discussions and the other -- at least one witness on the other side has something somewhat different. But in any case, the existence of settlement discussions, even if there were any, do not suspend or abrogate an individual's obligation to comply promptly with court orders unless the Court suspends or alters the order.

You have heard evidence, I will say to them, about these purported responses, dated November 4th and whatever the other November date is. I propose to instruct them that the crime of contempt is complete as of the first day on which a defendant was obliged to comply with a court order that otherwise meets the requirements for criminal contempt; in other words, all of the elements are satisfied. Evidence of a subsequent compliance or attempted compliance can be relevant to the question of whether the failure to comply earlier was willful.

In considering whether the purported responses -- in considering what significance to give the purported responses

I hear nothing.

I am going to ask my law clerk to distribute a very brief proposed addition, which we'll mark as Court Exhibit B, which is what I discussed earlier.

MS. FRITZ: Thank you.

May I, your Honor?

THE COURT: You want to begin?

MS. FRITZ: Unless the government --

THE COURT: Has the government had enough time?

MR. LANDSMAN-ROOS: Yes. Thank you.

THE COURT: Go ahead, Ms. Fritz.

MS. FRITZ: It is the first one regarding settlement discussions that concerns me and it concerns me for following reason, but I don't have the law here to cite for your Honor. It concerns me based on the following hypothetical: If the parties in this case agreed on August 22nd that the plaintiff was not further seeking the discovery while settlement discussions were going on and if that continued --

THE COURT: I missed the date. August 22nd?

MS. FRITZ: The Court order's compliance on the 22nd and actually gives him two weeks.

THE COURT: Right.

MS. FRITZ: So if as of the date that compliance would have been required, the parties have agreed that ICBC is not pursuing its discovery demands at that point and is instead is

very desirous of and wishes to engage in discussions regarding payment of the judgment and if that circumstance continues for a period of time, I totally understand your Honor saying that as a technical matter that doesn't in any way eliminate the existence the Court orders, but I do believe the law says that the parties are allowed to agree between themselves that discovery demands are not being pursued. If that is what is going on and that is being communicated, I have told your Honor before I don't think it is fair to say that someone is in contempt if the adversary has stood down at that point.

Now, I am happy to go get the law to say that parties are able to agree on things that may be inconsistent with a pending court order without coming back and getting that order revised. For example, we had all kinds of monetary cases with the government where there is limits on what could be paid. We go to the government and we say, Look, is it okay if we pay the kid's tuition. There is a court order that may restrain payment; but if the parties agree, then that may not be a wilful violation of a court order.

That may have been a lousy example.

THE COURT: Look, you know, I will give you a counter example. If a court after having innumerable times extended the discovery period in a civil case and finally after two years of delays says July 1st, and I mean it, and the parties on June 30th start talking and they are very desirous of

settling and they blow right through it, seems to me the judge is entirely within his rights to say, okay, you are going to trial. I don't care what you agreed between yourselves. It was my order. You didn't do it at your own risk.

MS. FRITZ: Is that a willful violation of the Court's order? In other words, I think we're dealing with a very consensual problem here, which is can parties basically agree to things -- I said it a moment -- that is inconsistent with the order. I believe that they can and I believe that is exactly what happened here.

THE COURT: Obviously they do. Sometimes it can be a crime. That's the problem. If there were an agreement between two parties where there was a court order to produce the discovery by September 4th that they are not going to insist on it while they are seeking discovery and there is a pending contempt application and then the talks break down and the beneficiary of the court order then presses the contempt application, first thing that could happen is going forward they could get a coercive order forcing compliance.

MS. FRITZ: Absolutely.

THE COURT: The place where the agreement pinches them is that the extent civil contempt is a compensatory remedy as well as coercive seems to me they would be blocked from getting damages caused by the delay in compliance during the period in which there would be a delay in compliance. It seems to me

also that that example doesn't answer your point.

MS. FRITZ: I think there is a couple of issues. Honestly, if on a particular day there is an agreement that discovery is not being demanded and if on that day -- you can argue the next day he violated the order but at that point is there a willful violation of a court order, I do not believe so. Not only here did the parties deal with precisely that issue, but the parties then went onto exchange settlement agreements that also would have addressed settlement of any contempt sanctions.

THE COURT: Civil.

MS. FRITZ: Yes. So the parties were in this case treating the Court's orders as if they were suspectable of alteration by the parties in terms of amount, in terms of whether the order to -- the demand for production applies today or tomorrow or the next day. They were treating it as if they had the ability to impact the Court order. Whether they were correct or incorrect, I don't know. This instruction to me goes a step too far to basically say I would argue it suggests that the parties cannot do that and as a matter of law I don't think that is correct nor do I think it is appropriate where the pivotal issue is willfulness and whether an individual in Mr. Brennerman's position would have understood that if Hessler says okay now we're going to settle, let's go meet in London, let's go do all these things to try to resolve this because

honestly ICBC just wanted its money, if all that is going on, would he know that no matter with a Paul Hessler says, he is engaging in a violation of the Court's order?

THE COURT: I will hear from the government.

MR. LANDSMAN-ROOS: Well, your Honor, first of all, the vast majority of this is not even in evidence. So we're arguing from a hypothetical. Our view is that the instruction is appropriate for at least two reasons. First, is that largely, and this was argued by my colleague this morning and it is in our letter briefing, in many ways this argument amounts to a collateral attack on the underlying order. Even if you credit defense counsel's argument that this somehow goes to willfulness, the law is pretty clear that willfulness or good-faith defense is limited to the circumstances where an individual tries to comply but fails.

So the example here would be had Mr. Brennerman gathered up a lot of the bank records in his apartment and a lot of things on his computer and missed some and that was held to have violated the Court order, that would be a plausible good-faith defense. This I didn't understand the law or I was given the wrong view of the law is not a valid good-faith defense. So the Court's instruction is totally appropriate. It is not a defense to willfulness if he thought in the civil context -- even if this is true and there is evidence that he thought in the civil context their settlement discussions could

put things on hold.

THE COURT: One more minute, Ms. Fritz.

MS. FRITZ: Now I am going to the clearest example I can think of which is Mr. Hessler indicated that forbearance concept in the documents that are in evidence. He sat on the witness stand and he said, We have no interest in pursuing that issue if we were going to settle. That is in evidence. If that information is communicated by Mr. Harris to Mr. Brennerman saying, okay, he has agreed to standdown while we try to settle this thing, it goes to knowledge of whether there is an extant duty. It goes to willfulness. It goes to intent. Even if he is wrong and I am not sure he is wrong.

THE COURT: Last one minute, government.

MR. LANDSMAN-ROOS: The only thing I would add is the citation *Remini* decision from the Second Circuit that my colleague put on the record this morning defines the parameters of a good-faith defense, discusses in that context a mistake of law defense in terms of what advice was given by counsel. It is not exactly advice of counsel defense here. We think the principle is similar. To the extent Mr. Brennerman's lawyers told him what was going on in settlement discussions, that is not a basis for a good-faith defense.

THE COURT: My present disposition is to overrule Ms. Fritz' objection. I will think about it some more overnight and before summations somebody remember to ask me whether I

changed my mind.

MS. FRITZ: Obviously, your Honor, particularly given the nature of my personality, I will try to find some case law also.

THE COURT: That's not a bad idea.

There is nothing else on Exhibit B, right?

MS. FRITZ: That's correct.

THE COURT: How long do you expect to be on closings?

MR. LANDSMAN-ROOS: We're still refining but my hunch is less than a half hour.

THE COURT: Ms. Fritz?

MS. FRITZ: I shall strive for the same.

THE COURT: Look, the last thing I want here is summations interrupted by objections. I would say that is the penultimate thing I want. The last thing I want is summations interrupted by objections that require me to instruct the jury either in the middle or later with respect to what counsel has just said. By this time you all know what I am going to charge and you all know the in limine rulings and you all know that my view quite clearly is that summations are based on the evidence of record not on anything else. I trust you will comply with that. It is in nobody's interest otherwise.

Thank you.

MR. LANDSMAN-ROOS: Your Honor, one other issue. I mentioned there would be the potential instruction on documents

APPENDIX I

Exhibit and submission in the United States District Court for the Southern District of N.Y. in *United States v. Brennerman*, No. 17 Cr. 337 (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.

APPENDIX J

Transcript of Proceedings and Oral Ruling
United States District Court for the Southern District of N.Y.
***United States v. Brennerman*, No. 17 Cr. 337**
(Trial Tr. 551-554)

(Jury present)

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

CROSS EXAMINATION

BY MR. WALLER:

Q. Good afternoon, Mr. Madgett.

A. Good afternoon.

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

A. 2009.

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

A. Correct.

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

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

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

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

Q. That's correct.

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

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

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

Q. Did you ever produce the documents from that credit

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

MR. ROOS: Objection.

THE COURT: You can answer.

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

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

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

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

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

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

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

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

BY MR. WALLER:

Q. Was there an answer?

A. Could you repeat the question, please?

Q. Yes.

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

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

THE WITNESS: I don't know.

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

BY MR. WALLER:

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

A. I don't know.

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

A. Yes.

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

A. Yes.

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

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

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

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

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