

1 LAW OFFICE OF DAVID W. WIECHERT  
DAVID WIECHERT (Cal. Bar No. 94607)  
2 JESSICA C. MUNK (Cal. Bar No. 238832)  
115 Avenida Miramar  
3 San Clemente, California 92672  
Telephone: (949) 361-2822  
4 Facsimile: (949) 496-6753  
Email: [dwiechert@aol.com](mailto:dwiechert@aol.com)  
5 Email: [jessica@davidwiechertlaw.com](mailto:jessica@davidwiechertlaw.com)

6 Attorneys for Defendant  
Kirk A. McMahan  
7

8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA  
10 SOUTHERN DIVISION

11 UNITED STATES OF AMERICA, )  
12 Plaintiff, )  
13 vs. )  
14 KIRK A. MCMAHAN, )  
15 Defendant. )  
16  
17

Case No. SA CR 07-00249 CJC  
**DEFENDANT'S OPPOSITION TO  
MOTION BY ALLEGED VICTIMS  
TO INTERVENE AND BE HEARD  
AT SENTENCING PURSUANT TO  
18 U.S.C. § 3771(d)(3);  
MEMORANDUM OF POINTS AND  
AUTHORITIES**  
Sentencing Date: October 31, 2011  
Sentencing Time: 9:00 a.m.

18 TO PLAINTIFF UNITED STATES OF AMERICA AND ALLEGED  
19 VICTIM INTERVENERS AND THEIR COUNSEL OF RECORD: PLEASE  
20 TAKE NOTICE that Defendant, Kirk A. McMahan, opposes the alleged victim  
21 interveners' motion to intervene and be given an opportunity to be heard at his  
22 sentencing hearing under 18 U.S.C. § 3771. The opposition is based on the grounds  
23 that the alleged victims have no standing under the Crime Victims' Rights Act, 18  
24 U.S.C. § 3771, as they are not victims of the offense for which Defendant is being  
25 sentenced and thus have no rights to be heard at his sentencing hearing. This  
26 opposition is based on the attached memorandum of points and authorities and any  
27 oral argument that the Court permits.  
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Date: October 28, 2011

Respectfully submitted:

By: /S/ David W. Wiechert  
David W. Wiechert  
Jessica C. Munk  
Attorneys for Defendant  
Kirk A. McMahan

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. THE ALLEGED VICTIMS ARE NOT “CRIME VICTIMS” AS**  
3 **DEFINED UNDER 18 U.S.C. § 3771 AND THUS DO NOT HAVE**  
4 **STANDING TO INTERVENE IN MCMAHAN’S SENTENCING**  
5 **HEARING**

6 The Crime Victims’ Rights Act (“CVRA”) defines a “crime victim” as “a  
7 person directly and proximately harmed as a result of the commission of a Federal  
8 offense or an offense in the District of Columbia.” 18 U.S.C. § 3771(e). If a person  
9 qualifies as a “crime victim,” as defined under the CVRA, 18 U.S.C. § 3771(b)  
10 provides:  
11

12 *In any court proceeding involving an offense against a crime victim,*  
13 *the court shall ensure that the crime victim is afforded the [eight] rights*  
14 *described in subsection (a).*

15 (Emphasis added). One of these eight rights includes the right to be heard at a  
16 defendant’s sentencing hearing. However, “only a ‘crime victim’ is permitted  
17 to be heard at a defendant’s sentencing.” *See United States v. Sharp*, 463 F.  
18 Supp. 2d 556, 560 (E.D. VA 2006) (holding the former domestic partner of a  
19 marijuana user who purchased drugs from defendant was not a “victim” as  
20 defined in the CVRA and thus not entitled to provide a victim impact  
21 statement at the defendant’s sentencing for conspiracy to possess with intent  
22 to distribute marijuana). Subsection (b) of § 3771 is clear that the rights in  
23 subsection (a) apply only to court proceedings *involving an offense against a*  
24 *crime victim.*  
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1 The issue before this Court is whether the alleged victim interveners  
2 were “directly and proximately harmed” as a result of the commission of the  
3 mail fraud offense, 18 U.S.C. § 1341, for which McMahan is being sentenced.  
4  
5 The answer is simple – they are not. The alleged victim interveners do not  
6 assert that they are crime victims of the mail fraud offense that McMahan  
7 pled guilty to. Rather, they wish to raise unfounded allegations based on  
8 hearsay and speculation, most of which do not even involve McMahan, and  
9 claim they have a right to be heard at his sentencing under the CVRA. The  
10 CVRA provides no such right.  
11  
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13 Although the Ninth Circuit has yet to address the definition of a “crime  
14 victim” under the CVRA, no court has held that the CVRA applies when  
15 there is no direct and proximate harm from the commission of the offense –  
16 let alone to baseless allegations that have not even been charged.  
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19 In *United States v. Sharp*, the first court to address the definition of  
20 “crime victim” under the CVRA, the court held that “an individual is only  
21 ‘directly and proximately harmed’ *when the harm results from ‘conduct*  
22 *underlying an element of the offense of conviction.’*” 463 F. Supp. 2d 556,  
23 563 (E.D. VA 2006) (emphasis added) (citing *United States v. Blake*, 81 F.3d  
24 498, 506 (4th Cir. 1996) (interpreting the definition of “victim” under the  
25 Victim and Witness Protection Act (“VWPA”)); *United States v. Davenport*,  
26 445 F.3d 366, 374 (4th Cir. 2006) (interpreting the definition of “victim”  
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1 under the Mandatory Victims Restitution Act (“MVPA”)), *overruled in part*  
2 *on other grounds by Irizarry v. United States*, 553 U.S. 708, 128 S. Ct. 2198,  
3 171 L. Ed. 2d 28 (2008)).

4  
5 The district court in *United States v. McNulty* held that Martin  
6 McNulty, a former employee of Arctic Glacier International, Inc., the  
7 company that pled guilty for conspiracy to violate the Sherman Act, was not a  
8 victim as defined under the CVRA, even though he alleged he was told about  
9 the conspiracy while working there, was fired for his refusal to participate in  
10 the conspiracy and blackballed from employment in the packaged ice industry  
11 because the victims of the offense were the customers, not the employees.

12  
13 597 F.3d 344, 346-48 (6th Cir. 2010). The Sixth Circuit addressed the  
14 definition of a “crime victim” under the CVRA for the first time. Relying on  
15 its sister circuits for guidance, it noted that “[t]he requirement that the victim  
16 be ‘directly and proximately harmed’ encompasses the traditional ‘but for’  
17 and proximate cause analyses.” *Id.* at 350 (quoting *In re Rendon Galvis*, 564  
18 F.3d 170, 175 (2d Cir. 2009) (holding the mother was “not a crime victim  
19 under the CVRA because the harm to her son was not a direct and proximate  
20 result of conspiring to import cocaine into the United States, which is the  
21 crime of conviction [t]here.”); *see also* (*In re Antrobus*, 519 F.3d 1123, 1124-  
22 26 (10th Cir. 2008) (upholding district court’s finding that the murder victim  
23 was not a “crime victim” of the defendant gun dealer who pled guilty to

1 illegally transferring a handgun to a juvenile where defendant had no  
2 knowledge of the juvenile's intentions and no contact with him after the gun  
3 was sold and thus the victim's parents were not entitled to mandamus relief  
4 under the CVRA). The CVRA

5  
6 instructs the district court to look at the offense itself only to determine  
7 the harmful effects the offense has on the parties. Under the plain  
8 language of the statute, a party may qualify as a victim, even though it  
9 may not have been the target of the crimes, *as long as it suffers harm  
as a result of the crime's commission.*

10 *McNulty*, 597 F.3d at 351 (quoting *In re Stewart*, 552 F.3d 1285, 1289 (11th  
11 Cir. 2008)) (emphasis added).

12  
13 The Sixth Circuit in *McNulty* noted that the issue was whether McNulty  
14 was directly and proximately harmed by criminal conduct in the course of the  
15 conspiracy or whether the actions were merely ancillary to the conspiracy.  
16 597 F.3d at 351. Looking to the facts of the plea agreement, the Sixth Circuit  
17 affirmed the district court's holding that McNulty was not a victim for  
18 purposes of the CVRA reasoning the alleged harms, if proven are not  
19 associated with the crime of antitrust conspiracy. *Id.* at 352. The court stated  
20  
21 *"the harm must be 'direct' requires harm to the victim be closely related to  
22 the conduct inherent to the offense, rather than merely tangentially linked."*  
23  
24 *Id.* at 352 (emphasis added). It further stated that for purposes of the CVRA's  
25 definition of "crime victim," the "only material federal offenses are those for  
26 which there is a conviction or plea." *Id.* n.9.

1 Here, it is undisputed that the victims in the mail fraud offense that  
2 McMahan is awaiting sentencing for were the banks involved in the offense.  
3  
4 See Reporter's Transcript of Proceedings, August 29, 2011 at 17, lns. 17-19.  
5 The alleged victim interveners are not only not victims of the offense for  
6 which McMahan is being sentenced, but they are not even tangentially linked  
7 to the offense for which he is being sentenced. The numerous unfounded  
8 assertions of criminal activity are based on merely hearsay and speculation,  
9 have clearly been reported to the USAO and the FBI and the government  
10 continues to take the position that the Court should move forward with  
11 McMahan's sentencing as the alleged victim interveners are not "crime  
12 victims" under the CVRA. Furthermore, the materials filed by the alleged  
13 victim interveners barely mention McMahan and more importantly there are  
14 no pending charges against him let alone a conviction related to these  
15 allegations. Thus, the alleged victim interveners are not "crime victims" as  
16 defined under the CVRA and have no right to be heard at McMahan's  
17 sentencing hearing. Therefore the Court should deny the motion to intervene.  
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## 23 II. CONCLUSION

24 For the foregoing reasons, the alleged victim interveners are not "crime  
25 victims" as defined by the CVRA and have no rights to be heard at McMahan's  
26 sentencing hearing. Thus, the Court should deny the motion to intervene.  
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Dated: October 28, 2011

Law Office of David W. Wiechert

By: /S/ David W. Wiechert  
David W. Wiechert  
Jessica C. Munk  
Attorneys for Defendant  
Kirk A. McMahan



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**CERTIFICATE OF SERVICE**

I, Danielle Dragotta, declare,

That I am a citizen of the United States and am a resident or employed in the county of Orange, California; that my business address is 115 Avenida Miramar, San Clemente, CA 92672; that I am over the age of 18 and not a party to the above-entitled action.

That I am employed by a member of the United States District Court for the Central District of California and at whose direction I served the foregoing document described as **DEFENDANT’S OPPOSITION TO MOTION BY ALLEGED VICTIMS TO INTERVENE AND BE HEARD AT SENTENCING PURSUANT TO 18 U.S.C. § 3771(d)(3); MEMORANDUM OF POINTS AND AUTHORITIES** on the interested parties as follows:

**[ x ] BY E-MAIL:** I caused a copy to be transmitted electronically by filing the foregoing with the clerk of the District Court using its ECF system, which electronically notifies counsel for that party

**[ x ] BY MAIL:** I caused such envelope(s) to be deposited in the mail at San Clemente, California with postage thereon fully prepaid to the office of the addressee(s) as indicated on the attached service list. I am “readily familiar” with this firm’s practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business to the following participants in this case:

- Jennifer Waier, Esq.
- United States Attorney’s Office
- 411 W 4th St #8000
- Santa Ana, CA 92701
- Attorneys for United States of America
  
- Law Office of Becky Walker James
- Becky Walker James
- 1990 South Bundy Drive, Suite 750
- Los Angeles, CA 90025
- becky@walkerjameslaw.com

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I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on October 28, 2011, at San Clemente, California.

*/S/ Danielle Dragotta*

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Danielle Dragotta

## Responses/Replies/Other Motion Related Documents

[8:07-cr-00249-CJC USA v. McMahan](#)

RELATED-G

### UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA

#### Notice of Electronic Filing

The following transaction was entered by Wiechert, David on 10/28/2011 at 11:14 AM PDT and filed on 10/28/2011

**Case Name:** USA v. McMahan  
**Case Number:** [8:07-cr-00249-CJC](#)  
**Filer:** Dft No. 1 - Kirk A McMahan  
**Document Number:** [58](#)

#### Docket Text:

**OPPOSITION to MOTION for Order for to Intervene and be Heard at Evidentiary Hearing and Sentencing[53] filed by Defendant Kirk A. McMahan. (Attachments: # (1) Memorandum Memorandum of Points and Authorities)(Wiechert, David)**

#### 8:07-cr-00249-CJC-1 Notice has been electronically mailed to:

David W Wiechert [dwiechert@aol.com](mailto:dwiechert@aol.com), [ddragotta@davidwiechertlaw.com](mailto:ddragotta@davidwiechertlaw.com),  
[jessica@davidwiechertlaw.com](mailto:jessica@davidwiechertlaw.com), [lprince@davidwiechertlaw.com](mailto:lprince@davidwiechertlaw.com)

Jennifer L Waier [USACAC.SACriminal@usdoj.gov](mailto:USACAC.SACriminal@usdoj.gov), [jennifer.waier@usdoj.gov](mailto:jennifer.waier@usdoj.gov)

#### 8:07-cr-00249-CJC-1 Notice has been delivered by First Class U. S. Mail or by other means to: :

The following document(s) are associated with this transaction:

#### Document description:Main Document

**Original filename:**C:\fakepath\McMahanOppositionMotiontoIntervene.pdf

#### Electronic document Stamp:

[STAMP cacdStamp\_ID=1020290914 [Date=10/28/2011] [FileNumber=12530916-0] [42452a6aa29da1e50a034a38f065c075a9020dd2ee3d0c6b0bc3d6a572d6f5823e555811cc391ca16fd7e6ac371091d05aa366e73438a90bf6a92d4bf887cc72]]

#### Document description:Memorandum Memorandum of Points and Authorities

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000116

1 ANDRÉ BIROTTE JR.  
 United States Attorney  
 2 DENNISE D. WILLETT  
 Assistant United States Attorney  
 3 Chief, Santa Ana Branch  
 JENNIFER L. WAIER  
 4 Assistant United States Attorney  
 California Bar Number: 209813  
 5 411 West Fourth Street, Suite 8000  
 Santa Ana, California 92701  
 6 Telephone: (714) 338-3550  
 Facsimile: (714) 338-3708  
 7 E-mail: Jennifer.Waier@usdoj.gov

8 Attorney for Plaintiff  
 United States of America  
 9

10 UNITED STATES DISTRICT COURT

11 FOR THE CENTRAL DISTRICT OF CALIFORNIA

12	UNITED STATES OF AMERICA,	)	Case No. SA CR 07-249-CJC
		)	
13	Plaintiff,	)	<u>GOVERNMENT'S RESPONSE TO</u>
		)	<u>MOTION TO INTERVENE</u>
14	v.	)	
		)	
15	KIRK McMAHAN,	)	
		)	
16		)	
		)	
17	Defendant.	)	
		)	
18		)	

19

20 Vince Andrich, Don Aspinal, Scott Connelly, Jeff Corbett,  
 21 Charlene Eglund, Jeffrey Gilbert, Darren Meade, Glenn Puit,  
 22 Michael Roberts, and Mark Warner (collectively "interveners")  
 23 filed a motion in the above-entitled criminal case to intervene  
 24 pursuant to the Crime Victims' Rights Act, Title 18, United  
 25 States Code, Section 3771 ("CVRA"). However, the interveners  
 26 lack standing to file such motion under the CVRA. Therefore, the  
 27 motion should be denied.

28

1 Only "crime victims" are entitled to rights articulated  
2 under the CVRA. See 18 U.S.C. §3771(a)(stating "[a] crime victim  
3 has the following rights"). Under the CVRA, a "crime victim" is  
4 a person directly or proximately harmed as a result of the  
5 commission of a Federal Offense . . . . 18 U.S.C. §3771(e).  
6 "In making the determination, [courts] must (1) look to the  
7 offense of conviction, based solely on facts reflected in the  
8 jury verdict or admitted by the defendant; and then  
9 (2) determine, based on those facts, whether any person or  
10 persons were 'directly and proximately harmed as a result of the  
11 commission of [that] Federal offense.'" In re Martin McNulty,  
12 597 F.3d 344, 351 (6th Cir. 2010) (stating "[t]he CVRA 'instructs  
13 the district court to look at the offense itself only to  
14 determine the harmful effects the offense has on the parties.'");  
15 see also United States v. Turner, 367 F.Supp.2d 319, 326-27  
16 (E.D.N.Y. 2005)(stating "the full Congress passed the CVRA  
17 knowing that similar language in earlier victims' rights bill had  
18 been interpreted not to refer to uncharged conduct. . . . Since  
19 the [VWPA] and [the CVRA] use similar definitions of 'victim,' it  
20 appears that the same reasoning would exclude victims of  
21 uncharged conduct from the class of those entitled to  
22 participatory rights under the [CVRA].").

23 Here, defendant admitted to defrauding financial  
24 institutions through an equipment leasing fraud scheme. The  
25 victims that were directly and proximately harmed by the admitted  
26 criminal conduct are financial institutions. Indeed, interveners  
27

1 make no claim that they were harmed as a result of the admitted  
2 criminal conduct.<sup>1</sup>

3 Because the interveners are not proximately harmed by the  
4 admitted criminal conduct, they have no standing to file a motion  
5 in this case under the CVRA. See McNulty, 597 F.3d at 351  
6 (stating "for purposes of the CVRA definition of 'crime victim,'  
7 the only material federal offenses are those for which there is a  
8 conviction or plea" and holding that McNulty was not a victim  
9 because there was no evidence that his harms were associated with  
10 the antitrust conspiracy); In re Rendon Glavis, 564 F.3d 170, 175  
11 (2d Cir. 2009) (holding that mother was not a crime victim under  
12 the CVRA because the harm to her son was not a direct and  
13 proximate result of conspiring to import cocaine into the United  
14 States, which was the crime of conviction); In re Antrobus, 519  
15 F.3d 1123, 1125-26 (10th Cir. 2008) (limiting standing of the

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24 <sup>1</sup> Instead, the interveners wish "to present evidence  
25 regarding additional crimes committed by defendant" while on  
26 pretrial release - unrelated to the charged criminal case. (See  
27 Mot. at 5). Incredibly, the interveners presently do not have  
any admissible evidence that defendant committed new federal  
crimes, but request additional time to compile such  
evidence. (Id.)

28

1 CVRA to the direct and proximate harm caused by the offense of  
2 conviction). Accordingly, the motion should be denied.

3 Dated: October 28, 2011                      Respectfully submitted,

4  
5    ANDRÉ BIROTTE JR.  
6    United States Attorney

7    DENNISE D. WILLETT  
8    Assistant United States Attorney  
9    Chief, Santa Ana Branch

10    Jennifer L. Waier  
11    JENNIFER L. WAIER  
12    Assistant United States Attorney

13  
14    Attorneys for Plaintiff  
15    United States of America

1 LAW OFFICES OF BECKY WALKER JAMES  
2 BECKY WALKER JAMES (CA Bar # 151419)  
3 1990 South Bundy Drive, Suite 705  
4 Los Angeles, California 90025  
Telephone: (310) 492-5104  
Facsimile: (310) 492-5026  
E-mail: becky@walkerjameslaw.com

5 *Counsel for Victim-Interveners*  
6 VINCE ANDRICH, DON ASPINAL,  
7 SCOTT CONNELLY, JEFF CORBETT,  
8 CHARLENE EGLAND, JERRY GILBERT,  
RACHEL GREEN, KEITH LEWIS,  
DARREN MEADE, GLENN PUTT,  
MICHAEL ROBERTS, and MARK WARNER

9  
10 UNITED STATES DISTRICT COURT  
11 FOR THE CENTRAL DISTRICT OF CALIFORNIA  
12 SOUTHERN DIVISION

13 UNITED STATES OF AMERICA,

14 Plaintiff,

15 v.

16 KIRK MCMAHAN,

17 Defendant.

18  
19 VINCE ANDRICH, DON  
20 ASPINAL, SCOTT CONNELLY,  
21 JEFF CORBETT, CHARLENE  
22 EGLAND, JERRY GILBERT,  
RACHEL GREEN, KEITH LEWIS,  
DARREN MEADE, GLENN PUTT,  
MICHAEL ROBERTS, and MARK  
WARNER,

23 Victim-Interveners.  
24  
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26  
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Case No. SACR 07-249-CJC

**REPLY TO OPPOSITIONS BY  
GOVERNMENT AND DEFENDANT  
TO MOTION BY VICTIMS TO  
INTERVENE AND BE HEARD**

Sentencing Date: December 5, 2011  
Time: 3:00 p.m.

Courtroom: 9B, Santa Ana Courthouse  
Hon. Cormac. J. Carney, United States  
District Judge



## I. INTRODUCTION

1  
2 The government and defendant oppose giving the victims of crimes  
3 committed by defendants McMahan and his cohort Adam Stuart Zuckerman an  
4 opportunity to be heard in connection with sentencing. They base their opposition  
5 on their claim that the Victim-Interveners are not “crime victims” under the Crime  
6 Victims’ Rights Act (“CVRA”). In support of this claim, they rely on out-of-circuit  
7 authority, none of which holds that the definition of “crime victims” is limited to  
8 the actual targets of the charged conduct. Such a cramped definition would be  
9 contrary to Ninth Circuit authority, the language of the statute, and its legislative  
10 history, all of which demonstrate the legislative intent to protect, not minimize,  
11 crime victims’ rights.

12 As interesting as the legal interpretation of the CVRA is, it is not necessary  
13 for the Court even to reach this issue. Regardless of whether the Victim-  
14 Interveners fall within the definition of “crime victims” under the CVRA, they  
15 plainly have relevant evidence to offer with respect to defendant McMahan’s (and  
16 ultimately defendant Zuckerman’s) sentencing. This Court has wide discretion to  
17 consider relevant information at sentencing. As this Court has already observed,  
18 evidence that the defendant has been engaging in further crimes would be highly  
19 relevant in deciding the issue of whether he should be given leniency based on his  
20 supposedly having led a “law-abiding life.” The defense – and more troublingly,  
21 the government – apparently would like the Court to turn a blind eye to this  
22 obviously relevant information and sentence defendant McMahan as if it does not  
23 exist. The Court need not and should not preclude the victims of crime who are  
24 willing – at great personal cost and risk – to come forward to explain their  
25 experiences from doing so, as those experiences bear directly on determining an  
26 appropriate sentence.

## II. ARGUMENT

### A. Victim-Interveners are Crime Victims Under the CVRA

Contrary to defendant's and the government's argument, the CVRA, 18 U.S.C. § 3771, does not limit its reach to victims of the crime charged. Rather, "crime victim" is expressly defined in the statute to mean "a person directly and proximately harmed as a result of the commission of *a* Federal offense." 18 U.S.C. § 3771(e) (emphasis added). The statute does not limit the definition of "crime victim" to a person harmed as a result of "*the* federal offense," or "the offense of conviction." Indeed, section 3771(d)(3) allows crime victims to assert their rights even where no prosecution is currently pending. Thus, it cannot be that Congress intended to limit crime victims' rights to only those proceedings in which the crime has been charged.

Indeed, the legislative history demonstrates precisely the opposite legislative intent. In discussing the definition of "crime victim" to include victims of "a federal offense," the sponsor of the legislation explained: "This is an intentionally broad definition because all victims of crime deserve to have their rights protected, *whether or not they are the victim of the count charged.*" 150 Cong. Rec. S10912 (Oct. 9, 2004) (statement of Sen. Kyl) (emphasis added). This intent is consistent with the broader intent of the legislation: "It is not the intent of this bill that its significance be whittled down or marginalized by the courts or the executive branch. This legislation is meant to correct, not continue, the legacy of the poor treatment of crime victims in the criminal process." *Id.* at S10911.<sup>1</sup>

<sup>1</sup> This intent must be kept in mind in reading the language in subsection (b), relied upon by defendant, that crime victims' rights apply "in any court proceeding involving an offense against a crime victim." To be squared with the legislative intent to protect all crime victims, whether or not they are the victims of the count charged, this language cannot be read to mean that crime victims' rights are limited to those proceedings in which the offense against the crime victim has been charged. Rather, it must be construed – consistently with its use of the broad terms "any" proceeding "involving" "an" offense against a crime victim – to confer rights with respect to *any* proceeding at which *an* offense against a crime victim is *involved*. As discussed below, the sentencing at issue here certainly "involves" the offenses committed against these victims, as defendant himself has put these offenses directly in issue by claiming to have led a "law-abiding life."

1 Consistent with this legislative intent, the Ninth Circuit has held that “[t]he  
2 definition of a ‘victim’ under the CVRA is not limited to the person against whom a  
3 crime was actually perpetrated.” *In re Mikhel*, 453 F.3d 1137, 1139 n.2 (9th Cir.  
4 2006). Moreover, the Ninth Circuit, reviewing the legislative history, has  
5 recognized the legislative intent to “make crime victims full participants in the  
6 criminal justice system.” *Kenna v. U.S. Dist. Ct.*, 435 F.3d 1011, 1016 (9th Cir.  
7 2006). The court also noted Senator Kyl’s comments that the statutory language  
8 “not be an excuse for minimizing the victim’s opportunity to be heard.” *Id.* at  
9 1015.

10 As defendant acknowledges, no Ninth Circuit authority holds that “crime  
11 victims” are limited to the victims of the crime charged. Defendant and the  
12 government instead point to out-of-circuit authority they claim supports this  
13 proposition. First, this authority is not binding on this Court, and even assuming it  
14 did support the parties’ interpretation of the CVRA, such interpretation would be  
15 flatly inconsistent with legislative intent and the Ninth Circuit authority recognizing  
16 that intent, as discussed above.

17 In any event, none of the cases cited in fact holds that “crime victims” under  
18 the CVRA includes only victims of the crime charged. Rather, each of the cases  
19 addresses the different issue of harms that are too attenuated to be considered  
20 “proximately caused” by the offenses committed by the defendant. For example, in  
21 *In re McNulty*, 597 F.3d 344 (6th Cir. 2010), the principal case relied on by the  
22 parties, the issue was whether an employee who was fired and blackballed from  
23 employment for refusing to participate in an antitrust conspiracy was a “crime  
24 victim.” The court held that the employee was not a “crime victim” under the  
25 CVRA because firing and blackballing were only civil, not criminal, harms and  
26 were only tangentially linked to the defendant employer’s criminal conduct of  
27 conspiracy and restraint of interstate commerce. *Id.* at 351-52. *Accord In re*  
28 *Rendon Galvis*, 564 F.3d 170, 175 (2d Cir. 2009) (insufficient nexus between

1 murder and defendant's crime of drug trafficking); *In re Antrobus*, 519 F.3d 1123,  
2 1125-26 (10th Cir. 2008) (murder not proximately caused by defendant's crime of  
3 supplying handgun to juvenile); *United States v. Sharp*, 463 F. Supp. 2d 556, 565-  
4 67 (E.D. Va. 2006) (insufficient causal link between abuse by user of marijuana and  
5 defendant's conduct in conspiring to distribute marijuana).

6 Moreover, while the government cites *United States v. Turner*, 367 F. Supp.  
7 2d 319 (E.D.N.Y. 2005), there the court ultimately concluded that ambiguity over  
8 whether the CVRA applies to victims of uncharged conduct counsels erring on the  
9 side of caution. *Id.* at 326-27. The court explained that "it is important to avoid the  
10 pitfall of seeking to determine who is 'actually' a victim as a threshold for  
11 safeguarding the rights set forth in § 3771." *Id.* at 327 (citation omitted). The court  
12 went on to explain that it would follow "an inclusive approach" and would presume  
13 that any person who the government asserts or who self-identifies as having been  
14 "harmed by conduct attributed to a defendant . . . enjoys all of the procedural and  
15 substantive rights set forth in § 3771." *Id.*

16 Here, Victim-Intervenors have identified themselves as individuals who have  
17 been harmed by the conduct of defendant McMahan or defendant Zuckerman or  
18 both. Several of the victims have evidence that they were directly defrauded by  
19 defendant McMahan in violation of federal law. Moreover, the victims can also  
20 testify to the fact that defendant McMahan has been acting at the direction of  
21 defendant Zuckerman, supporting aider-and-abettor or co-conspirator criminal  
22 liability on the part of defendant McMahan for defendant Zuckerman's further acts  
23 of deception and intimidation. *See* 18 U.S.C. §§ 2, 371. Because these individuals  
24 are victims of federal offenses, they are "crime victims" and must be afforded the  
25 rights granted in the CVRA, including the right to be heard at the upcoming  
26 sentencing of defendant McMahan at which his continuing criminal conduct is  
27 directly in issue.  
28

1       **B.     Even Apart from the Applicability of the CVRA, this Court Has**  
2       **Discretion to and Should Consider Evidence from Victim-Interveners,**  
3       **Which Is Highly Relevant to the Court’s Sentencing Determination**

4       Even if Victim-Interveners were not crime victims for purposes of the  
5       CVRA, this Court should consider the evidence they wish to present pursuant to its  
6       wide sentencing discretion. It is well established that a “district court may consider  
7       a wide variety of information at sentencing that could not otherwise be considered  
8       at trial, *see* 18 U.S.C. § 3661, and is not bound by the rules of evidence, *see* Fed. R.  
9       Evid. 1101(d)(3).” *United States v. Vanderwerfhorst*, 576 F.3d 929, 935 (9th Cir.  
10      2009). Indeed, 18 U.S.C. § 3661 makes clear that “[n]o limitation shall be placed  
11      on the information concerning the background, character, and conduct of a person  
12      convicted of an offense which a court of the United States may receive and consider  
13      for the purpose of imposing an appropriate sentence.” Likewise, the Sentencing  
14      Guidelines provide that “the court may consider relevant information without  
15      regard to its admissibility under the rules of evidence applicable at trial, provided  
16      that the information has sufficient indicia of reliability to support its probable  
17      accuracy.” U.S.S.G. § 6A1.3(a) (policy statement).

18      Thus, “[a] sentencing judge ‘may appropriately conduct an inquiry broad in  
19      scope, largely unlimited as to the kind of information he may consider, or the  
20      source from which it may come.’ ” *Vanderwerfhorst*, 576 F.3d at 935 (quoting  
21      *Nichols v. United States*, 511 U.S. 738, 747 (1994), and *United States v. Tucker*,  
22      404 U.S. 443, 446 (1972)). Indeed, the Ninth Circuit has expressly held that  
23      “‘[h]earsay evidence of unproved criminal activity not passed on by a court,’ for  
24      example, ‘may be considered in sentencing.’” *Id.* (quoting *Farrow v. United States*,  
25      580 F.2d 1339, 1360 (9th Cir.1978)).

26      The Eighth Circuit’s recent decision in *United States v. Ortiz*, 636 F.3d 389,  
27      393-94 (8th Cir. 2011), is instructive. There, the district court permitted victims to  
28      testify at sentencing about the total losses they suffered, overruling the defendant’s

1 objection that the victims' testimony should be limited to the scope of the offense.  
2 *Id.* at 393. The Eighth Circuit affirmed, holding that the district court was not  
3 limited to hearing only crime victims' testimony that was within the scope of the  
4 offense, given the district court's authority to conduct an inquiry "broad in scope"  
5 that would aid the court in determining whether to vary from the guidelines. *Id.* at  
6 393-94.

7 Here, as this Court has already observed, evidence that defendants have been  
8 engaged in further criminal activity while on pretrial release would certainly aid the  
9 court in evaluating the background, character, and conduct of the defendants and,  
10 specifically, in determining whether to vary from the guidelines. Defendant  
11 McMahan has put this issue directly before the Court, seeking a downward variance  
12 based on having led a law-abiding life. At the previous hearing on this matter, the  
13 Court was understandably "baffled" as to how it could *not* consider such evidence  
14 of further criminal activity, as it bears directly on this issue. (RT 50.)

15 The parties offer no real response to the Court's well-founded question,  
16 except to complain that the Victim-Interveners have provided only hearsay and not  
17 admissible evidence. First, under all the authorities cited above, that is irrelevant,  
18 since the Court is not limited in the information it can receive and can consider  
19 even hearsay and otherwise inadmissible evidence at sentencing. In any event, the  
20 argument puts the cart before the horse. At this juncture, Victim-Interveners are  
21 simply seeking the opportunity to be heard. If the Court wishes to proceed by way  
22 of an evidentiary hearing, following the Rules of Evidence, Victim-Interveners are  
23 willing to testify under oath at such a hearing, thereby providing admissible non-  
24 hearsay evidence. Further, if it would aid the Court, Victim-Interveners are also  
25 willing to submit written statements or sworn declarations in advance of the  
26 sentencing hearing.<sup>2</sup>

27 <sup>2</sup> In so doing, however, Victim-Interveners do not waive their right to be heard  
28 orally at the sentencing hearing. *See Kenna*, 435 F.3d at 1014-16 (right to be heard  
under CVRA includes right to address court orally and is not satisfied by  
acceptance of written statements).

**III. CONCLUSION**

For the foregoing reasons and the reasons set forth in their original motion, Victim-Interveners request that the Court grant their motion to intervene and be heard.

Dated: November 2, 2011

/s/Becky Walker James  
Becky Walker James  
LAW OFFICES OF BECKY WALKER JAMES

*Counsel for Victim-Interveners*  
VINCE ANDRICH, DON ASPINAL, SCOTT CONNELLY, JEFF CORBETT, CHARLENE EGLAND, JERRY GILBERT, RACHEL GREEN, KEITH LEWIS, DARREN MEADE, GLENN PUIT, MICHAEL ROBERTS, and MARK WARNER

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**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
SOUTHERN DIVISION**

**UNITED STATES OF AMERICA,**

**Plaintiff,**

**vs.**

**KIRK MCMAHAN,**

**Defendant.**

**Case No.: SACR 07-00249-CJC**

**ORDER DENYING ALLEGED  
VICTIM-INTERVENERS' MOTION  
TO INTERVENE AND BE HEARD AT  
DEFENDANT'S SENTENCING  
HEARING**

**INTRODUCTION & BACKGROUND**

On October 26, 2011, alleged victim-interveners Vince Andrich, Don Aspinal, Scott Connelly, Jeff Corbett, Charlene Egland, Jeffrey Gilbert, Darren Meade, Glenn Puit, Michael Roberts, and Mark Warner (collectively "interveners") filed a motion to intervene and be heard at a second sentencing hearing for Defendant Kirk McMahan



1 pursuant to the Crime Victim's Rights Act, 18 U.S.C. § 3771(a)(7) ("CVRA").<sup>1</sup> On  
2 January 31, 2008, Mr. McMahan pled guilty to one count of mail fraud pursuant to 18  
3 U.S.C. § 1341. After a series of continuances, the Court held a sentencing hearing on  
4 August 29, 2011. At this hearing, two of the interveners asserted that Mr. McMahan had  
5 committed additional Federal offenses in the time between his plea and the scheduled  
6 sentencing hearing. Based on these statements, the Court requested that the government  
7 investigate and present evidence regarding Mr. McMahan's post-plea conduct at a second  
8 sentencing hearing scheduled for October 31, 2011. The government investigated the  
9 allegations and decided neither to bring charges for these alleged offenses nor to present  
10 evidence about them at the second sentencing hearing in this case. In response, on  
11 October 26, 2011, the interveners filed the present motion. They asserted a right to be  
12 heard at the second sentencing hearing under the CVRA, that the hearing be postponed to  
13 allow them time to gather evidence to present regarding their assertions, and finally that  
14 Mr. McMahan's codefendant's conduct also be considered at this hearing for purposes of  
15 his sentencing. The Court, on its own motion, continued the second sentencing hearing  
16 to December 5, 2011, to resolve the interveners' motion. For the reasons set forth below,  
17 the Court DENIES the interveners' motion.

## 18 19 ANALYSIS

20  
21 Under the CVRA, a "crime victim" has "[t]he right to be reasonably heard at any  
22 public proceeding in the district court involving release, plea, sentencing, or any parole  
23 proceeding." 18 U.S.C. § 3771(a)(7). The statute defines a "crime victim" as "a person  
24 directly and proximately harmed as a result of the commission of a Federal offense or an  
25 offense in the District of Columbia." *Id.* § 3771(e). At issue here is whether, at  
26 sentencing, the "Federal offense" must be one for which the defendant has been  
27

28 <sup>1</sup> Having read and considered the papers presented by the parties, the Court finds this matter appropriate for disposition without a hearing. *See* FED. R. CIV. P. 78; LOCAL RULE 7-15.

1 convicted or to which he or she has pled, or whether the statute permits a person to be  
2 heard if he or she asserts rights as a victim of an unrelated, uncharged, unproven Federal  
3 offense allegedly committed by the defendant.

4  
5 This issue appears to be one of first impression, not only in the Ninth Circuit, but  
6 for all courts. The case in this circuit interpreting the definition of “crime victim” under  
7 the CVRA centered on whether victims of the offense were only those against who the  
8 crime was perpetrated, or whether family members, legal guardians, or representatives of  
9 the estate of a murder victim could be deemed “crime victims.” *See In re Mikhel*, 453  
10 F.3d 1137, 1139 n.2 (9th Cir. 2006). This case did not need to address whether offenses  
11 other than those for which a defendant has neither been charged nor convicted were  
12 covered by the CVRA “crime victim” definition. Although other circuit and district  
13 courts have addressed the definition of “crime victim,” none have had this particular issue  
14 before them. None of the cases in other circuits and districts involved individuals  
15 seeking to enforce rights under the CVRA based on their status as victims of alleged  
16 crimes unrelated to the conviction offense. Instead, the interveners in these cases sought  
17 to connect the harm they suffered to the conviction offense for which the defendant was  
18 being sentenced. *See United States v. McNulty*, 597 F.3d 344 (6th Cir. 2010) (holding  
19 that an intervener was not directly and proximately harmed by the convicted offense of  
20 antitrust conspiracy where he was fired for refusing to participate in the conspiracy); *In re*  
21 *Galvis*, 564 F.3d 170 (2d Cir. 2009) (holding that the connection between a murder  
22 victim’s death at the hands of a Columbian paramilitary organization in which the  
23 defendant was a commander, and the defendant’s conviction offense of conspiring to  
24 import cocaine as part of that organization was too attenuated for the victim’s mother to  
25 qualify as a crime victim because her son’s death had not been shown to be related to the  
26 drug trafficking); *In re Antrobus*, 519 F.3d 1123 (10th Cir. 2008) (holding that the  
27 connection between an individual’s murder and the defendant gun dealer’s conviction  
28 offense of illegal transfer of a hand gun was too attenuated to find that the defendant’s

1 offense proximately caused the death); *United States v. Sharp*, 463 F. Supp. 2d 556 (E.D.  
2 Va. 2006) (holding that the defendant’s offense of conviction was not the proximate  
3 cause of domestic violence by one of the dealer’s customers to grant the domestic  
4 violence victim the right to be heard under the CVRA). These courts were, thus, required  
5 to determine whether an individual was “directly and proximately harmed” by the  
6 conviction offense. None of these courts were required to consider whether harm was  
7 caused by an offense other than that of conviction. They, thus, did not reach the question  
8 before this Court: May a person invoke the right to be heard at sentencing if he or she has  
9 been harmed by an unrelated offense for which the defendant has not been tried, charged,  
10 or convicted?

11  
12 In *McNulty*, the court did state in dicta that “for purposes of the CVRA definition  
13 of ‘crime victim,’ the only material federal offenses are those for which there is a  
14 conviction or plea.” See *McNulty*, 597 F.3d at 352 n.9. However, the court provided no  
15 reasoning to support this assertion, and the cases cited interpret the definition under the  
16 Victim and Witness Protection Act, 18 U.S.C. § 3663, which, like the Mandatory Victims  
17 Restitution Act, 18 U.S.C. § 3663A, is worded differently than the CVRA. Similarly, for  
18 a pre-conviction interpretation of the definition of crime victim, one court, concerned  
19 with preserving the presumption of innocence in interpreting the CVRA interpreted the  
20 phrase as follows: The “definition on § 3771(e) . . . include[s] any person who would be  
21 considered a ‘crime victim’ if the government were to establish the truth of the factual  
22 allegations in its charging instrument.” *United States v. Turner*, 367 F. Supp. 2d 319  
23 (E.D.N.Y. 2005). Both of these cases indicate that the statute refers to the conviction  
24 offense, not any alleged Federal offense. *But see* 150 Cong. Rec. S10912 (Oct. 9, 2004)  
25 (statement of Sen. Kyl) (“This is an intentionally broad definition because all victims of  
26 crime deserve to have their rights protected, whether or not they are the victim of the  
27 count charged.”).

1           The Supreme Court has held that the canons of construction “are not mandatory  
2 rules,” but rather “guides ‘that need not be conclusive.’” *Chickasaw Nation v. United*  
3 *States*, 534 U.S. 84, 94 (2001) (quoting *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105,  
4 115 (2001)). The “first step in interpreting a statute is to determine whether the language  
5 at issue has a plain and unambiguous meaning with regard to the particular dispute in the  
6 case.” *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997) (citing *United States v. Ron*  
7 *Pair Enters., Inc.*, 489 U.S. 235, 240 (1989)). To determine whether a statute is  
8 ambiguous courts look to “the language itself, the specific context in which that language  
9 is used, and the broader context of the statute as a whole.” *Id.* at 341 (citing *Estate of*  
10 *Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 477 (1992)). The statute should be read as  
11 a whole, “since the meaning of statutory language, plain or not, depends on context.”  
12 *King v. St. Vincent’s Hosp.*, 502 U.S. 215 (1991). The Supreme Court has also held that  
13 “when deciding which of two plausible statutory constructions to adopt, a court must  
14 consider the necessary consequences of its choice. If one of them would raise a multitude  
15 of constitutional problems, the other should prevail—whether or not those constitutional  
16 problems pertain to the particular litigant before the [c]ourt.” *Clark v. Martinez*, 543 U.S.  
17 371, 380–81 (2005).

18  
19           Here, the interpretation of the CVRA definition of a crime victim suggested by the  
20 interveners would “raise a multitude of constitutional problems.” *Id.* The Sixth  
21 Amendment requires that “[i]n all criminal prosecutions, the accused shall enjoy the right  
22 to a speedy and public trial, by an impartial jury of the State and district wherein the  
23 crime shall have been committed, . . . to be informed of the nature and cause of the  
24 accusation; to be confronted with the witnesses against him; to have compulsory process  
25 for obtaining witnesses in his favor, and to have the [a]ssistance of [c]ounsel for his  
26 defence.” U.S. CONST. amend. VI. The criminal proceeding envisioned by the  
27 interveners meets almost none of these constitutional requirements. Mr. McMahan  
28 would not be charged by indictment, and he would not be provided with an advance

1 opportunity to know the charges. The criminal allegations would be presented and  
2 prosecuted by private citizens, not the government. The weight of the evidence would be  
3 evaluated by a judge and not a jury. Mr. McMahan would not even be entitled to cross-  
4 examine the interveners because “a defendant has no due process right to cross examine  
5 witnesses who supply information relied on in sentencing.” *Farrow v. U.S.*, 580 F.2d  
6 1339, 1353 n.25 (9th Cir. 1978). Finally, the evidence presented would not be required to  
7 comply with the rules of evidence at trial, and Mr. McMahan would be subject to a lower  
8 burden of proof; this evidence would be evaluated under a clear and convincing evidence  
9 or preponderance of the evidence standard, rather than proof beyond a reasonable doubt.  
10 *See United States v. Bonilla-Montenegro*, 331 F.3d 1047, 1049–50 (9th Cir. 2003)  
11 (quoting *United States v. Jordan*, 256 F.3d 922, 927 (9th Cir. 2001) (“[D]ue process is  
12 generally satisfied by using a preponderance of the evidence standard to prove  
13 sentencing factors that are set forth in the [United States Sentencing Guidelines].”  
14 However, when a sentencing factor has an extremely disproportionate effect on the  
15 sentence, the government must prove the sentencing enhancement by clear and  
16 convincing evidence.” (internal citations omitted)); *U.S. v. Berger*, 587 F.3d 1038, 1047  
17 (9th Cir. 2009) (citing *United States v. Moreland*, 509 F.3d 1201, 1220 (9th Cir. 2007) (  
18 “A district court typically uses a preponderance of the evidence standard when finding  
19 facts pertinent to sentencing.”). Simply put, increasing Mr. McMahan’s sentence based  
20 upon the procedure and evidence proposed by the interveners would be constitutionally  
21 improper and would be a flagrant violation of Mr. McMahan’s due process rights.  
22 Consequently, the Court will not permit the interveners to be heard at the second  
23 sentencing or to present any evidence of any criminal wrongdoing on Mr. McMahan’s  
24 part unrelated to the crime of conviction.<sup>2</sup>

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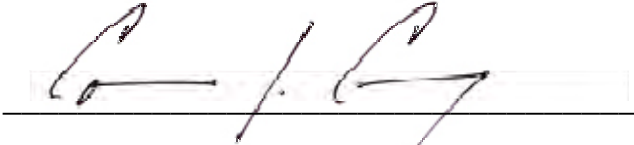
26 <sup>2</sup> Nor will the Court, as the interveners have suggested in their reply, exercise discretion to hear their  
27 proffered evidence. First, the conduct alleged is not “relevant conduct” under the Sentencing  
28 Guidelines, because it is not conduct “that occurred during the commission of the offense of conviction,  
in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that  
offense.” U.S. SENTENCING GUIDELINES MANUAL § 1B1.3 (2010). Second, considering this evidence

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**CONCLUSION**

For the foregoing reasons, the alleged victim-interveners’ motion to intervene and be heard is DENIED.

DATED: November 16, 2011



CORMAC J. CARNEY  
UNITED STATES DISTRICT JUDGE

through an exercise of discretion, rather than through the CVRA, would still give rise to the same constitutional issues.

1 LAW OFFICES OF BECKY WALKER JAMES  
2 BECKY WALKER JAMES (CA Bar # 151419)  
3 1990 South Bundy Drive, Suite 705  
4 Los Angeles, California 90025  
5 Telephone: (310) 492-5104  
6 Facsimile: (310) 492-5026  
7 E-mail: becky@walkerjameslaw.com

8 *Counsel for Victim-Interveners*  
9 VINCE ANDRICH, DON ASPINAL,  
10 SCOTT CONNELLY, JEFF CORBETT,  
11 CHARLENE EGLAND, JERRY GILBERT,  
12 IRA GILMER, RACHEL GREEN, KEITH LEWIS,  
13 DARREN MEADE, LEE PATIN, GLENN PUIT,  
14 ANTHONY ROBERTS, MICHAEL ROBERTS,  
15 MARK WARNER, and JIM ZASLAW

16 UNITED STATES DISTRICT COURT  
17 FOR THE CENTRAL DISTRICT OF CALIFORNIA  
18 SOUTHERN DIVISION

19 UNITED STATES OF AMERICA,  
20  
21 Plaintiff,

22 v.

23 KIRK MCMAHAN,  
24  
25 Defendant.

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27 VINCE ANDRICH, DON  
28 ASPINAL, SCOTT CONNELLY,  
JEFF CORBETT, CHARLENE  
EGLAND, JERRY GILBERT, IRA  
GILMER, RACHEL GREEN,  
KEITH LEWIS, DARREN MEADE,  
LEE PATIN, GLENN PUIT,  
ANTHONY ROBERTS, MICHAEL  
ROBERTS, MARK WARNER, and  
JIM ZASLAW,

Victim-Interveners.

Case No. SACR 07-249-CJC

**MOTION TO RECONSIDER ORDER  
DENYING MOTION BY VICTIMS  
TO INTERVENE AND BE HEARD  
AT SENTENCING, AND FOR  
ADDITION OF VICTIMS;  
DECLARATIONS OF RICHARD  
KINCAID, LEE PATIN, KEITH  
LEWIS, CHARLENE EGLAND,  
JERRY GILBERT, JEFF CORBETT,  
AND DARREN MEADE; EXHIBITS**

Sentencing Date: December 5, 2011  
Time: 3:00 p.m.

Courtroom: 9B, Santa Ana Courthouse  
Hon. Cormac. J. Carney, United States  
District Judge

1           On November 16, 2011, this Court denied Victim-Interveners’ motion to be  
2 heard at sentencing and for other relief. Victim-Interveners respectfully move for  
3 reconsideration of the Court’s order.

4           First, Victim-Interveners request reconsideration to address the constitutional  
5 concerns raised by the Court, which were not addressed by the parties in their  
6 briefing. Contrary to the Court’s concerns, the law is clear that consideration of  
7 evidence of further uncharged criminal activity by the defendant between plea and  
8 sentencing, such as that proffered here, is entirely permissible and does not in any  
9 way impinge on the defendant’s due process rights.

10           Second, because the description of the criminal conduct at issue was  
11 admittedly general in Victim-Interveners’ original motion, Victim-Interveners  
12 realize that the close connection between the crime of conviction and the specific  
13 evidence the victims would offer may not have been clear to the Court. Based on  
14 ongoing investigation, it is now clear that the conduct at issue here is not, as the  
15 Court apparently was led to believe, “unrelated” to the crime of conviction. In fact,  
16 as set forth in the attached declarations and exhibits which explain in greater detail  
17 the evidence proffered by Victim-Interveners, defendant’s conduct is in reality a  
18 continuation of the same fraudulent conduct targeting small businesses seeking  
19 financing that gave rise to defendant’s conviction.

20           Finally, while the further criminal activity certainly could be the subject of  
21 further prosecution, it is neither necessary nor sufficient to rely on the government  
22 to investigate and bring charges and otherwise to ignore the evidence of such  
23 activity. That the government has shown no interest in pursuing further charges  
24 does not mean that the public does not have an interest in having this relevant  
25 evidence properly considered at sentencing. It is precisely this public concern that  
26 is behind the Crime Victims’ Rights Act and warrants the Court allowing the  
27 victims’ voices to be heard.<sup>1</sup>

28 <sup>1</sup> Local Rule 7-18 allows for motions for reconsideration to address “(a) a material difference in  
2



1 I. Allowing Victim-Interveners To Be Heard at Sentencing Does Not Raise  
2 Constitutional Problems

3 This Court recognized that it is a question of first impression whether the  
4 Crime Victims' Rights Act applies to victims of further uncharged criminal conduct  
5 that goes beyond the crime of conviction. In holding that it does not, the Court  
6 relied on the premise that to interpret the Act to include such victims would "raise a  
7 multitude of constitutional problems." (Order at 5 (quoting *Clark v. Martinez*, 543  
8 U.S. 371, 380-81 (2005).) Specifically, the Court expressed the concern that to  
9 consider Victim-Interveners' evidence at sentencing would deprive defendant of his  
10 Sixth Amendment and due process rights because it would not be subject to the  
11 same constitutional protections as would apply if the conduct were charged as new  
12 offenses. (Order at 5-6.)

13 The Court's constitutional concerns about consideration of defendant's  
14 further criminal activity at sentencing are unfounded. The Supreme Court has long  
15 made clear that the constitutional constraints placed on the adjudication of guilt do  
16 not apply to sentencing determinations, but rather the sentencing judge has "wide  
17 discretion" to consider evidence to determine the appropriate punishment within the  
18 bounds fixed by law. *See, e.g., Williams v. New York*, 337 U.S. 961, (1949) ("In  
19 determining whether a defendant shall receive a one-year minimum or a twenty-  
20 year maximum sentence, we do not think the Federal Constitution restricts the view  
21 of the sentencing judge to the information received in open court. The due-process  
22 clause should not be treated as a device for freezing the evidential procedure of

23 fact or law from that presented to the Court before such decision that in the exercise of reasonable  
24 diligence could not have been known to the party moving for reconsideration at the time of such  
25 decision, or (b) the emergence of new material facts or a change of law occurring after the time of  
26 such decision, or (c) a manifest showing of a failure to consider material facts presented to the  
27 Court before such decision. Here, because the Court based its decision on constitutional concerns  
28 not briefed by the parties, Victim-Interveners did not have an opportunity to respond to those  
concerns in the original briefing. Moreover, as was noted in Victim-Interveners' motion, the  
investigation of their claims has been ongoing, and more facts regarding the connection between  
the defendant's post-plea conduct and the crime of conviction have emerged since the time of the  
original briefing.

1 sentencing in the mold of trial procedure.”). As the Ninth Circuit recently  
2 explained, “[t]he Sixth Amendment guarantees that a conviction must rest ‘upon a  
3 jury determination that the defendant is guilty of every element of the crime with  
4 which he is charged.’ As the Supreme Court has made clear, however, once there is  
5 a conviction, the sentencing judge is possessed of extraordinarily broad powers to  
6 find the facts that will drive the sentence.” *United States v. Fitch*, 659 F.3d 788,  
7 794 (9<sup>th</sup> Cir. Sept. 23, 2011) (citation omitted). While the Sixth Amendment does  
8 require a jury determination beyond a reasonable doubt of “any fact that increases  
9 the penalty for a crime beyond the prescribed statutory maximum,” *Apprendi v.*  
10 *New Jersey*, 530 U.S. 466, 489 (2000), the Sixth Amendment imposes no similar  
11 constraint on facts found in applying the now-advisory Sentencing Guidelines,  
12 *United States v. Booker*, 543 U.S. 220, 233 (2005) (“We have never doubted the  
13 authority of a judge to exercise broad discretion in imposing a sentence within a  
14 statutory range.”).

15 Applying these principles, both the Supreme Court and the Ninth Circuit  
16 have upheld sentencing judges’ consideration of uncharged criminal conduct at  
17 sentencing. In *Williams*, the Court upheld the sentencing judge’s consideration of  
18 30 uncharged burglaries in sentencing a murder defendant. And in *Fitch*, the Ninth  
19 Circuit held that the district court properly considered facts evidencing that a fraud  
20 defendant had killed his wife, even though the defendant had never been charged  
21 with the murder. *See also United States v. Watts*, 519 U.S. 148 (1997) (court may  
22 consider even acquitted conduct at sentencing); *United States v. Mezas de Jesus*,  
23 217 F.3d 638, 642-44 (9<sup>th</sup> Cir. 2000) (court could properly consider uncharged  
24 kidnapping, though disproportionate effect of sentencing enhancement based on  
25 kidnapping required proof by clear and convincing evidence).

26 The Ninth Circuit has also made clear that the sentencing court may consider  
27 post-offense criminal conduct while on release pending sentencing. In *United*  
28 *States v. Myers*, 41 F.3d 531, 532-34 (9<sup>th</sup> Cir. 1994), the court held that in a fraud

1 case, the defendant's post-plea commission of additional fraud was properly  
2 considered in imposing an upward departure. In so holding, the Ninth Circuit  
3 joined every other circuit to have addressed the issue. *Id.* at 533. Indeed, as the  
4 court explained, the defendant's post-offense criminal conduct "constitutes the  
5 strongest possible evidence of a likelihood that she will continue to commit similar  
6 crimes in the future." *Id.* at 534.

7 Further, in *United States v. Mara*, 523 F. 3d 1036 (9<sup>th</sup> Cir. 2008), the Ninth  
8 Circuit held that unrelated, uncharged criminal conduct following a guilty plea may  
9 properly be considered at sentencing. There, the defendant was involved in a  
10 physical altercation in jail while awaiting sentencing. The Ninth Circuit, again  
11 joining the overwhelming majority of circuits to have considered the issue, held  
12 that this post-offense conduct was properly considered in deciding not to grant a  
13 sentencing reduction for acceptance of responsibility. *Id.* at 1039. The court also  
14 rejected the defendant's challenge that the information regarding the jailhouse  
15 incident was only hearsay contained in a police report. Noting the general rule that  
16 relevant information may be considered at sentencing without regard to the rules of  
17 evidence, the court held that the statements in the police report were sufficiently  
18 corroborated to provide the requisite indicia of reliability. *Id.*

19 Here, for the same reasons, evidence of further criminal activity by defendant  
20 is both properly considered and highly relevant at defendant's sentencing. It is not  
21 constitutionally required that this activity be charged, nor that it be related to the  
22 offense of conviction (though, as discussed below, the conduct here is certainly  
23 related to the offense of conviction). It is also not required that the evidence be  
24 admissible under the Rules of Evidence or otherwise subject to trial procedure  
25 (though the victims here are submitting sworn declarations and are willing to  
26 appear at an evidentiary hearing). Thus, purported constitutional concerns cannot  
27 justify interpreting the Crime Victims' Rights Act to exclude victims of federal  
28 offenses simply because they were not the victims of the particular acts alleged in

1 the indictment. As discussed in Victim-Interveners' motion and reply, the language  
2 and legislative history of the Crime Victims' Rights Act support an interpretation  
3 that would include these victims, and there simply are no countervailing  
4 constitutional concerns that would outweigh this expressed legislative intent.

5 Moreover, while the Court dismissed Victim-Interveners' argument that it  
6 could consider this evidence in its exercise of discretion even apart from the Crime  
7 Victims' Rights Act, the Court in fact does have wide discretion to consider this  
8 evidence, and to do so raises no constitutional concerns for all the same reasons  
9 discussed above. The Court notes that U.S.S.G. § 1B1.3 limits "relevant conduct"  
10 to acts that occurred during, in preparation for, or to avoid detection or  
11 responsibility for the crime of conviction. However, this provision is only for the  
12 purpose of applying certain sentencing adjustments under the Guidelines. The next  
13 provision makes clear that in determining a point within the range or whether to  
14 depart from the Guidelines, "the court may consider, without limitation, any  
15 information concerning the background, character and conduct of the defendant,  
16 unless otherwise prohibited by law." U.S.S.G. § 1B1.4. Here, regardless of  
17 whether the victims' evidence would result in an adjustment under the Guidelines,  
18 it is certainly relevant and properly considered by the Court in determining what  
19 sentence to ultimately impose. Indeed, such evidence is highly relevant here to  
20 rebut an assertion apparently made by defendant that he is entitled to a downward  
21 variance based on having led a law-abiding life since his guilty plea. It would be a  
22 strange perversion of justice to allow a defendant to make such an assertion but  
23 disallow the relevant evidence that would rebut it.

24 II. The Further Criminal Activity Here Is Related to, and Even a Continuation  
25 of, the Offense Conduct

26 At several points, the Court characterized the post-offense conduct here as  
27 "unrelated" to the crime of conviction. (Order at 3, 6.) While Victim-Interveners'  
28 motion may have erroneously suggested such a lack of relationship, in fact, the

1 evidence the victims would present here is not “unrelated” to the fraud scheme that  
2 gave rise to defendant’s conviction, but actually represented a continuation of the  
3 same fraudulent conduct, involving the same players, the same type of small-  
4 business financing operation, and the same use of false representations in a  
5 nationwide scheme to make money. While, as set forth above, the victims’  
6 evidence of further criminal activity would be properly considered by the Court  
7 even if it were unrelated to the crime of conviction, the fact that the conduct at issue  
8 here is closely connected to the underlying offense makes the need to consider this  
9 evidence all the more compelling.

10 Although the Brickbanc operation was shut down as a result of the  
11 government’s intervention, defendant continued to work closely with co-defendant  
12 Zuckerman and others from Brickbanc. (Declaration of Richard Kincaid ¶¶ 7-10;  
13 Declaration of Jeff Corbett ¶¶ 14-15.) Both McMahan and Zuckerman used aliases  
14 in an obvious effort to conceal their connection to the Brickbanc scheme.  
15 (Declaration of Richard Kincaid ¶¶ 5, 8; Declaration of Jeff Corbett ¶¶ 4-5.)  
16 Zuckerman became a partner in “Mercury Ventures,” and through that entity  
17 established various entities he also controlled, including “The X Banker.”  
18 (Declaration of Richard Kincaid ¶ 6.) Mercury Ventures, like Brickbanc, engaged  
19 in small business financing and funding; Zuckerman and others associated with the  
20 Mercury Ventures entities fraudulently represented that they would secure  
21 significant investor funding for new companies when in fact little or no money was  
22 actually invested in those companies. (Declaration of Richard Kincaid ¶ 5;  
23 Declaration of Jeff Corbett ¶¶ 7-8, 16-17.)

24 Defendant McMahan ran The X Banker at Zuckerman’s direction.  
25 (Declaration of Richard Kincaid ¶ 11; Declaration of Jeff Corbett ¶¶ 10, 15.) Just  
26 as with Brickbanc, The X Banker targeted small business owners, offering business  
27 credit services. (*Id.*) Significantly, one of the offerings of The X Banker, was the  
28 offer of equipment leases – the core of the Brickbanc scheme. (*Id.*; Exhibit 5.)

1 Numerous victims have reported being victims of fraudulent representations  
2 by The X Banker. (See Declarations of Richard Kincaid, Charlene Egland, Jerry  
3 Gilbert, Keith Lewis, and Lee Patin.) These victims were told that The X Banker  
4 would provide business loans and credit building services, and were offered a 100  
5 percent money-back guarantee if they did not obtain at least \$100,000 in business  
6 credit. (Declaration of Richard Kincaid ¶ 12; Declaration of Lee Patin ¶¶ 2-3;  
7 Declaration of Charlene Egland ¶ 3; Declaration of Jerry Gilbert ¶ 1; Declaration of  
8 Keith Lewis ¶¶ 2-3; Exhibits 5, 8.) Each of the victims paid The X Banker money  
9 for these services and often incurred automatic monthly charges. (Declaration of  
10 Richard Kincaid ¶ 12; Declaration of Lee Patin ¶ 6; Declaration of Charlene Egland  
11 ¶ 3; Declaration of Jerry Gilbert ¶ 2.) The X Banker did not perform the services or  
12 obtain the financing promised; yet, directly contrary to the money-back guarantee,  
13 The X Banker refused to refund the victims' money to them. (Declaration of Lee  
14 Patin ¶ 4-5; Declaration of Charlene Egland ¶¶ 3, 6; Declaration of Jerry Gilbert ¶¶  
15 3-4; Declaration of Keith Lewis ¶¶ 4-5.) McMahan was directly involved in these  
16 fraudulent representations. (Declaration of Charlene Egland ¶ 3; Declaration of  
17 Keith Lewis ¶¶ 2, 4; Declaration of Lee Patin ¶ 5; Exhibit 10.)

18 Thus, the evidence the victims seek to introduce is directly relevant to  
19 defendant's sentencing for his fraud offense. Defendant's continuing involvement  
20 in fraud surrounding small business financing demonstrates that he has simply  
21 continued to perpetuate the same fraudulent conduct for which he is being  
22 sentenced. This information is properly considered by the Court in evaluating  
23 defendant's conduct and character, the need for deterrence, and the need to protect  
24 the public, and in determining the appropriate sentence.

### 25 III. The Victims Should Not Be Excluded Because of the Government's Inaction

26 Finally, the Court seemed to place significant weight on the fact that the  
27 government has not elected to present this evidence. However, the Crime Victims'  
28 Rights Acts confers rights on *victims*, not the government. Similarly, it is for the

1 Court, not the government, to consider the relevant evidence and determine an  
2 appropriate sentence.

3 Moreover, as discussed in the attached declarations, several of the victims  
4 have attempted repeatedly to have the government investigate and charge the  
5 defendants here with their further crimes, but the government has unfortunately  
6 shown a lack of interest. (*See* Declaration of Richard Kincaid ¶¶ 14-16;  
7 Declaration of Darren Meade ¶¶ 5, 7; Exhibits 11, 12.) The government has been  
8 notified repeatedly of the fraudulent activities of Zuckerman and McMahan and  
9 their association together. (Declaration of Richard Kincaid ¶¶ 14-16.) After the  
10 August 29, 2011 hearing, the government engaged in a perfunctory and even hostile  
11 “interview” with victim Darren Meade. (Declaration of Darren Meade ¶ 7.) And as  
12 previously noted in Victim-Interveners’ motion, the government was also notified  
13 of the existence of additional victims. However, the government elected not to  
14 further investigate or present any of this evidence to the Court, giving rise to  
15 Victim-Interveners’ independent request to be heard.<sup>2</sup>

16 The government has, for reasons of its own, elected to align itself with the  
17 defense in this case, apparently having developed a cooperative – even friendly –  
18 relationship with the defendants.<sup>3</sup> Whatever the government’s interest might be,  
19 however, members of the public have been harmed by defendant’s conduct. The  
20 government’s inattention and even opposition to the victims’ rights, far from  
21 justifying exclusion of the victims, undermines public confidence in the justice  
22 system and is precisely the reason the victims should be allowed to be heard.

23  
24 <sup>2</sup> Victim-Interveners renew their request to be given access to the under seal filing by the  
25 government asking the Court not to hold an evidentiary hearing, so that they may properly  
26 respond.

27 <sup>3</sup> Court documents reveal that defendant McMahan’s sentencing has been continued numerous  
28 times due to “ongoing discussions” between him and the government, and defendant  
Zuckerman’s sentencing likewise has been continued due to such ongoing discussions and his  
providing assistance to the government pursuant to his plea agreement. The relationship has  
apparently become so friendly that at a prior hearing, one of the victims witnessed the prosecutor  
even give defendant Zuckerman a hug. (Declaration of Jeff Corbett ¶ 18.)

1 IV. Additional Victims Request To Be Included As Victim-Interveners

2 Since the time Victim-Interveners’ motion was filed, several more victims  
3 have come forward, namely Lee Patin, Anthony Roberts, and Jim Zaslaw. These  
4 victims, like the others already named, have relevant information regarding federal  
5 offenses committed by either defendant McMahan or defendant Zuckerman or both  
6 in connection with their operation of the group of companies discussed above.  
7 Therefore, Victim-Interveners request that these victims be added to the group of  
8 Victim-Interveners for purposes of these proceedings.<sup>4</sup>

9 V. Conclusion

10 For the foregoing reasons and the reasons set forth in Victim-Interveners’  
11 motion and reply, Victim-Interveners respectfully request that the Court reconsider  
12 its previous order and grant their request to be heard at sentencing, and further  
13 request that the additional victims identified above be added to the group of Victim-  
14 Interveners.

15 Dated: November 22, 2011

16  
17 /s/Becky Walker James  
18 Becky Walker James  
19 LAW OFFICES OF BECKY WALKER JAMES

20 *Counsel for Victim-Interveners*  
21 VINCE ANDRICH, DON ASPINAL, SCOTT  
22 CONNELLY, JEFF CORBETT, CHARLENE  
23 EGLAND, JERRY GILBERT, IRA GILMER,  
24 RACHEL GREEN, KEITH LEWIS, DARREN  
25 MEADE, LEE PATIN, GLENN PUIT,  
26 ANTHONY ROBERTS, MICHAEL ROBERTS,  
27 MARK WARNER, and JIM ZASLAW

28 \_\_\_\_\_  
<sup>4</sup> While the large number of victims from across the country is indicative of the scope of the  
defendants’ criminal conduct, it should be noted that not every one of the Victim-Interveners  
would request to speak or testify at defendant McMahan’s sentencing hearing.



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DECLARATION OF RICHARD KINCAID

I, Richard Kincaid, declare as follows:

1. I am a private investigator with the firm Arixmar. Before joining Arixmar, I was a Special Agent with the Federal Bureau of Investigation for over nine years. Our firm has been retained by Becky Walker James to investigate allegations of criminal misconduct by Adam Stuart Zuckerman and Kirk McMahan. I make this declaration in support of Victim-Interveners' Motion to Reconsider Order Denying Motion to Intervene and Be Heard at Sentencing.

Mercury Ventures/The X Banker is a Continuation of Brickbanc Capital

2. Brickbanc Capital (Brickbanc) operated from approximately 1997 to 2005 and was controlled by Adam Stuart Zuckerman. Brickbanc offered financial services to emerging growth companies looking to raise private capital, mergers and acquisitions, and other specialized financing needs. (Exhibit \_1\_)

3. As set forth in the Information in this case, Kirk McMahan and Paul Arnold worked with Zuckerman at Brickbanc. During 2004 and 2005, Brickbanc solicited small business owners and offered money loans and working capital. As the mechanism to obtain these loans, Brickbanc became involved in a fraudulent equipment lease scheme. The small business owners that replied to Brickbanc's solicitations were exploited into thinking they were obtaining legitimate loans. Brickbanc worked with its network of vendors and lenders to submit the fraudulent applications in the name of the small businesses which resulted in millions of dollars in losses to the lenders as a result of this fraud scheme.

4. Towards the end of 2005, operations at Brickbanc were halted by the government. Zuckerman, McMahan, and Arnold and numerous others were charged in 2007 as a result of their participation in the fraudulent scheme. In 2008, all three pled guilty to violating 18 U.S.C. Section 1341, Mail Fraud.

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5. Simultaneous to the cessation of operations at Brickbanc in 2005, Zuckerman adopted a new identity “Adam Stuart” and became a partner in Mercury Ventures continuing to engage in small business financing. (Declaration of Jeff Corbett.) Many other victims have indicated that they met, worked with, and decided upon investments based upon communications with “Adam Stuart” not knowing that “Adam Stuart” was in fact the alias for the convicted felon Adam Stuart Zuckerman. Mercury Ventures offered business finance services including funding strategies, capital networking, bank debt financing and equity financing and other small business financing needs. (Exhibit \_2\_)

6. As part of my investigation, I learned that in 2007 Mercury Ventures established Shared Success, The X Banker, Venture Pharma and later Progenex. All entities were controlled by Adam Zuckerman through an entity called Amidah LLC. In the trial of *Progenex vs. Zinc Solutions*, held in the Orange County Superior Court, Ryan Page, the President of Progenex and a number of other companies including Mercury Ventures, testified that Zuckerman is a consultant for Mercury Ventures on business matters and that compensation to Zuckerman is paid directly to Amidah LLC. In interrogatory responses in that case, Zuckerman stated that he receives compensation from Amidah LLC and The X Banker.

McMahan Continues to Work with the Same Individuals from Brickbanc at Mercury Ventures and The X Banker

7. As discussed by Jeff Corbett, during Zuckerman’s 2005 transition from Brickbanc to “Adam Stuart” at Mercury Ventures he continued to associate and work with his co-schemers Kirk McMahan and Paul Arnold.

8. During the course of my investigation I reviewed numerous emails that were provided by Dr. Scott Connelly, the former CEO of Progenex and victim of the continuing Mercury Ventures fraud. In an email dated Janaury 15, 2010, Mr.

1 Zuckerman sent the email to several email addresses including to the address “Kirk  
2 McMahan” <kirkm@thexbanker.com>. The name “Kirk McMahan” identifies the  
3 address as that belonging to Mr. McMahan. I also reviewed financial documents  
4 produced by Mercury Ventures for January 2010 to November 3, 2010 and filed in  
5 a federal court proceeding. In one of the sections, “Kirk McMahan” is identified as  
6 being associated with the Mercury Ventures company “Progenex.” (Exhibit \_3\_)

7 9. In a March 2009 email from Zuckerman to Timra Valentyne, who ran  
8 the Zuckerman-controlled entity United Homestead, while discussing the raising of  
9 money and capitalizing a small business, Zuckerman explains what role McMahan  
10 has played for Zuckerman. In a quote from the email, Zuckerman stated that “As  
11 for Kirk, his job is to determine what can bite me and my partners in the ass and/or  
12 annoy me to hell by being sucked into a dink deal. He’s evaluated and  
13 commissioned deals for me that produced 45M annually.” (Exhibit \_4\_)

14 10. During the course of this investigation I listened to numerous  
15 consensually recorded conversations. Many meetings between Mr. Zuckerman and  
16 other individuals were openly, routinely and consensually recorded on Livescribe  
17 digital recorders. In one such recording from 2010 Mr. Zuckerman explained that  
18 “...Kirk has been with me for seven, eight years. I don’t care what he does. He’s  
19 got so much street cred with me. He can say I need a week off, and no questions  
20 asked. I need a week off and 20 G’s. Cash or gold? Wired? Where? Here. OK. That  
21 is how much street cred he’s got. And when he gets sick or has an issue with his  
22 wife...or drank too much, whatever. Whenever he does something like that he  
23 doesn’t come in. He doesn’t call me. And he won’t answer his phone. You know  
24 what I said to him? Just last week I said to him, What is wrong with you? He said  
25 what? How long have we been together? How much have we been through? He  
26 (McMahan) said lots. What is so hard about just telling me I’m staying home or  
27 letting me know you’re OK. What do you think I am going to do? Scream at you  
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for not being in the office? All you gotta do is tell me. He’s like, I guess that’s a good point.”

McMahan’s Continuing Fraudulent Activities at The X Banker

11. In 2007, The X Banker was established and run by McMahan at Zuckerman’s direction. The X Banker solicited small business owners with offers of business finance services including business credit services. Along with the offer to assist with business credit cards, bank loans, lines of credit, was the offer of equipment leases. As with Brickbanc, The X Banker targeted small business owners and worked with a network of vendors and lenders. (Exhibit \_5\_)

12. I reviewed over 25 online complaints about the problems individuals had experienced with the X Banker, in addition to speaking to a number of victims directly. Common comments among most of the complainants was (1) The X Banker offered a 100% money back guarantee; (2) a failure to perform the credit building services; (3) delayed or no response when contacting customer service or the assigned coach with a complaint; (4) credit score negatively impacted by taking steps advised by X Banker program; and (5) failure to honor the money back guarantee. The guarantee was usually delivered as an attachment to an informational email sent to prospective clients and generally read that if \$100,000 to \$150,000 in business credit was not obtained, then the money for the program would be refunded. Victims often paid large down payments, sometimes \$550 to \$3,000 and often incurred monthly payments. Often the businesses received little or no business credit. Upon The X Banker’s failure to perform, the victims’ request for a refund, in accordance with the clear guarantee, were flatly denied. (Exhibit \_5\_)(See also Declarations of Charlene Egland, Keith Lewis, Jerry Gilbert, Lee Patin.)

13. In late 2010, Zuckerman and McMahan became very concerned that if

1 the true nature of the activities taking place at The X Banker were revealed they  
2 would have a negative impact on their pending sentencing in the Brickbanc case.  
3 As a result they decided to do two things. First, Adam Zuckerman's mother,  
4 Miriam Zuckerman, would be prohibited from entering the building and  
5 communicating with any X Banker customers out of a fear that the customers  
6 would make a connection between Miriam Zuckerman and Adam Zuckerman and  
7 thus reveal his background. Second, The X Banker operations would have to be  
8 shut down by January 2011. (Declaration of Darren Meade)  
9

10 The Government is Notified of the Activities of Zuckerman and McMahan

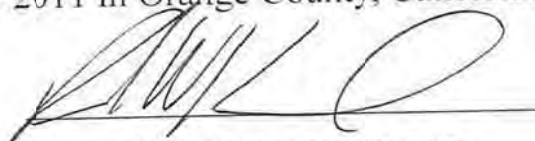
11 14. In August 2009, the Government was alerted to Zuckerman's activities  
12 including his use of an alias, association with other felons, work in the small  
13 business finance industry with his other convicted co-schemers from Brickbanc,  
14 including McMahan, and raising of money. (Exhibit \_6\_)

15 15. In August 2010, I met with FBI Special Agent Paul Bonin and notified  
16 him of Zuckerman's and McMahan's activities including the use of an alias, his  
17 association with other felons, his continuing work in the small business finance  
18 industry and his continued work with his other convicted co-schemers from  
19 Brickbanc, raising money from investors, threatening and violent behavior.

20 16. In March 2011, the Government was notified by a new witness / victim  
21 of recorded death threats he received by Zuckerman, and other fraudulent activities  
22 occurring at Mercury Ventures, The X Banker and Progenex. (Darren Meade  
23 Declaration)

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

25 Executed this 22nd day of November 2011 in Orange County, California.

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28 RICHARD KINCAID

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DECLARATION OF LEE PATIN

I, Lee Patin, declare as follows:

1. I am the owner of Certified Bookkeeping Services, a small business located in Orange County, California.

2. In early 2010, I engaged the services of The X Banker to assist with obtaining business credit. (Exhibit 7.) The X Banker provided me a flyer that promised a 100% guarantee that if my business did not receive \$100,000 in new business credit within six months, then the fees paid for their services would be refunded. (Exhibit 8.)

3. On March 2, 2010, I provided my credit card information to X Banker representative Paul Rogers. In addition to Mr. Rogers verbally telling me about the guarantee he also told me he was the Vice President of X Banker, a fact that I later discovered to be false. I paid the down payment and was told I could make monthly payments to cover the balance of the fee.

4. The X Banker representatives did very little for me. When I began to complain about the service the communications nearly stopped. I was introduced to one bank to apply for one loan which was denied and received in total approximately \$3,000 in credit from a hunting supply store.

5. I spoke with Miriam Zuckerman, also of The X Banker and requested a refund per the stated money back guarantee. (Exhibit 9.) She told me that the manager, Kirk McMahan, would contact me. He never did. I was forced to follow up again. After numerous attempts, including the writing of a request letter, Mr. McMahan denied my request for a refund, claiming that “there are key elements to the program that has caused us to be unable to uphold our Guarantee.” (Exhibit 10.)

6. I was forced to continue with my payments to a third party company. I ultimately lost \$1,989.35.

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7. Since The X Banker operated in Orange County, I filed a small claims case in Orange County Superior Court. However, since the company was actually incorporated in Wyoming, I was forced to drop my case in California.

8. I feel that once The X Banker had my money, they did nothing to help me obtain business credit as they had promised to do.

I declare under penalty of perjury that the foregoing is true and correct.  
Executed this 20th day of November 2011 in Orange County, California.

  
\_\_\_\_\_  
LEE PATIN

DECLARATION OF KEITH LEWIS

1 I, Keith Lewis, declare as follows:

2 1. I am the owner of American Allied, a small business located in  
3 Florida.

4 2. In 2009, I contacted The X Banker to assist with obtaining business  
5 loans. I was running some well established businesses and was looking to obtain  
6 additional business credit. I was interested in having them do the work for me to  
7 apply for loans, etc. I was contacted by Kirk McMahan, the manager at The X  
8 Banker, and told that they were developing a "VIP Carte Blanche" program that  
9 would be able to handle my request. I was assured by Mr. McMahan that they  
10 could help me obtain the loans I was looking to establish.

11 3. On at least two occasions I was informed about The X Banker's 100%  
12 money back guarantee if I did not receive at least \$50,000 of new business credit.  
13 This guarantee served as a deciding factor in my decision to do business with them.

14 4. Following my payment of \$3,000, The X Banker did nothing. After 45  
15 days no applications had been submitted, as they said they would. Mr. McMahan  
16 later told me that I would get more credit by establishing a brand new company or  
17 by purchasing a shelf company from them.

18 5. After five to six months I demanded a refund. They admitted that they  
19 could not provide me the service they had promised but refused to refund any of my  
20 money and failed to honor their money back guarantee.

21 6. I feel that once The X Banker had my money they did nothing to help  
22 me obtain business credit as they had promised to do.

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

25 Executed this 20th day of November 2011 in Palm Beach County, Florida.

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1 KEITH LEWIS



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DECLARATION OF CHARLENE EGLAND

I, Charlene Eglan, declare as follows:

1. I am the owner of Eglan Enterprises doing business as Clothing Especially So Rich, a small business located in Los Angeles County, California.
2. In early 2008, I was contacted by individuals at The X Banker to assist me with building business credit. They told me that they were affiliated with Business Credit Services, a company I had previously had a positive experience with, a fact which I later learned to be false.
3. Prior to engaging their services they told me that if I did not received between \$100,000 and \$200,000 in new business credit than the fee I paid them would be returned in accordance with their 100% Money Back Guarantee.
3. In approximately March 2008 I engaged the services of The X Banker and began making monthly payments of \$107.40. After nearly two years of making these payments they did nothing for me. I did not receive any business credit. In April 2010, I contacted the main office and spoke with Miriam Zuckerman. She sent me a document which stated that I could exit the program but had to waive the refund. I refused. Ms. Zuckerman later told me that the manager, Kirk, would have to decide on a refund.
4. At this point I began to do research about The X Banker and found many other people had complained about The X Banker and called it a scam. I ultimately discovered that X Banker's manager, Kirk, was actually Kirk McMahan, a convicted felon awaiting sentencing for a federal fraud case. I also learned that the person running that company and several others was Adam Stuart Zuckerman, also a convicted felon awaiting sentencing for federal charges that he was convicted of while working together with Kirk McMahan.

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5. In February 2011, I sent a certified letter to the FBI and to the Federal Trade Commission complaining about how The X Banker had treated myself and others.

6. I feel that once The X Banker took my money they did nothing to help me obtain business credit as they had promised to do and refused to honor their 100% Money Back Guarantee. I am outraged that this company is run by convicted felons who want time off their pending sentence for good behavior and gainful employment.

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

Executed this 21st day of November 2011 in Los Angeles County, California.

  
CHARLENE EGLAND

1949-207-3141

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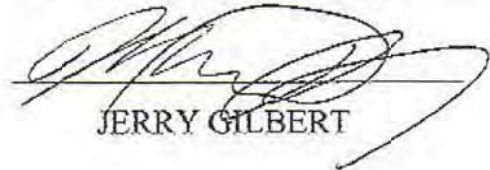
DECLARATION OF JERRY GILBERT

I, Jerry Gilbert, declare as follows:

1. In 2009 I engaged the services of The X Banker to assist with setting up a business entity and obtaining business credit. The X Banker provided me a flyer that promised a 100% guarantee that if my business did not receive \$100,000 in new business credit within six months, then the fees paid for their services would be refunded.
2. I paid an initial down payment of approximately \$750 and was required to pay \$340 per month.
3. I was assigned to work with Mark and Christine Ireland, both representatives of The X Banker. For approximately a year I was in communication with them but very little was being done to obtain business credit. When I complained they told me I was in the wrong program, moved me to another representative or tried to sell me other services.
4. When I complained and requested a refund in accordance with the money back guarantee they stopped communicating with me. Ultimately they refused to refund the approximate \$4,000 I was forced to pay.
5. I feel that The X Banker stole my money and did nothing to help me obtain business credit as they had promised to do.

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

Executed this 21st day of November 2011 in <sup>Wayne</sup>~~Lane~~ County, Michigan.



JERRY GILBERT

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DECLARATION OF JEFF CORBETT

I, Jeff Corbett, declare as follows:

1. I am real estate consultant and reside in North Carolina.

2. In 2001, I was introduced to Adam Stuart Zuckerman who was at the time running a company called Brickbanc. Mr. Zuckerman described Brickbanc as a business incubator that worked with early start up companies and raised money for their operations.

3. In late 2005 to early 2006, I was reintroduced to Mr. Zuckerman. He had entered into a partnership in a company called Mercury Ventures. Mr. Zuckerman said that Mercury Ventures could raise money for Mr. Corbett’s business concept.

4. I knew Mr. Zuckerman’s true name but realized he was using the name “Adam Stuart” in all of his business conversations and relationships. When I asked why this was he said that to avoid anti-semitism he had dropped the use of his obviously Jewish last name.

5. “Adam Stuart” introduced me to Mark Warner, a financial advisor and investor from Texas. Mercury Ventures assisted in establishing the company RealEspace for the joint venture between myself, Mr. Warner and Mercury Ventures. Just prior to raising any monies Mr. Warner and myself found out why Mr. Zuckerman was using the alias “Adam Stuart.” Mr. Zuckerman had been involved in a massive financial fraud which was investigated by the FBI. We told Mr. Zuckerman that he could no longer be involved in any way with RealEspace because the disclosure of his background and involvement would kill the deal with the investors.

6. Ultimately, Mr. Zuckerman managed to develop enough problems between the parties involved with RealEspace that the deal fell apart. However,

1 because the concept remained very viable, I moved forward with the development  
2 of a separate company, RE Tech, under the Mercury Ventures division of Shared  
3 Success.

4 7. Shared Success, a company owned and controlled by Mercury  
5 Ventures and Adam Zuckerman, was supposed to be a small business incubator to  
6 help package and position small business and raise funds for their operation and  
7 expansion. Part of the new company, RE Tech, was owned by Shared Success. In  
8 return, Shared Success would raise funds from investors to invest in the new  
9 company.

10 8. On many occasions I overheard Mercury Ventures / Shared Success  
11 employee Aaron Thomas tell investors about how RE Tech was a terrific  
12 opportunity and touted my involvement as a catalyst to raise funds. I was also told  
13 that Mercury Ventures had raised hundreds of thousands of dollars specifically  
14 earmarked for investment in RE Tech. Very little of that money was actually  
15 invested in the new company. Mr. Zuckerman joked with everyone, including Mr.  
16 Thomas, that it was time to “water the plants” as a reference to telling the investors  
17 that everything was running fine when, in fact, it was not.

18 9. Shortly after establishing RE Tech, Mr. Zuckerman attempted to force  
19 a change in the operating agreement which would give much more control to  
20 Mercury Ventures, i.e. Adam Zuckerman. I realized that although he claimed to  
21 have no control over Shared Success he was in fact the true director of the  
22 company. He repeatedly threatened to file baseless lawsuits simply to cause me  
23 pain and suffering and stop funding the company. I refused to capitulate and as  
24 promised he cut off all funding to RE Tech.

25 10. While working at RE Tech I became aware of another Shared Success  
26 investment, The X Banker. I overheard Kirk McMahan and Adam Zuckerman on  
27 numerous occasions discuss the business. For a period of time, Mr. McMahan  
28

1 worked, at the direction of Adam Zuckerman, at Business Credit Services in Las  
2 Vegas, Nevada. At some point Mr. McMahan returned to Southern California  
3 along with Ryan Page and Luke Adams, formerly of BCS. After their return they  
4 established The X Banker.

5 11. After being present at numerous meetings and working around and  
6 with Mr. Zuckerman, Mr. McMahan, Mr. Page, Mr. Adams and the others it  
7 became obvious that it was Adam Zuckerman that pulled the strings on all the  
8 businesses.

9 12. While working with Mr. Zuckerman and Mr. Page I became aware that  
10 an entity called Amidah served as Adam Zuckerman's holding company.

11 13. I recall that Mr. Zuckerman had figured out a way to access the  
12 computer databases at Dunn and Bradstreet. This access gave him the ability to  
13 manipulate a company's D&B report thus making it appear more credit worthy or  
14 established. This technique had been utilized by Mr. Zuckerman for several years  
15 including during the Operation Lease Fleece fraud.

16 14. When I visited the offices of Mercury Ventures/Shared Success, I saw  
17 Paul Arnold working in the sales and customer service operations of The X Banker.

18 15. Mr. Zuckerman worked closely with Mr. McMahan at The X Banker. I  
19 witnessed their involvement together many times.

20 16. Mr. Zuckerman made joking references to the "phantom fund", a large,  
21 non-existent capital fund that he would tell business owners that he had access to in  
22 order to seduce them to sign an agreement with Mercury Ventures.

23 17. I believe Mr. Zuckerman, Mr. McMahan, and the others used the  
24 monies raised from investors, not to build any companies but simply to pay  
25 themselves and possibly some select investors.

26 18. While at a court hearing pertaining to Mr. Zuckerman's remand  
27 hearing in Orange County, California in April, 2011, I witnessed the Assistant  
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United States Attorney Jennifer Waier, the individual prosecuting Mr. Zuckerman's federal case, give Mr. Zuckerman a hug in the courtroom of the court house.

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

Executed this 21st day of November 2011 in Mecklenburg County, North Carolina.

A handwritten signature in black ink, appearing to read "JEFF CORBETT", is written over a horizontal line. The signature is stylized and somewhat cursive.

JEFF CORBETT

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DECLARATION OF DARREN MEADE

I, Darren Meade, declare as follows:

1. I am the owner of Kairos-Meade, a consulting firm located in Orange County, California.

2. From approximately July, 2010 to approximately February 27, 2011, I worked directly with Adam Stuart Zuckerman and Kirk McMahan, among others, as the interim CEO of Progenex Dairy Bioactives. While working at Progenex I became aware that four convicted felons were all working together running the different companies. These individuals included Adam Zuckerman, Kirk McMahan, Paul Arnold and Andrew Medal.

3. In late 2010, I was present during a meeting where Mr. Zuckerman and Mr. McMahan became very concerned that if the true nature of the activities taking place at The X Banker were revealed they would have a negative impact on their pending sentencing in the Brickbanc case. As a result they decided to do two things. First, Adam Zuckerman's mother, Miriam Zuckerman, would be prohibited from entering the building and communicating with any X Banker customers out of a fear that the customers would make a connection between Miriam Zuckerman and Adam Zuckerman and thus reveal his background. Second, The X Banker operations would have to be shut down by January 2011.

4. During the course of my tenure as Interim CEO at Progenex I became aware of numerous apparent criminal acts being led and perpetrated by Adam Zuckerman and Kirk McMahan. Among other things, I became aware that Adam Zuckerman and Kirk McMahan were taking active steps to create a reputational management company. They planned to use The X Banker customer list (approximately 20,000 companies) and mine Ripoff Report for professionals that they could exploit. The new venture was to create negative content and engage the targeted individuals with services to get rid of the negative content they themselves



1 created. On February 23, 2011, Mr. Zuckerman told me that if I resigned and  
 2 started talking he would destroy my business reputation, ruin me financially and  
 3 then kill me. On February 27, 2011, I resigned as Interim CEO of Progenex.

4 5. In the following days I reached out to AUSA Jennifer Waier and  
 5 Special Agent Bondurant to inform them of the ongoing fraud being perpetrated by  
 6 Mr. Zuckerman and Mr. McMahan. I notified them because I felt that since both  
 7 Mr. McMahan and Mr. Zuckerman were both convicted and awaiting sentencing in  
 8 a case they investigated and prosecuted that they would be able to take action  
 9 against them. AUSA Waier and Agent Bondurant did not seem to be interested.

10 6. Since the time of my resignation I have been the victim of a relentless  
 11 online reputation assault in which my name and company name has been usurped to  
 12 distribute false and malicious videos and information about me.

13 7. On September 8, 2011, I sent an email to Agent Bondurant and  
 14 indicated that I had relevant evidence pertaining to Mr. McMahan and Mr.  
 15 Zuckerman and requested to be contacted. (Exhibit 11.) Shortly thereafter I  
 16 retained attorney John Gladych to represent me in this matter. Mr. Gladych  
 17 communicated with AUSA Waier and Agent Bondurant and indicated that I was  
 18 willing and eager to cooperate. Despite being aware that I was then represented by  
 19 Mr. Gladych, Agent Bondurant contacted me directly by telephone on September  
 20 23, 2011. I responded to Agent Bondurant by email and stated where he was  
 21 factually incorrect. (Exhibit 12.) During the call Agent Bondurant was hostile and  
 22 accusatory towards me. He called me a liar on facts that he clearly had wrong. Later  
 23 Agent Bondurant sent a text message to Mr. Gladych and claimed that I was  
 24 avoiding him.

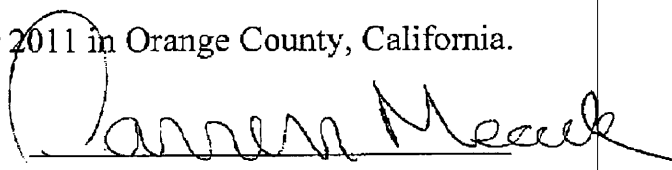
25 8. Following my publishing of a press release that discussed the criminal  
 26 acts going on at Mercury Ventures, Progenex and the other companies involving  
 27 Mr. Zuckerman and Mr. McMahan, and after my testimony at Mr. McMahan's  
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sentencing hearing on August, 2011, I received two fraudulent 1099's issued by Luke Adams, the CFO and accountant of all the Zuckerman and McMahan nested entities.

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

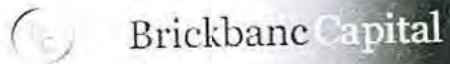
Executed this 21st day of November 2011 in Orange County, California.



DARREN MEADE

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- Corporate Information
- Financial Services
- Capital Markets
- Investment Banking
- Transactions

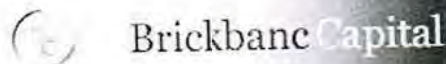
**CORPORATE INFORMATION**

Founded in 1997, **Brickbanc Capital, LLC** is one of the last remaining independent investment banks dedicated to emerging growth companies in the small and micro-cap market. Our independence allows us to maintain our focus on these companies, their entrepreneurial managers and their highly specialized financing needs.

Brickbanc Capital is a leading full-service investment bank dedicated to providing innovative, professional financial services to emerging growth companies. Our commitment to this segment of the market is unsurpassed and our success is founded on delivering solutions while providing the highest quality service. We conduct our business with integrity and fairness, which is the backbone of our culture and tradition.

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Corporate Information

Financial Services

Capital Markets

Investment Banking

Transactions

## Financial Services

### Corporate Finance

Brickbanc Capital is a leading underwriter of equity offerings for growth companies. We offer our clients a comprehensive range of services including initial public offerings, follow-on offerings and private placements. Strength lies in our ability to identify and finance emerging growth companies in their early stages of development. We believe these opportunities offer investment value.

### Technology

Brickbanc Capital' Technology team advises and executes transactions for well-managed public and private companies with emerging technologies. Every client engagement is lead by senior, experienced professionals with specialized industry knowledge.

Our team focuses on the following areas:

- Software
- Hardware/Infrastructure
- Telecom
- Services

### Healthcare / Life Sciences

Brickbanc Capital' Healthcare team advises and executes transactions for public and private companies with emerging technologies and novel therapeutic approaches. We provide senior-level attention to our clients, and work with them to ensure that the size and parameters of their transactions take into account the needs of their businesses.

Our team focuses on the following areas:

- Biotechnology
- Genomics/Proteomics
- Drug Delivery
- Medical Devices
- Diagnostics

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**Capital Markets**

**Private Capital Markets**

Brickbanc Capital' Private Equity team assists well managed, emerging growth companies looking to raise private capital. Our expertise is in equity, equity-linked and debt securities for both public and private companies. Our Private Equity Group has extensive transaction experience within the following industry sectors: Software, Communications, Consumer Products, Hardware Systems, Internet Infrastructure, Life Sciences, Media and Medical Devices and real estate.

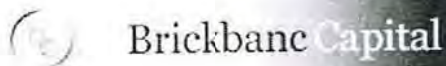
The Private Equity Group focuses on later-stage private transactions, typically those companies looking to raise at least \$5 million. The equity raised is typically used to finance rapid growth for developed product offerings as well as possible acquisitions. Private placements can also provide an opportunity for strategic investors, such as technology partners, customers, or suppliers, to contribute to a company's growth and take an equity stake.

**For additional information, please contact:**

Mark Stuart, Managing  
 Newport Beach, 888-916-3863 ext. 85, mailto: [mstuart@brickbanc.com](mailto:mstuart@brickbanc.com)

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Corporate Information

Financial Services

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## Investment Banking

### Mergers and Acquisitions

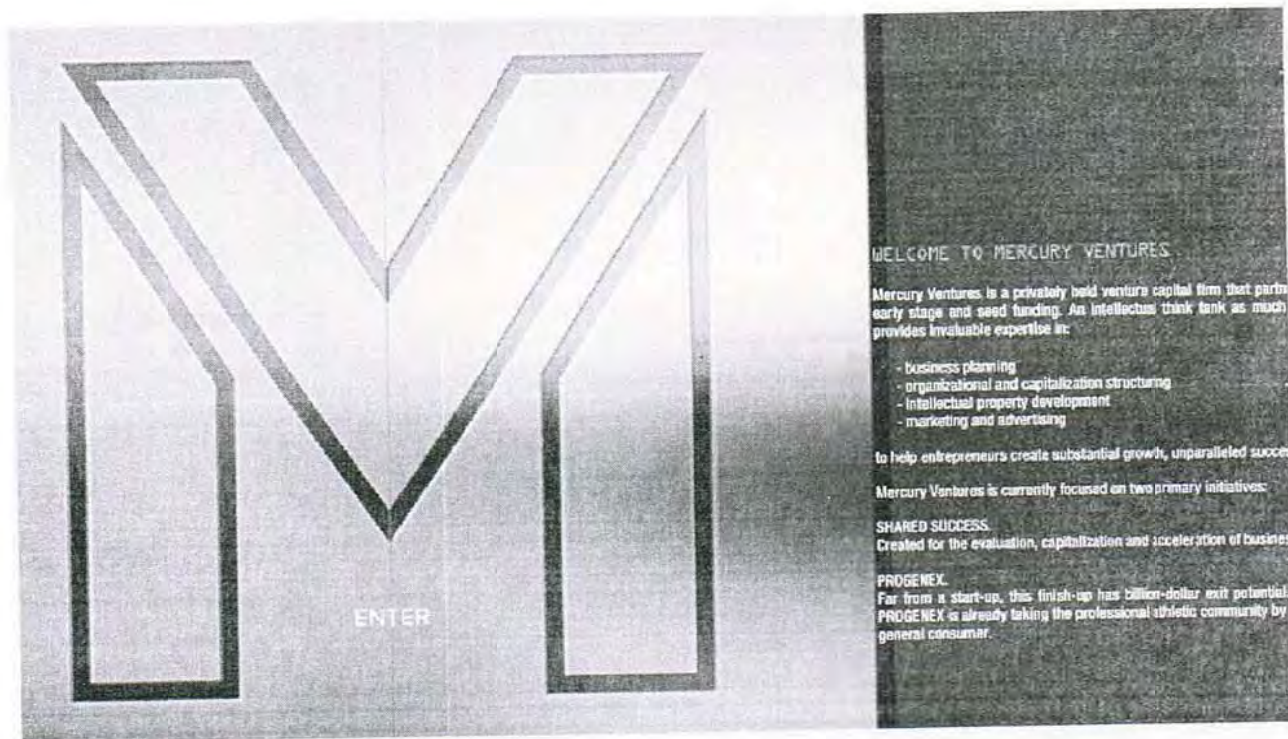
Brickbanc Capitals' Mergers & Acquisitions team provide advisory services to emerging growth companies. Every client engagement is lead by senior, experienced professionals with specialized industry knowledge. In combination with Brickbanc Capital full-service investment banking capabilities, our integrated, industry-focused approach enables innovative and strategic transactions which transform companies and industries in the emerging growth sector. Our commitment to helping increase shareholder value in this segment of the market is unsurpassed and our success is founded on delivering these innovative financial solutions.

#### Our Merger & Acquisition Advisory Services include:

- Sell-Side
- Buy-Side
- Divestitures
- Recapitalizations
- LBO's/MBO's
- Fairness Opinions

#### For additional information, please contact:

Mark Stuart, Managing Director  
Newport Beach, 888-916-3863 ext. 85, mail to: [mstuart@brickbanc.com](mailto:mstuart@brickbanc.com)







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# Mercury Ventures

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## The Right Funds

### What Kind of Player Are You?

When considering how best to finance a business, you need to know what your options are. Raising capital through the sale of equity (stock) is the preferred option for young businesses with aggressive, cash-dependent growth potential. Debt financing is normally cheaper and easier to secure than equity financing. Unfortunately, the majority of entrepreneurs don't understand the formula for accessing these resources.

Shared Success™ is designed to prepare you for either path.

### Equity Financing

Mercury Ventures, like other equity investors, expects little or no return in the early stages, but requires much more extensive reporting on the company's progress. An equity investment is made with the hope of very high returns—far beyond the interest rates in traditional lending.

The majority of early-stage, third-party equity financing comes through Angels investors who tend to keep their money close to home (within 50 miles or so) and invest small amounts (\$10,000 to \$250,000). Qualified Angels can be difficult to locate because unless they belong to networks or trade associations. Mercury Ventures has an extensive network of credible Angels behind its Shared Success™ program who have both the interest and the capacity to invest in properly-positioned opportunities.

#### CONSIDERATIONS:

1. Am I willing to share control and future profits in my business?
2. Do I really want investor-partners forever?
3. How big of a share am I willing to give up?
4. Will I be able to keep up with the investor's reporting requirements?
5. Am I comfortable disclosing company secrets to *potential* investors?

Keep in mind that traditional investors will want to take a much larger share of a start-up, than they will accept of a company with a two- or three-year track record of success.

### Debt Financing

Assuming you've established solid business credit (Mercury equivalent of 150+), debt financing can offer more flexibility and options than you may realize. A key benefit of Shared Success™ is access to our network of credit facilities, the approval guidelines for which we are intimately familiar.

Unlike equity, debt financing doesn't require a "road show"—securing an approval for debt financing is primarily based on how well you match against the bank's automated scoring model that rarely requires human eyes for approvals on loans

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1. What kind of debt financing can my company qualify for?
2. What are the key factors for approval?
3. How much debt can my business afford?
4. Can I handle the payments if cash flow is off?
5. What happens if interest rates rise?
6. Am I willing to pledge company and/or personal assets?

Remember, debt lending is more analytical than personal. Your ideas aren't as important as your ratios. It boils down to a simple question: Is your business credit worthy? Are you? **Business credit is essential.**

## • Essentials

- [MERCURY METHOD](#)
  - [SCOUTING PROCESS](#)
  - [GETTING FUNDED](#)
- [SHARED SUCCESS](#)
  - [THE RIGHT FUNDS](#)
  - [WORKSHOPS](#)
  - [APPLICATION](#)

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- [XBroker.org](#)

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Adam Zuckerman Cyber Defamation Impressario

From: "adam" <adam@xvulture.com> Date: January 15, 2010 9:19:59 PM PST

To: "Aaron Thomas" <aaronthomas21@gmail.com>, "Kirk McMahon" <kirkm@thexbanker.com>, "Paul Stegemann" <pstegemann@thexbanker.com>

Subject: Fw: Xbanker... Reply-To: adam@xvulture.com

Thought u'd boys would enjoy this

. -----Original Message----- From: "adam" [adam@xvulture.com](mailto:adam@xvulture.com)

Date: Sat, 16 Jan 2010 05:18:45 To: <Hazen.martin@gmail.com>; Luke Adams<ladams@mercuryventures.com>; Ryan Page<rpage@mercuryventures.com>

**Subject: Xbanker...** Hazen, As you probably know, I don't often get involved with issues related to xbanker, although profitable, and now flourishing with 15 reps in Vegas - the result of cleaning out the toilet rats you had fester, and due to the superior management of Paul Stegemann. However, your name has come up twice in two days, related to the topic, which is two times too much. That said, let me make things crystal clear for you, **since my reputation probably precedes me**. First, you are a penniless drunken mooch, who needs to grow up. Second, If you believe the ripoff report, which we have no control of requires us to clear your name, think again. Not only will we not waste time to clear your name for your well-deserved ineptitude, but if I hear it one more time, **I'll pay a staff of 10 people to proliferate the internet with pictures of you fucking a donkey, drunk**. Does that sound like slander or libel to you? If so, good, why don't you see how far one of you family lawyers will go to help you against the panel of pit bulls I retain, solely to eradicate more formidable vermin than you. Hopefully we're clear now, but if you want to pop off to me, you'd better know that I don't bluff, and piss away at least what you made in your best month on mediocre wine. Now beat it.

-----Original Message-----

From: adam@nvcvcventures.com

Date: Thu, 26 Mar 2009 22:15:19

To: Timra Valentyne<valentyne@verizon.net>

Subject: Re: Concerns

I'm in the middle of a deal today, but I wanted to answer u quickly

First, I love u to death and think the world of u, but u've yet to run and capitalize any business in your life so far for a reason...you have no experience, and u grossly overestimate the simplicity of smart deal mechanics, and if u want to pay for it, I can sell it to u - its called catastrophic failure.

This is by no means a long process, but the result of normal and efficient due diligence - the reason I don't end up with dick in hand - ever, while the rest of the world is standing in unemployment lines.

The reason YOU DO want to go through this process is to be clear of the kind of resources and people that are willing to support you. With all due respect to Jamie, regardless of what he has done, he's broke and started Liberty with the amount of money I spend on Fresh Salmon annually.

As for Kirk, his job is to determine what can bite me and my partners in the ass and/or annoy me to hell by being sucked into a dink deal with land mines. He's evaluated and commissioned deals for me that produced 45M annually. There is no diff in care big or small.

As for the pot, there is no pot but the one I stir, and there are no "fronters" in my world, just soldiers. Ur deal will be with Shared Success and the next step is to discuss the key elements of the deal:

Capital, Equity, Current Comp, and Performance Guidelines.

Everyone has a story about big money, and nobody ever wants to talk about big risk or the way in which they plan to be on the hook for it - because they never are. This is the world of capital and experience, not midnight dreamers. A lesson Jamie is learning the way we all did - the hard way.

So, we are ready to go, and ready to discuss the details. Believe me, the deal never breaks down during the due dil - it breaks down at this next stage when the "bringers" fall prey to the deadly misconception that "sweat" is equivalent to "cash." Herein lies Mark Twains famous tale of leaving home... "Do so

while u know everything."

If u can find dumb money to finance ur operation - I'd take it all day. If not, we're ready, and Ryan will take over from here.

Love and kisses

# XBanker™

## 100% Money Back Guarantee!

How would you like to know, with absolute certainty, that you are making the best decision regarding building your business credit?

### Well, Now You Can. We Offer an Unmatched 100% Money Back Guarantee!

We understand that building your business credit is something that is serious, it takes time and dedication on your part and we want to make you certain that choosing Corporate Credit Concepts is the absolute best decision you could make to help you establish your business credit.

### How Do We Ensure Your Success?

Simple...we have experienced business credit coaches that will guide you, step-by-step through the credit building process. We are there for your 100% of the time. You will have access to an interactive back office that will keep track on your success as well as give you guidance on what the next "to-do" items are. The back office, coupled with the help of your business credit coach is a sure fire way to achieve business credit results.

- Trade Credit - \$40,000
- Credit Cards (tax id only!) - \$25,000
- Equipment Lease - \$100,000
- Small Business Loan - \$25,000
- Unsecured Business Loan - \$25,000
- Business Credit Cards - \$30,000
- Bank lines of Credit - \$40,000 - \$100,000

### What is our Guarantee?

If after completing our business credit builder program, you have not obtained the following, we will refund 100% of your money:

1. Corporate Compliance and documentation review
2. D&B file and a D&B rating
3. D&B Paydex Score
4. Business credit file with Corporate Experian with an inteliscore
5. Business credit file with business Equifax with the appropriate business credit score.
6. Trade accounts and/or Vendor Accounts with and without a personal guarantee.
7. A minimum of a \$10,000 trade line reporting to D&B.
8. And....

✓ **At least \$150,000 in business credit, regardless of your personal credit scores.**

\*Business credit consists of any of the following: cash lines of credit, business loan, trade credit, vendor credit, credit cards, and/or equipment approvals.

- (Based on Business score only)
- (Based on Business score only)
- (When qualified - 500+ FICO)
- (When qualified - 500+ FICO)
- (When qualified - 620+ FICO)
- (When qualified - 640+FICO)
- (When qualified - 680+FICO)

**Estimated Total - \$150,000 - \$250,000**

*Guaranteed minimum of \$150,000 or your money back!*

Thom Mrozek Email String

Subject: **Info on Adam Zuckerman**  
-----

From: **Concerned Citizen** <[isthisacon@gmail.com](mailto:isthisacon@gmail.com)>  
Date: Tue, Aug 11, 2009 at 7:02 PM  
To: [thom.mrozek@usdoj.gov](mailto:thom.mrozek@usdoj.gov)

Hello Thom,

We spoke today about Operation Lease Fleece and Adam Zuckerman. thank you for taking the call. We met Adam (he goes by Adam Stuart) about six months ago as he was trying to work a deal to purchase a supplement manufacturer in NY that my associate and I were working with. This NY company was in a Chapter 11 turnaround situation, and so we spoke to him. He did not succeed with a purchase with the owner of that company, but tried to get us to come work for him as his "integration team" while he raised money to buy other nutraceutical companies. He also said his company Mercury Ventures controlled a \$500mm fund and that would be used in part to buyout or consolidate companies in the nutrition space.

We were about to sign a deal to work with him, and then, by accident, my associate found out his last name was actually Zuckerman. We quickly Google'd his real name with "fraud" and we hit pay-dirt. We then said we wanted no part of him, through a letter from our attorney. Adam countered by stating he was a victim of circumstance and proceeded to "come clean" on the Leasing deal. We never went to work for Adam, but he said he was still going to raise money for nutraceutical companies, and if something looked good, would we still consider working with him. We said, yes, as if to say, we won't completely blackball you, if in fact your criminal past was one where you may have been in the wrong place at the wrong time...

But more things just aren't adding up, like his so-called fund, his lack of any history in developing or funding good businesses, and the fact that he is now promoting a new deal with a colleague of ours, and making really outlandish claims about what the deal is or can be, in our opinion.

So with that as a backdrop, what I/we would like to know is:

- Has Adam's sentencing hearing took place? If so, when will he go to prison, or did he get parole etc.?
- Does Adam have any stipulations in his plea that state he cannot take part in any money raising or proffering of investments?
- *Is it okay if Adam uses another last name to hide his past from his new business associates?*

Exh 6

000175

- As I stated, he uses the name Adam Stuart, and it seems he is involved in numerous telemarketing operations based in Cost Mesa Ca.
- These telemarketing deals all wreak of "scheme" and range from "rebuild your credit", to getting people re-financed on their mortgages if they are faced with a bad loan or loss of income.
- Adam also says his sentencing hearing is in a year or so, is this true?

In closing, Adam is now promoting a large investment with a colleague of ours. However, many critical aspects of this deal are considered by Adam to be insignificant, but leave my associate and I thinking this is a scam. Since my associate and I are close with our colleague, and worked with him previously we've been asked to be part of the new management if the company gets funded, which we will decline.

We don't need to know if Adam is a true con-man, we believe this is the case already. We do wonder how we can tell our colleague about this without Adam doing something stupid because he lost his next "mark"?

We do not want anyone to get hurt by working with Adam, and don't know how to proceed...

Any advice in this matter is greatly appreciated.

-----  
From: **Concerned Citizen** <[isthisacon@gmail.com](mailto:isthisacon@gmail.com)>  
Date: Thu, Aug 13, 2009 at 9:21 AM  
To: [thom.mrozek@usdoj.gov](mailto:thom.mrozek@usdoj.gov)

Mr. Mrozek,

I know you are busy, but did you get my last email regarding Adam Zuckerman?

-----  
From: **Mrozek, Thom (USACAC)** <[Thom.Mrozek@usdoj.gov](mailto:Thom.Mrozek@usdoj.gov)>  
Date: Thu, Aug 13, 2009 at 9:21 AM  
To: [isthisacon@gmail.com](mailto:isthisacon@gmail.com)

*Yes.*

-----  
From: **Concerned Citizen** <[isthisacon@gmail.com](mailto:isthisacon@gmail.com)>

Date: Thu, Aug 13, 2009 at 9:39 AM  
To: "Mrozek, Thom (USACAC)" <[Thom.Mrozek@usdoj.gov](mailto:Thom.Mrozek@usdoj.gov)>

Thank you.



1<sup>ST</sup> Welcome Email

Lee

---

**From:** paulr@thexbanker.com  
**Sent:** Monday, March 01, 2010 10:25 AM  
**To:** lee@certifiedbookkeepingservices.com  
**Subject:** Lee from Paul Rogers The Finance Information You Requested  
**Attachments:** THEXBanker \$100k GUARANTEE.pdf; #1.doc

Dear Lee ,

PLEASE "CLICK" AND "OPEN" THE " TWO ATTACHMENTS" ABOVE, THEN CLICK ON "REPLY"- TYPE "PAUL, I RECEIVED THE E-MAIL" THEN CLICK ON "SEND". THANKS, PAUL

RE: Business Credit Builder Program:



Business Credit eXpert Gerri Detweiler.

Business and personal credit expert routinely featured in national television, radio and print media.

This program is the foundation to an advanced level of business credit building. The Business Credit Builder will help you establish your business credit and set it up so you can obtain lines of credit from the bank. This foundation will help you in establishing trade (or vendor) credit, building the credit scores (from business credit bureaus) to strong levels, allowing us to aid you in applying for business credit cards that are based on the TAX ID ONLY and not your social security number! You will have a personal business credit coach to guide you through the entire process.

Many business owners that start the Business Credit Builder do not have good personal credit. The Business Credit Builder will set the business foundation for obtaining lines of credit with our over 200 banking contacts.

Many of our clients use the credit cards that the Business Credit Builder Program obtains to help them pay for the personal credit repair process. Once the business owner's scores are adequate we can obtain a combination of trade credit, credit cards and bank lines of credit.

There are other companies willing to help you try to secure corporate credit. And even a few who can get credit cards without your personal guarantee. But they aren't able to obtain cash credit.

And there is one other critical difference - how long you'll wait to access your cash credit.

The industry standard is two to three years. But we can help you get the cash corporate credit you need in as little as 2 to 4 months!

The entire purpose of the Business Credit Builder Program is to build the foundational level of business credit and to give you some cash to repair your personal credit if needed.

Business Credit Builder - Estimated Amounts Within the First 4 to 6 Months:

Estimated Total - \$50,000 to \$100,000

Exh 7

Sincerely,

Paul Rogers  
Senior Financial Manager  
XBanker  
Phone: (702) 430-1856  
Email: [paulr@thexbanker.com](mailto:paulr@thexbanker.com)

**XBanker**™

CONFIDENTIALITY NOTICE: This communication and any documents, files or previous e-mail messages attached to it, constitute an electronic communication within the scope of the Electronic Communication Privacy Act, 18 USCA 2510. This communication may contain non-public, confidential, or legally privileged information intended for the sole use of the designated recipient(s). The unlawful interception, use or disclosure of such information is strictly prohibited pursuant to 18 USCA 2511 and any applicable laws. If you are not the intended recipient, or have received this communication in error, please notify the sender immediately by reply email and delete all copies of this communication, including attachments, without reading them or saving them to disk.





800.317.6467

The Smart Way to Equipize Your Business

## 100% Money Back Guarantee!

How would you like to know, with absolute certainty, that you are making the best decision regarding financing your business, building your business credit and accessing the most Capital as quickly as possible?

### Well, Now You Can. We Offer an Unmatched 100% Money Back Guarantee!

We understand that building your businesses credit is something that is serious, it takes time and dedication on your part and we want to make you certain that choosing XBanker is the absolute best decision you could make to help you establish your business credit.

### How Do We Ensure Your Success?

Simple... we have experienced business credit coaches that will guide you, step-by-step through the credit building process. We are there for you 100% of the time. You will have access to an interactive dashboard that will keep track of your success as well as give you guidance on what the next "to-do" items are. Some applications can even be submitted directly through our software to Banks, Lenders and Vendors. The back office, coupled with the help of your business credit coach is a sure fire way to achieve business credit results. Your coach will be calling you at least twice a week to check on progress in addition to rapid responses to calls and emails.

Our program and this guarantee are designed for businesses of any type, size or age and for owners of any personal credit range. We have successfully helped business owners that have had 400 FICO scores and owners with 850 FICO scores and everywhere in between.

### What is our Guarantee?

If after 6 months and completing our business credit and finance program, you have not obtained the following, we will refund 100% of your money:

1. Corporate Compliance and documentation review
2. D&B file and a D&B rating
3. D&B Paydex Score
4. Business credit file with Corporate Experian with an intelliscore
5. Business credit file with business Equifax with the appropriate business credit score.
6. And....

### At least \$100,000 in business credit, regardless of your personal credit scores.

\*Business credit consists of any of the following: cash lines of credit, business loans, trade credit, retail credit, vendor credit, credit cards, factoring, PO financing, asset based funding, real estate, and/or equipment and vehicle finance approvals.

If your business needs less than \$100,000 in total credit and financing do not be alarmed. You do not have to use all of the credit that we establish for you and it won't cost you anything. If you need more or even a lot more than \$100,000 in total credit and financing we will not stop at \$100,000 and will get you as much as you need and we can get you qualified for. We only stop when you tell us to

***Guaranteed minimum of \$100,000 or your money back! www.thexbanker.com***

Certified Letter to Vice President

## Certified Bookkeeping Services

Virtual Bookkeeping and Administrative Solutions

August 20, 2010

The X Banker  
3197 Airport Loop Drive Unit B  
Costa Mesa, CA 92626

Ms. Miriam Zuckerman,

I am writing to you regarding the program that I signed up for in March 2010. I originally spoke to Paul Rogers and he informed me at the time that he was the Vice President and signed me up for this with a \$550.00 deposit and \$287.87 per month. He also informed me and emailed me the 6 months guarantee (see attach), if I do not received at least \$100,000.00 within a 6 month time frame all my money will be refunded. He provided me with his mobile number and instructed me to call him if I have any problems. My business was already established so he escalated me to the next level and gave me Timra Valentine's information and told me I will be working with her.

Timra Valentine has been working on my account for the last 4 months and has had no luck finding any type of financing. I have called her several times and send numerous emails with no response. This is extremely unprofessional! The last email that I sent her was August 1<sup>st</sup> informing her that I am giving her 2 more weeks to work on my account and if she cannot find any type of financing I will be cancelling and want all monies refunded. She has still not responded. I left her a detailed message yesterday and still have not responded. I called Paul Rogers who informed me that he was no longer working for the company and later found out that he was just a salesman.

I have been searching online about your company and all I am finding out from other individuals is that your company is a scam and just out to take business owners money. I am extremely disappointed with the professionalism of your company and all the misconstrued information that I have received.



21520 Yorba Linda Blvd. Ste G-282  
Yorba Linda, CA 92887  
T 800.645.4989  
F 714.276.0493

[www.certifiedbookkeepingservices.com](http://www.certifiedbookkeepingservices.com)

# Certified Bookkeeping Services

Virtual Bookkeeping and Administrative Solutions

I am formally cancelling my account and want the entire amount that I have paid of \$1,989.35 refunded immediately. I have attached my statements and you will see all the deductions have been made.

Your company is in the same county as I live in so if I do not receive a refund in a timely manner I will be taking The X Banker to Small Claims court immediately and this will cost your company more then what I have paid into this scam program. I will also be reporting to the Better Business Bureau if this is not resolved.

Thank you,



Lee Patin  
President, Certified Bookkeeping Services, Inc



21520 Yorba Linda Blvd. Ste G-282

Yorba Linda, CA 92887

T 800.645.4989

F 714.276.0493

[www.certifiedbookkeepingservices.com](http://www.certifiedbookkeepingservices.com)

# Last Email

Lee

---

**From:** kirkm@thexbanker.com  
**Sent:** Friday, September 10, 2010 3:00 PM  
**To:** lee@certifiedbookkeepingservices.com  
**Subject:** Certified letter

Dear Ms Patin:

We have received your letter requesting a refund. After reviewing your file, I have noticed that there has been key elements to the program that has caused us to be unable to uphold our Guarantee. As expressed throughout the program, The Xbanker is unable to influence to what extent bank's will waiver on someone's personal credit.

Your progress on our dashboard indicates that you have made strides in developing vendor credit, which is the cornerstone for our program, and its design.

We are happy to extend you a 60 day no additional charge for coaching, but are unable to approve a full refund. We apologize for any confusion, but must stand firm on our refund policy. Please feel free to contact me if you have any further questions.

Sincerely,

Kirk  
Vice President of Operation

Exh 10

# My Last Response

Lee

**From:** Lee [lee@certifiedbookkeepingservices.com]  
**Sent:** Friday, September 10, 2010 3:25 PM  
**To:** 'kirkm@thexbanker.com'  
**Subject:** RE: Certified letter  
**Attachments:** 100% Money Back Guarantee pdf; image001.jpg

That is completely unacceptable and I will be filing a lawsuit in small claims court. I was already an established business and after I went through all those vendor credit request I had all of them except Cabela's. Cabela's extended me a 3,000.00 credit line but I am a bookkeeping business and why would I be buying anything from an outdoor hunting vendor? I already had all the gas cards, staples and home depot prior to even signing up with your program. I also was established with Dunn and Bradstreet and had a paydex score of 78 when I started your program. This is what triggered me to call Paul Roger's and tell him that I am already established with all these vendor creditors and have a duns number, etc... So he told me no problem I will escalate you to the next level of actual business financing and that is when he had Timra Valentine contact me. She also agreed that I did not need to go through all the so called "Coaching" because I was already established. But this has nothing to do with the 100% Money Back Guarantee, and I have an email from Timra that states she will not be able to find financing due to my personal credit issues and she is forwarding my file to upper management for a refund.

I have the letter from The XBanker that states if we can not provide you with \$100,000.00 of business credit and/or financing there is a 100% money back guarantee. You will not have a leg to stand on in court. I will not be suing you for just my refund amount but for my time and effort as well. So it is in your best interest to issue me a full refund for every penny that I put into your scam program or I will be seeing you in small claims court and will sue you for 3 times the amount. I have attached the 100% money back guarantee that Paul Rogers emailed when I started the program because it's obvious that you do not have this.

Thank you,

*Lee Patin*



Certified Bookkeeping Services  
Virtual Bookkeeping and Administrative Solutions

**21520 Yorba Linda Blvd #G-282**  
**Yorba Linda, CA 92887**  
**800-645-4989 ext 3 Office**  
**714-280-2766 Mobile**  
**714-276-0493 Fax**  
**www.certifiedbookkeepingservices.com**

**From:** [kirkm@thexbanker.com](mailto:kirkm@thexbanker.com) [mailto:kirkm@thexbanker.com]  
**Sent:** Friday, September 10, 2010 3:00 PM  
**To:** [lee@certifiedbookkeepingservices.com](mailto:lee@certifiedbookkeepingservices.com)  
**Subject:** Certified letter

Dear Ms Patin:

We have received your letter requesting a refund. After reviewing your file, I have noticed that there has been key elements to the program that has caused us to be unable to uphold our Guarantee. As

----- Original Message -----

Subject: Adam Zuckerman; Kirk McMahan & Paul Arnold  
From: "Darren M. Meade" <[dmeade@kairos-meade.com](mailto:dmeade@kairos-meade.com)>  
Date: Thu, September 08, 2011 4:14 am  
To: "William Bondurant" <[William.Bondurant@ic.fbi.gov](mailto:William.Bondurant@ic.fbi.gov)>

Special Agent Bondurant,

I was recently granted the privilege of providing testimony in Judge Carmac Carneys courtroom on August 29, 2011 regarding the ongoing working relationship of Adam Stuart Zuckerman and Kirk McMahan in the Zuckerman controlled business entity known as the X-Banker which on the attached tape Zuckerman claims to have made over \$5 million dollars. Additionally, I advised that Zuckerman / McMahan and Paul Arnold started a new nationwide extortion scheme in February of 2011.

I had supplied a letter written to regarding these facts of my personal fear for my life, and that multiple co-defendants and other violent convicted felons were working together on a daily basis at 3197B Airport Loop Drive - Costa Mesa, California. This was detailed in my March 1, 2011 email and are two subsequent contacts. I offered to supply documents and consensual recording to corroborate that factual nature of my communication. During my testimony it appeared to me that Judge Carmac Carney was never presented any of the evidence I offered. Jennifer Waier, in general terms, tried to convey, you investigated my claims, I believe that to be a falsehood.

Adam Zuckerman has threatened my life personally, and sent someone to my home residence stating : " I would never live to testify again ". I can provide you a detailed list of all the intimidation tactics Adam Zuckerman & Kirk McMahan have tried as I've continually tried to warn authorities, to protect the public. They have brought up a minimum of two new criminal enterprises while on supervised release, the latest one, will create a minimum of 25,000 new victims.

**Exh 11**

000185



If you listen to the audio file titled 'Unrepentent...', Adam claims the government would have killed him, is he didn't cooperate. That leaves me in a lamentable position.

I must report now another offense committed against me which has occurred in direction connection to my testimony on Aug. 29, as typical, Adam Zuckerman, took to his controlled website [ascottconnelly.com](http://ascottconnelly.com) and posted additional defamatory illustrations and commentary calling me a 'Dr. Connelly's Gimp Bitch'. That is on-top of the personal death threat, criminal threats at my home address, and the audio clip attached, in which is boasts of wanting to explode my brain with a '50 caliber hollow point bullet'.

I perceive all of this to be a deliberate attempt to intimidate me from providing additional testimony into the evidentiary hearing scheduled for October 31st.

May we work together?

Or, should I go through someone else?

Adam, openly mocks how he outsmarts the FBI & AUSA. Listen, to how he brags about utilizing pre-paid cell phones to avoid detection. I have other snippets in which he (Zuckerman) and Ryan Page state they have checked out the best countries to avoid U.S. taxes with the key being knowing their extradition laws.

I will call you later today.

Respectfully,

Darren M. Meade  
Managing Director  
Kairos-Meade  
14 Monarch Bay Plaza # 101  
Monarch Beach, CA 92629

Direct: (949) 295-0502  
Fax: (800) 657-5660

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----- Original Message -----

Subject: Reiteration of Friday, September 23, 2011 telephone call

From: "Darren M. Meade" <dmeade@kairos-meade.com>

Date: Fri, September 23, 2011 8:24 pm

To: "William Bondurant" <William.Bondurant@ic.fbi.gov>

Special Agent Bondurant:

I ask that this email and attachment be included in the report you are drafting following our phone call on Friday, September 23, 2011.

I would like to reiterate the points in which we respectfully disagreed on the call :

- I issued a fraud warning on Friday, July 22, 2011 10:01 AM and copied Jennifer Waier, Andre Birotte and Beth Phillips. I had previously sent this to you directly and have attached another copy. This afternoon you asked me to '**guess**' on a few matters pertaining to Adam Zuckerman and Kirk McMahan. This struck me as odd as I detailed I am meeting with you and Ms. Waier next week. That being said, the July 22, 2011 letter is prima facie evidence based on fact: sworn testimony; criminal backgrounds; consensual audio recordings and my own personal knowledge as Chief Executive Officer.
- In February of 2011 Adam Stuart Zuckerman began delivering a series of ever escalating criminal threats to myself, When I first contacted your office in Feb. 2011 regarding the threat against my life made by Adam Zuckerman. Additionally, on April 8, 2011, I wrote to Matthew Markowski of Pretrial Services and likewise informed him that Adam Zuckerman had made death threats to me because I had alerted the public about his ongoing criminal enterprises. Thus, after promptly reporting Zuckerman's death threat to three separate divisions of federal law enforcement without any apparent intervention from any of these sectors to abate the risk to my Had anyone from either the US Attorney's Office, the FBI, or Pretrial services advised me to contact the local police back in February or March, the Laguna Beach PD might have had a stronger case than they do at this stage. Mr. Bondurant if you have anything in writing where you advised me to contact the local police department, please provide it. There was no such guidance **ever** given until Jennifer Waier's instruction on Sat, Jul 30, 2011 8:46 am. Today, you proffered a that I stated I contacted the Newport Beach, police and stated that they told me the threats were not specific enough to investigate, **that is false.** I have never lived in Newport Beach. I live, in Laguna Beach. I contacted the Laguna Beach Police. I have a letter dated August 8, 2001

RE: Offense Report Complaint # 1102949 which states : " This is to notify you that your recent report of a criminal offense have been received by the Investigative Services Division. After a careful review of the preliminary report, your case is being assigned to Detective Julia Bowman."

Special Agent Bondurant, the Laguna Beach police view the death threats by Adam Zuckerman as credible. The Laguna Beach police **never** categorized them as you claimed 'non specific'.

Adam Zuckerman, Kirk McMahan, Paul Arnold and Andrew Skylar Medal, four convicted felons worked together daily in Costa Mesa, California. Adam and Kirk utilized alias's and bragged about being retired, alluding to money they had hidden from 'Operation Lease Fleece'.

I respectfully request that you add this communication and it's attachments to your report on our telephone call of Friday, September 23, 2011. I am forced to the conclusion that it is possible that an unfeigned attempt may be made on my life, and that with the evidence already in your possession that Zuckerman has experience with techniques and procedures such as changing cell phones weekly and familiarizing himself with extradition laws from foreign countries, that these facts in aggregate suggest that he plans to flee the country if he executes his threats to end my life.

The threats are real, the Laguna Beach police are investigating and prima facie evidence based on fact: sworn testimony; criminal backgrounds; consensual audio recordings and my own personal knowledge as Chief Executive Officer, is attached to this communication.

Respectfully submitted,

Darren M. Meade  
Managing Director  
Kairos-Meade  
14 Monarch Bay Plaza # 101  
Monarch Beach, CA 92629

Direct: (949) 295-0502  
Fax: (800) 657-5660

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**UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA**  
**(Southern Division - Santa Ana)**  
**CRIMINAL DOCKET FOR CASE #: 8:07-cr-00249-CJC-1**

Case title: USA v. McMahan

Date Filed: 11/07/2007

Assigned to: Judge Cormac J. Carney

**Defendant (1)****Kirk A McMahan**

represented by **David W Wiechert**  
Law Offices of David W Wiechert  
115 Avenida Miramar  
San Clemente, CA 92672  
949-361-2822  
Fax: 949-496-6753  
Email: [dwiechert@aol.com](mailto:dwiechert@aol.com)  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*  
*Designation: Retained*

**Pending Counts**

18:1341: Mail Fraud  
(1)

**Disposition****Highest Offense Level (Opening)**

Felony

**Terminated Counts**

None

**Disposition****Highest Offense Level (Terminated)**

None

**Complaints**

None

**Disposition****Movant**

**Vince Andrich**

represented by **Becky Walker James**  
Law Offices of Becky Walker James  
1990 South Bundy Drive Suite 705  
Los Angeles, CA 90025  
310-492-5104  
Fax: 310-492-5026  
Email: becky@walkerjameslaw.com  
**ATTORNEY TO BE NOTICED**  
*Designation: Retained*

---

**Movant**

**Don Aspinal**

represented by **Becky Walker James**  
(See above for address)  
**ATTORNEY TO BE NOTICED**  
*Designation: Retained*

---

**Movant**

**Scott Connelly**

represented by **Becky Walker James**  
(See above for address)  
**ATTORNEY TO BE NOTICED**  
*Designation: Retained*

---

**Movant**

**Jeff Corbett**

represented by **Becky Walker James**  
(See above for address)  
**ATTORNEY TO BE NOTICED**  
*Designation: Retained*

---

**Movant**

**Charlene Eglund**

represented by **Becky Walker James**  
(See above for address)  
**ATTORNEY TO BE NOTICED**  
*Designation: Retained*

---

**Movant**

**Jerry Gilbert**

represented by **Becky Walker James**  
(See above for address)  
**ATTORNEY TO BE NOTICED**  
*Designation: Retained*

---

**Movant****Rachel Green**

represented by **Becky Walker James**  
(See above for address)  
*ATTORNEY TO BE NOTICED*  
*Designation: Retained*

---

**Movant****Keith Lewis**

represented by **Becky Walker James**  
(See above for address)  
*ATTORNEY TO BE NOTICED*  
*Designation: Retained*

---

**Movant****Darren Meade**

represented by **Becky Walker James**  
(See above for address)  
*ATTORNEY TO BE NOTICED*  
*Designation: Retained*

---

**Movant****Glenn Puit**

represented by **Becky Walker James**  
(See above for address)  
*ATTORNEY TO BE NOTICED*  
*Designation: Retained*

---

**Movant****Michael Roberts**

represented by **Becky Walker James**  
(See above for address)  
*ATTORNEY TO BE NOTICED*  
*Designation: Retained*

---

**Movant****Mark Warner**

represented by **Becky Walker James**  
(See above for address)  
*ATTORNEY TO BE NOTICED*  
*Designation: Retained*

---

**Plaintiff**

USA

represented by **Jennifer L Waier**

AUSA - Office of US Attorney

411 West Fourth Street Suite 8000

Santa Ana, CA 92701

714-338-3550

Fax: 714-338-3708

Email: USACAC.SACriminal@usdoj.gov

**LEAD ATTORNEY****ATTORNEY TO BE NOTICED**

<b>Date Filed</b>	<b>#</b>	<b>Docket Text</b>
11/07/2007	<a href="#">1</a>	INFORMATION filed as to Kirk A McMahan (1) on count 1. Offense occurred in OC. (cyo) (Entered: 11/15/2007)
11/07/2007	<a href="#">2</a>	CASE SUMMARY filed by AUSA Jennifer Waier as to Defendant Kirk A McMahan; defendant's Year of Birth: 1976. (cyo) (Entered: 11/15/2007)
11/07/2007	<a href="#">3</a>	MEMORANDUM filed by Plaintiff USA as to Defendant Kirk A McMahan. Re: Judge Stephen G. Larson. (cyo) (Entered: 11/15/2007)
11/07/2007	<a href="#">4</a>	MEMORANDUM filed by Plaintiff USA as to Defendant Kirk A McMahan. Re: Magistrate Judge John Charles Rayburn Jr., Jacqueline Chooljian, Patrick J. Walsh, Jennifer T. Lum, and Jeffrey W. Johnson. (cyo) (Entered: 11/15/2007)
11/07/2007	<a href="#">5</a>	NOTICE of Related Case(s) filed by Plaintiff USA as to Defendant Kirk A McMahan Related Case(s): SA CR 06-256-CJC. (cyo) (Entered: 11/15/2007)
12/07/2007	<a href="#">13</a>	SEALED DOCUMENT re EXPARTE APPLICATION for Order Sealing Document(ln) (Entered: 12/27/2007)
12/07/2007	<a href="#">14</a>	SEALED DOCUMENT re SEALING ORDER by Magistrate Judge Arthur Nakazato (ln) (Entered: 12/27/2007)
12/07/2007	<a href="#">15</a>	SEALED DOCUMENT re PLEA AGREEMENT (ln) (Entered: 12/27/2007)
12/10/2007	<a href="#">6</a>	Summons Returned Executed on 12/10/07 as to Kirk A McMahan (mt) (Entered: 12/12/2007)
12/10/2007	<a href="#">7</a>	MINUTES OF POST-INDICTMENT ARRAIGNMENT: held before Magistrate Judge Robert N. Block as to Kirk A McMahan (1) Count 1. Defendant arraigned, states true name: as charged. Attorney: David W Wiechert for Kirk A McMahan, Retd, present. Defendants first appearance. Bond is ordered in the amount of \$10,000.00 Unsecured Appearance bond. See attached copy of bond. Court orders defendant to report to the US Marshal's Office forthwith for processing. Detention hearing is held. Defendant entered not guilty plea to all counts as charged. Case assigned to Judge James V. Selna. Jury Trial set for 2/5/2008 08:30 AM before Judge James V. Selna. Status Conference set for 1/28/2008 09:00 AM before Judge James V. Selna. Defendant and counsel are ordered to appear. Trial estimate: 5 days. Court Smart: CourtSmart. (mt) (Entered: 12/13/2007)
12/10/2007	<a href="#">8</a>	STATEMENT OF CONSTITUTIONAL RIGHTS filed by Defendant Kirk A McMahan (mt) (Entered: 12/13/2007)

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12/10/2007	<a href="#">9</a>	WAIVER OF INDICTMENT by Defendant Kirk A McMahan before Magistrate Judge Robert N. Block (mt) (Entered: 12/13/2007)
12/10/2007	<a href="#">10</a>	DESIGNATION AND APPEARANCE OF COUNSEL; filed by David W Wiechert appearing for Kirk A McMahan (mt) (Entered: 12/13/2007)
12/10/2007	<a href="#">11</a>	BOND AND CONDITIONS OF RELEASE filed as to Defendant Kirk A McMahan conditions of release: \$10,000.00 Unsecured Appearance Bond (see document for details) approved by Magistrate Judge Robert N. Block. Original bond routed to File. (mt) (Entered: 12/13/2007)
12/10/2007	<a href="#">12</a>	DECLARATION RE: PASSPORT filed by Defendant Kirk A McMahan, declaring that I am unable to locate my passport(s). RE: Bond and Conditions (CR-1) <a href="#">11</a> . (mt) (Entered: 12/13/2007)
12/27/2007	<a href="#">16</a>	ORDER RE TRANSFER PURSUANT TO GENERAL ORDER 224 -Related Case- filed. Related Case No: SACR 06-256 CJC. Case, as to Defendant Kirk A McMahan, transferred from Judge James V. Selna to Judge Cormac J. Carney for all further proceedings. The case number will now reflect the initials of the transferee Judge SACR 07-249 CJC.Signed by Judge Cormac J. Carney (jal) (Entered: 12/27/2007)
01/23/2008	<a href="#">17</a>	MINUTES OF IN CHAMBERS ORDER by Judge Cormac J. Carney: Change of Plea Hearing set for 1/31/2008 at 5:00 PM before Judge Cormac J. Carney. (mu) (Entered: 01/23/2008)
01/31/2008	<a href="#">18</a>	MINUTES OF Change of Plea Hearing held before Judge Cormac J. Carney as to Defendant Kirk A McMahan. Defendant sworn. The Defendant Kirk A McMahan (1) pleads GUILTY to Count 1 of the Information. Court questions defendant regarding the plea. The plea is accepted. The Court ORDERS the preparation of a Presentence Report. Sentencing set for 10/20/2008 09:00 AM before Judge Cormac J. Carney. Court vacates jury trial date of 2/5/08. Defendant remains on bond under same terms and conditions. Court Reporter: Deborah Parker. (mt) (Entered: 02/04/2008)
06/04/2008	<a href="#">19</a>	STIPULATION for Modification of Conditions of Release filed by Defendant Kirk A McMahan (Attachments: # <a href="#">1</a> Proposed Order MODIFYING CONDITIONS OF RELEASE)(Wiechert, David) (Entered: 06/04/2008)
06/06/2008	<a href="#">20</a>	ORDER MODIFYING CONDITIONS OF RELEASE by Judge Cormac J. Carney as to Defendant Kirk A McMahan: Defendant pre-trial supervision status will be modified from intensive to routine supervision. (mt) (Entered: 06/11/2008)
08/28/2008	<a href="#">21</a>	STIPULATION to Continue Sentencing Date from October 20, 2008 to April 6, 2009 filed by Plaintiff USA as to Defendant Kirk A McMahan (Attachments: # <a href="#">1</a> Proposed Order)(Waier, Jennifer) (Entered: 08/28/2008)
08/28/2008	<a href="#">22</a>	ORDER by Judge Cormac J. Carney as to Defendant Kirk A McMahan: continuing Sentencing Hearing to 4/6/2009 11:00 AM before Judge Cormac J. Carney. (mt) (Entered: 08/29/2008)
03/02/2009	<a href="#">23</a>	STIPULATION to Continue Sentencing Date from April 6, 2009 to January 4, 2010 filed by Plaintiff USA as to Defendant Kirk A McMahan (Attachments: # <a href="#">1</a> Proposed Order)(Waier, Jennifer) (Entered: 03/02/2009)
03/05/2009	<a href="#">24</a>	ORDER by Judge Cormac J. Carney as to Defendant Kirk A McMahan: continuing Sentencing Hearing to 1/4/2010 11:00 AM before Judge Cormac J. Carney. (mt)



		(Entered: 03/06/2009)
03/09/2009	<a href="#">25</a>	STIPULATION for Modification of Conditions of Release filed by Defendant Kirk A McMahan (Attachments: # <a href="#">1</a> Proposed Order Modifying Conditions of Release) (Wiechert, David) (Entered: 03/09/2009)
03/10/2009	<a href="#">26</a>	ORDER MODIFYING CONDITIONS OF RELEASE by Judge Cormac J. Carney as to Defendant Kirk A McMahan (mt) (Entered: 03/12/2009)
11/18/2009	<a href="#">27</a>	STIPULATION to Continue Sentencing Date from January 4, 2010 to January 3, 2011 filed by Plaintiff USA as to Defendant Kirk A McMahan (Attachments: # <a href="#">1</a> Proposed Order)(Waier, Jennifer) (Entered: 11/18/2009)
11/23/2009	<a href="#">28</a>	ORDER CONTINUING sentencing by Judge Cormac J. Carney as to Defendant Kirk A McMahan. Sentencing continued to 1/3/2011 09:00 AM before Judge Cormac J. Carney. (rla) (Entered: 11/24/2009)
06/11/2010	<a href="#">29</a>	STIPULATION for Modification of Conditions of Release filed by Defendant Kirk A McMahan (Attachments: # <a href="#">1</a> Proposed Order)(Wiechert, David) (Entered: 06/11/2010)
06/14/2010	<a href="#">30</a>	ORDER MODIFYING TRAVEL RESTRICTIONS by Judge Cormac J. Carney as to Defendant Kirk A McMahan: Defendant Kirk A. McMahan's travel restrictions are modified to permit Defendant, upon notice to Pretrial Services, to travel within the United States. (rla) (Entered: 06/15/2010)
08/12/2010	<a href="#">31</a>	NOTICE of Change of Attorney Information for attorney David W Wiechert counsel for defendant Kirk McMahan. Changing address to 115 Avenida Miramar, San Clemente, CA 92672. Filed by defendant Kirk McMahan (Wiechert, David) (Entered: 08/12/2010)
11/09/2010	<a href="#">32</a>	STIPULATION to Continue Sentencing Date from January 3, 2011 to April 4, 2011 filed by Plaintiff USA as to Defendant Kirk A McMahan (Attachments: # <a href="#">1</a> Proposed Order) (Waier, Jennifer) (Entered: 11/09/2010)
11/12/2010	<a href="#">33</a>	ORDER by Judge Cormac J. Carney as to Defendant Kirk A McMahan: continuing Sentencing hearing to 4/4/2011 11:00 AM before Judge Cormac J. Carney. (mt) (Entered: 11/12/2010)
02/04/2011	<a href="#">34</a>	STIPULATION to Continue Sentencing Date from April 4, 2011 to June 27, 2011 filed by Plaintiff USA as to Defendant Kirk A McMahan (Attachments: # <a href="#">1</a> Proposed Order) (Waier, Jennifer) (Entered: 02/04/2011)
02/07/2011	<a href="#">35</a>	ORDER TO CONTINUE Sentencing by Judge Cormac J. Carney as to Defendant Kirk A McMahan. Sentencing continued to 6/27/2011 at 09:00 AM before Judge Cormac J. Carney. (dg) (Entered: 02/08/2011)
06/14/2011	<a href="#">38</a>	STIPULATION to Continue Sentencing Date from June 27, 2011 to August 29, 2011 filed by Plaintiff USA as to Defendant Kirk A McMahan (Attachments: # <a href="#">1</a> Proposed Order)(Waier, Jennifer) (Entered: 06/14/2011)
06/16/2011	<a href="#">39</a>	ORDER TO CONTINUE Sentencing by Judge Cormac J. Carney as to Defendant Kirk A McMahan. Sentencing continued to 8/29/2011 09:00 AM before Judge Cormac J. Carney. (dg) (Entered: 06/17/2011)
08/15/2011	<a href="#">40</a>	NOTICE of Manual Filing of Defendant Kirk A. McMahan's Sentencing Memorandum and Exhibits; Ex Parte Application for Order Permitting Documents to be Filed Under

		Seal; Declaration of David W. Wiechert filed by Defendant Kirk A McMahan (Attachments: # <a href="#">1</a> Certificate of Service)(Wiechert, David) (Entered: 08/15/2011)
08/17/2011	<a href="#">41</a>	ORDER by Judge Cormac J. Carney as to Defendant Kirk A McMahan: Granting Application to File Under Seal. (mt) (Entered: 08/18/2011)
08/17/2011	<a href="#">42</a>	SEALED DOCUMENT RE: EXPARTE APPLICATION FOR ORDER PERMITTING DOCUMENTS TO BE FILED UNDER SEAL. Filed by Defendant Kirk A McMahan(dg) (Entered: 08/18/2011)
08/17/2011	<a href="#">43</a>	SEALED DOCUMENT RE: STATEMENT OF POSITION WITH RESPECT TO SENTENCING FACTORS AND SENTENCING MEMORANDUM filed by Defendant Kirk A McMahan (dg) (Entered: 08/18/2011)
08/19/2011	<a href="#">44</a>	NOTICE of Manual Filing of Under Seal Document filed by Plaintiff USA as to Defendant Kirk A McMahan (Waier, Jennifer) (Entered: 08/19/2011)
08/22/2011	<a href="#">46</a>	**SEALED DOCUMENT** RE: EX PARTE APPLICATION for Order Sealing Document (ln) (Entered: 08/23/2011)
08/22/2011	<a href="#">47</a>	**SEALED DOCUMENT** RE: ORDER by Judge Cormac J. Carney (ln) (Entered: 08/23/2011)
08/22/2011	<a href="#">48</a>	**SEALED DOCUMENT** RE: UNDER SEAL (ln) (Entered: 08/23/2011)
08/29/2011	<a href="#">49</a>	MINUTES OF SENTENCING Hearing held before Judge Cormac J. Carney as to Defendant Kirk A McMahan. Court hears oral argument and schedules an evidentiary hearing regarding post plea conduct for October 31, 2011 at 9:00 a.m. Court Reporter: Maria Dellaneve. (mt) (Entered: 09/07/2011)
09/08/2011	<a href="#">50</a>	TRANSCRIPT filed as to Defendant Kirk A McMahan for proceedings held on 8/29/2011. Court Reporter/Electronic Court Recorder: Maria Beesley-Dellaneve, phone number 714-564-9259. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Electronic Court Recorder before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Notice of Intent to Redact due within 7 days of this date. Redaction Request due 9/29/2011. Redacted Transcript Deadline set for 10/9/2011. Release of Transcript Restriction set for 12/7/2011.(dg) (Entered: 09/08/2011)
09/08/2011	<a href="#">51</a>	NOTICE OF FILING TRANSCRIPT filed as to Defendant Kirk A McMahan for proceedings 8/29/2011 (dg) (Entered: 09/08/2011)
10/21/2011	<a href="#">52</a>	NOTICE of Manual Filing of Under Seal Document filed by Plaintiff USA as to Defendant Kirk A McMahan (Waier, Jennifer) (Entered: 10/21/2011)
10/24/2011	<a href="#">54</a>	SEALED DOCUMENT RE GOVERNMENT'S EXPARTE MOTION FOR ORDER SEALING DOCUMENTS (mt) (Entered: 10/27/2011)
10/24/2011	<a href="#">55</a>	SEALED DOCUMENT RE SEALING ORDER (mt) (Main Document 55 replaced on 11/7/2011 due to incorrect image attached) (lwag). (Entered: 10/27/2011)
10/24/2011	<a href="#">56</a>	SEALED DOCUMENT RE REQUEST TO TAKE EVIDENTIARY HEARING OFF CALENDAR AND SET SENTENCING DATE (mt) (Entered: 10/27/2011)
10/24/2011	<a href="#">57</a>	SEALED DOCUMENT RE ORDER TAKING EVIDENTIARY HEARING OFF CALENDAR AND SETTING SENTENCING DATE. NEW SENTENCING DATE: 10/31/2011 AT 9:00 AM. (mt) (Entered: 10/27/2011)

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10/26/2011	<a href="#">53</a>	MOTION BY VICTIMS to Intervene and be Heard at Evidentiary Hearing and Sentencing Pursuant to 18:3771(d)(3); Request for Continuance and other Relief; Declarations of Becky Walker James, Richard Kincaid, and Glenn Puit; Exhibits; [Proposed] Order. Filed as to Defendant Kirk A McMahan (Attachments: # <a href="#">1</a> part 2, # <a href="#">2</a> part 3)(mt) (Entered: 10/26/2011)
10/28/2011	<a href="#">58</a>	OPPOSITION to MOTION for Order for to Intervene and be Heard at Evidentiary Hearing and Sentencing <a href="#">53</a> filed by Defendant Kirk A. McMahan. (Attachments: # <a href="#">1</a> Memorandum Memorandum of Points and Authorities)(Wiechert, David) (Entered: 10/28/2011)
10/28/2011	<a href="#">59</a>	ORDER CONTINUING Sentencing by Judge Cormac J. Carney as to Defendant Kirk A McMahan. Accordingly, the Court on its own motion continues the sentencing hearing for Mr. McMahan from October 31, 2001, at 9:00 a.m. to December 5, 2011 at 3:00 p.m. (see document for details) (mu) (Entered: 10/28/2011)
10/28/2011	<a href="#">60</a>	OPPOSITION to MOTION for Order for to Intervene and be Heard at Evidentiary Hearing and Sentencing <a href="#">53</a> (Waier, Jennifer) (Entered: 10/28/2011)
11/02/2011	<a href="#">61</a>	REPLY in support of MOTION for Order for to Intervene and be Heard at Evidentiary Hearing and Sentencing <a href="#">53</a> (James, Becky) (Entered: 11/02/2011)
11/16/2011	<a href="#">62</a>	ORDER by Judge Cormac J. Carney: DENYING ALLEGED VICTIM-INTERVENERS' MOTION TO INTERVENE AND BE HEARD AT DEFENDANT'S SENTENCING HEARING <a href="#">53</a> : (See document for details.) For the foregoing reasons, the alleged victim-intervenors' motion to intervene and be heard is DENIED. (rla) (Entered: 11/16/2011)
11/22/2011	<a href="#">63</a>	NOTICE OF MOTION AND MOTION for Reconsideration re Order on Motion for Order, <a href="#">62</a> by victims to intervene and be heard at sentencing Filed by Plaintiff Mark Warner, Michael Roberts, Glenn Puit, Darren Meade, Keith Lewis, Rachel Green, Jerry Gilbert, Charlene Eglund, Jeff Corbett, Scott Connelly, Don Aspinall, Vince Andrich as to Defendant Kirk A McMahan Motion set for hearing on 12/5/2011 at 03:00 PM before Judge Cormac J. Carney. (Attachments: # <a href="#">1</a> Declaration Declarations in support of motion for reconsideration, # <a href="#">2</a> Exhibit Exhibits in support of motion for reconsideration)(James, Becky) (Entered: 11/22/2011)

<b>PACER Service Center</b>			
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<b>Billable Pages:</b>	6	<b>Cost:</b>	0.48

9th Circuit Case Number(s)

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**CERTIFICATE OF SERVICE**

**When All Case Participants are Registered for the Appellate CM/ECF System**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date)  .

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature (use "s/" format)

\*\*\*\*\*

**CERTIFICATE OF SERVICE**

**When Not All Case Participants are Registered for the Appellate CM/ECF System**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date)  .

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I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Signature (use "s/" format)

**SERVICE LIST**

Jennifer L. Waier (BY E-MAIL and MAIL)  
Assistant United States Attorney  
411 West Fourth Street, Suite 8000  
Santa Ana, CA 92701

David W. Wiechert, Jessica Munk (BY E-MAIL and MAIL)  
Law Offices of David Wiechert  
115 Avenida Miramar  
San Clemente, CA 92672

Hon. Cormac J. Carney (BY HAND DELIVERY)  
U.S. District Court  
411 West Fourth Street  
Santa Ana, CA 92701-4516