

No. \_\_\_\_\_

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

VINCE ANDRICH, DON 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/Petitioners, )

v. )

UNITED STATES DISTRICT COURT, )

Respondent. )

UNITED STATES OF AMERICA, Plaintiff, )  
KIRK A. MCMAHAN, Defendant, )

Real Parties in Interest, )

**EXHIBITS TO PETITION FOR WRIT OF MANDAMUS**

Petition from order of the U.S. District Court (C.D. Cal.), No. SACR 07-249-CJC,  
Honorable Cormac J. Carney, United States District Judge

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Attorney for Victim-Interveners/Petitioners

## **EXHIBITS TO PETITION FOR WRIT OF MANDAMUS**

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1           2.     Platinum PC Technologies ("Platinum PC") is a purported  
2 equipment vendor located in Irvine, California.

3     II.   THE FRAUDULENT SCHEME

4           3.     Beginning in or around October 2004 and continuing  
5 through in or around September 2005, in Orange County, within the  
6 Central District of California, and elsewhere, defendant and  
7 others known and unknown, knowingly and with the intent to  
8 defraud, devised, executed, and participated in a scheme to  
9 defraud and to obtain money by means of materially false and  
10 fraudulent pretenses, representations, and promises, and the non-  
11 disclosure and concealment of material facts, in connection with  
12 a fraudulent equipment lease scheme.

13           4.     The fraudulent equipment lease scheme was designed to  
14 operate and did operate, as follows:

15                 (a)    Brinkbanc located small businesses in Orange  
16 County, California, and elsewhere, that required an infusion of  
17 cash to cover their operating expenses, such as rent payments and  
18 payroll. BrickBanc would send blast-faxes or use other marketing  
19 techniques to advertise money loans and working capital to small  
20 businesses.

21                 (b)    Defendant would communicate with customers who  
22 responded to the ads, and reiterate that Brickbanc could obtain  
23 money loans for them. Defendant would tell the customers that  
24 they would get the money, but would also have to accept some  
25 equipment with which the customer was free to do with it what  
26 they wished.

1 (c) Once the small businesses agreed to his  
2 assistance, defendant used false statements and promises to  
3 induce lenders to provide equipment leases to the small  
4 businesses. More precisely, at the direction of defendant,  
5 Platinum PC would create false and misleading invoices to submit  
6 to lending institutions to make it appear as though the lessees  
7 were receiving computer equipment worth a substantial amount of  
8 money. These invoices were designed to trick the lending  
9 institutions into paying for non-existent and over-valued  
10 equipment. Platinum PC would, in turn, provide the lessees  
11 nothing or computers that were worth substantially less than what  
12 was represented to the lending institution.

13 (d) Before funding the lease, the lenders contacted  
14 the small businesses to confirm that the small businesses, in  
15 fact, had purchased, installed, and were using the equipment  
16 obtained from Platinum PC. Defendant and other employees at  
17 Brickbanc coached the small businesses to provide false  
18 information to the lenders in response to these questions.

19 (e) Based upon false information, the lenders approved  
20 the applications and forwarded money to Platinum PC for the  
21 purported equipment purchases.

22 (f) Rather than using the lease proceeds to purchase  
23 equipment as promised, Platinum PC took the money received from  
24 the lending institutions, kept a portion, caused a portion of the  
25 money to be paid to the lessee as a cash loan, and caused a  
26 portion to be paid to Brickbanc from which defendant received  
27 some funds.

28

1           5.    In order to execute the scheme, defendant made and  
2 caused to be made false statements and false promises to  
3 prospective borrowers and lenders, including, without limitation,  
4 the following:

5               (a)   Defendant assisted small businesses obtain bona  
6 fide cash loans;

7               (b)   Platinum PC was a bona fide equipment vendor that  
8 sold office equipment to businesses and individuals;

9               (c)   Defendant and Platinum PC worked with small  
10 businesses who wished to obtain financing from lenders for the  
11 purchase of equipment;

12              (d)   Defendant and Platinum PC would provide true and  
13 accurate sales invoices to the lenders;

14              (e)   Defendant and Platinum PC would instruct the small  
15 businesses to provide true and correct information to lenders  
16 concerning the purchase, installation, and use of the computer  
17 equipment allegedly purchased from Platinum PC; and

18              (f)   Defendant and Platinum PC would cause the lenders'  
19 funds to be used exclusively for the purchase of the equipment  
20 specified in the sales invoices.

21           6.    At the time defendant made the false statements and  
22 false promises, and caused them to be made, he knew that such  
23 statements and promises were false, in that:

24               (a)   Defendant was obtaining fraudulent equipment  
25 leases, not bona fide cash loans, for small businesses;

1 (b) Platinum PC was in the business of fraudulently  
2 depriving lenders of their money, not selling office equipment to  
3 businesses and individuals;

4 (c) Defendant worked with small businesses that wished  
5 to obtain cash loans from lenders, not financing for the purchase  
6 of equipment;

7 (d) Platinum PC submitted false invoices to the  
8 lenders detailing purported equipment sales that never occurred;

9 (e) Defendant or others at his direction coached the  
10 small businesses to falsely verify to the lenders that the  
11 businesses had purchased, installed, and were using equipment  
12 allegedly acquired Platinum PC; and

13 (f) Defendant and Platinum PC used the loan proceeds  
14 to improperly make cash loans to the small businesses and for  
15 their own personal benefit.

16 7. By devising, executing, and participating in the  
17 finance lease scheme, defendant caused lenders to lose thousands  
18 of dollars.

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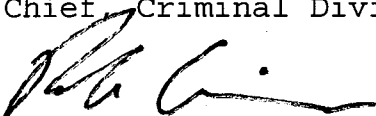
1 III. THE MAILING

2 8. On or about the date listed below, in the Central  
3 District of California, and elsewhere, defendant MCMAHAN, for the  
4 purpose of carrying out the above-described scheme to defraud,  
5 caused the item described below to be deposited with, and  
6 delivered by, the United States Postal Service as well as private  
7 and commercial interstate carriers:

| <u>COUNT</u> | <u>DATE</u> | <u>MAIL MATTER</u>   |
|--------------|-------------|--|
| 1            | 2/1/05      | An Amendment to a Master Lease Agreement was sent by Federal Express to CitiCapital, 1255 Wrights Lane, Westchester, PA, 19380, from A.O.'s place of employment, the Law Offices of Edward Hess Jr. in Tustin, California. |

13  
14  
15 THOMAS P. O'BRIEN  
United States Attorney

16 CHRISTINE C. EWELL  
17 Assistant United States Attorney  
18 Chief, Criminal Division

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20 ROBB C. ADKINS  
Assistant United States Attorney  
21 Chief, Santa Ana Branch Office



ORIGINAL

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| FILED - SOUTHERN DIVISION<br>CLERK, U.S. DISTRICT COURT<br><br>NOV - 7 2007<br><i>dy 4:07</i><br>CENTRAL DISTRICT OF CALIFORNIA<br>BY DEPUTY |
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UNITED STATES DISTRICT COURT  
 FOR THE CENTRAL DISTRICT OF CALIFORNIA  
 SOUTHERN DIVISION

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UNITED STATES OF AMERICA, )  
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 Plaintiff, )  
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 v. )  
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 ADAM S. ZUCKERMAN, )  
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 Defendant. )  
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 )

SA CR 07-SA CR 07 - 00239  
 I N F O R M A T I O N  
 [18 U.S.C. § 1341: Mail Fraud]

The United States Attorney charges:  
 COUNT ONE  
 [18 U.S.C. § 1341]

I. INTRODUCTION

At all times relevant to this Information:

1. Defendant ADAM S. ZUCKERMAN ("defendant") owned and operated Brickbanc Capital ("Brickbanc"), also known as Louiscifer Holdings, Channel Equities, Geneva Roth Holdings, Heat

JLW:jlw  


1 Rock, and Tech Capital Holdings, located in Orange County,  
2 California.

3 II. THE FRAUDULENT SCHEME

4 2. Beginning in or around 2004 and continuing through in  
5 or around 2005, in Orange County, within the Central District of  
6 California, and elsewhere, defendant and others, known and  
7 unknown, knowingly and with the intent to defraud, devised,  
8 executed, and participated in a scheme to defraud and to obtain  
9 money and property by means of materially false and fraudulent  
10 pretenses, representations, and promises, and the non-disclosure  
11 and concealment of material facts, in connection with a  
12 fraudulent equipment lease scheme.

13 3. The fraudulent equipment lease scheme was designed to  
14 operate and did operate, as follows:

15 (a) Defendant owned and operated Brickbanc that had  
16 approximately six to ten employees, including K.M. and B.S. At  
17 the direction of defendant, Brickbanc located small businesses in  
18 Orange County, California, and elsewhere, that required an  
19 infusion of cash to cover their operating expenses, such as rent  
20 payments and payroll. Brickbanc would send blast-faxes or use  
21 other marketing techniques to advertise money loans and working  
22 capital to small businesses.

23 (b) At defendant's direction, Brickbanc communicated  
24 with customers who responded to the ads, and reiterated that  
25 Brickbanc could obtain money loans for them. At defendant's  
26 direction, Brickbanc would tell the customers that they would  
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1 receive money, but would also have to accept some equipment with  
2 which the customers were free to do with it what they wished.

3 (c) Once the small businesses agreed to Brickbanc's  
4 assistance, defendant used false statements and promises to  
5 induce lenders to provide equipment leases to the small  
6 businesses. More precisely, defendant, through Brickbanc, caused  
7 lease applications to be submitted to lenders through vendors  
8 ("Vendors"), which purported to sell equipment, typically,  
9 computers, to businesses. In these lease applications, the  
10 Vendors falsely represented to the lender that the small  
11 businesses needed financing for the purchase of the Vendors'  
12 equipment. To corroborate this claim, the Vendors submitted  
13 false invoices that purported to document the sale of computer  
14 equipment to the small businesses.

15 (d) Before funding the lease, the lenders contacted  
16 the small businesses to confirm that the small businesses, in  
17 fact, had purchased, installed, and were using the equipment  
18 obtained from the Vendors. At defendant's direction, Brickbanc  
19 and the Vendors coached the small businesses to provide false  
20 information to the lenders in response to these questions.

21 (e) Based upon false information, the lenders approved  
22 the applications and forwarded money to the Vendors for the  
23 purported equipment purchases.

24 (f) Rather than using the lease proceeds to purchase  
25 equipment as promised, the Vendors took the money received from  
26 the lending institutions, kept a portion for themselves, caused a  
27 portion of the money to be paid to the lessee as a cash loan, and  
28

1 caused a portion to be paid to Brickbanc, from which defendant  
2 received funds.

3 4. In order to execute the scheme, defendant made and  
4 caused to be made false statements and false promises to  
5 prospective borrowers and lenders, including, without limitation,  
6 the following:

7 (a) Brickbanc assisted small businesses obtain bona  
8 fide cash loans;

9 (b) The Vendors were bona fide equipment vendors that  
10 sold office equipment to businesses and individuals;

11 (c) Brickbanc and the Vendors worked with small  
12 businesses who wished to obtain financing from lenders for the  
13 purchase of equipment;

14 (d) Brickbanc and the Vendors would provide true and  
15 accurate sales invoices to the lenders;

16 (e) Brickbanc and the Vendors would instruct the small  
17 businesses to provide true and correct information to lenders  
18 concerning the purchase, installation, and use of the equipment  
19 allegedly purchased from the Vendors; and

20 (f) Brickbanc and the Vendors would cause the lenders'  
21 funds to be used exclusively for the purchase of the equipment  
22 specified in the sales invoices.

23 5. At the time defendant made the false statements and  
24 false promises, and caused them to be made, he knew that such  
25 statements and promises were false, in that:

26 (a) Brickbanc obtained fraudulent equipment leases,  
27 not bona fide cash loans, for small businesses;

28

1 (b) The Vendors were in the business of fraudulently  
2 depriving lenders of their money, not selling office equipment to  
3 businesses and individuals;

4 (c) Brickbanc worked with small businesses that wished  
5 to obtain cash loans from lenders, not financing for the purchase  
6 of equipment;

7 (d) The Vendors submitted false invoices to the  
8 lenders detailing purported equipment sales that never occurred;

9 (e) At the direction of defendant, the small  
10 businesses were coached to falsely verify to the lenders that the  
11 businesses had purchased, installed, and were using equipment  
12 allegedly acquired from the Vendors; and

13 (f) Defendant and the Vendors used the loan proceeds  
14 to improperly make cash loans to the small businesses and for  
15 their own personal benefit.

16 6. By devising, executing, and participating in the  
17 fraudulent equipment lease scheme, defendant caused lenders to  
18 lose millions of dollars.

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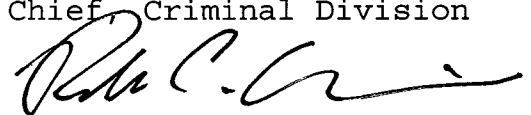
1 III. THE MAILING

2 7. On or about the date listed below, in the Central  
3 District of California, and elsewhere, defendant, for the purpose  
4 of carrying out the above-described scheme to defraud, caused the  
5 item described below to be delivered by a commercial interstate  
6 carrier:

| <u>COUNT</u> | <u>DATE</u> | <u>MAIL MATTER</u>   |
|--------------|-------------|--|
| 1            | 2/1/05      | Amendment to a Master Lease Agreement was Federal Expressed to CitiCapital, 1255 Wrights Lane, Westchester, PA, 19380, from A.O.'s place of employment, the Law Offices of Edward Hess Jr. in Tustin, California |

14 THOMAS P. O'BRIEN  
15 United States Attorney

16 CHRISTINE C. EWELL  
17 Assistant United States Attorney  
18 Chief, Criminal Division

18   
19 ROBB C. ADKINS  
20 Assistant United States Attorney  
21 Chief, Santa Ana Branch Office

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*lodged  
order*

BY \_\_\_\_\_  
CLERK U.S. DISTRICT COURT  
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FILED

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 MEADÉ, GLENN PUTT,  
MICHAEL ROBERTS, and MARK WARNER

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

23 Victim-Interveners.

Case No. SACR 07-249-CJC

**MOTION BY VICTIMS TO  
INTERVENE AND BE HEARD AT  
EVIDENTIARY HEARING AND  
SENTENCING PURSUANT TO 18  
U.S.C. § 3771(d)(3); REQUEST FOR  
CONTINUANCE AND OTHER  
RELIEF; DECLARATIONS OF  
BECKY WALKER JAMES,  
RICHARD KINCAID, AND GLENN  
PUTT; EXHIBITS; [PROPOSED]  
ORDER**

**[MOTION TO BE TAKEN UP  
FORTHWITH, 18 U.S.C. § 3771(d)(3)]**

Evidentiary Hearing Date: Oct. 31, 2011  
Time: 9:00 a.m.

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

1 Victim-Interveners VINCE ANDRICH, DON ASPINAL, SCOTT  
 2 CONNELLY, JEFF CORBETT, CHARLENE EGLAND, JERRY GILBERT,  
 3 RACHEL GREEN, KEITH LEWIS, DARREN MEADE, GLENN PUIT,  
 4 MICHAEL ROBERTS, and MARK WARNER, respectfully move to intervene and  
 5 to assert their rights to be given notice of and an opportunity to be heard in  
 6 connection with the upcoming evidentiary hearing and any subsequent sentencing  
 7 held in the case of *United States v. McMahan* (“*McMahan*”), No. SACR 07-249-  
 8 CJC. Victim-Interveners are the victims of federal offenses committed by  
 9 defendant McMahan and/or co-defendant Adam S. Zuckerman. Victim-Interveners  
 10 further request that the Court continue the October 31, 2011 evidentiary hearing in  
 11 *McMahan* to give them adequate time to present relevant information to the Court,  
 12 that the evidentiary hearing also include Zuckerman, a co-defendant in the related  
 13 case of *United States v. Zuckerman*, No. SACR 07-239-CJC (“*Zuckerman*”), and  
 14 that a copy of the October 21, 2011 under seal filing by the government in  
 15 *McMahan* be disclosed to counsel for Victim-Interveners. Victim-Interveners bring  
 16 this motion pursuant to 18 U.S.C. § 3771(d)(3).

17 I. Victims’ Rights Under the Crime Victims’ Rights Act

18 18 U.S.C. § 3771 gives crime victims certain rights, including the “right to  
 19 reasonable, accurate, and timely notice of any public court proceeding . . . involving  
 20 the crime or of any release or escape of the accused,” the “right not to be excluded  
 21 from any such public court proceeding,” the “right to be reasonably heard at any  
 22 public proceeding in the district court involving release, plea, [or] sentencing,” and  
 23 the “right to be treated with fairness and with respect for the victim’s dignity and  
 24 privacy.” 18 U.S.C. § 3771(a). Section 3771(b) further provides that “[i]n any  
 25 court proceeding involving an offense against a crime victim, the court shall ensure  
 26 that the crime victim is afforded the rights described in subsection (a).” Further,  
 27 subsection (d) provides that “[t]he crime victim or the crime victim’s lawful  
 28 representative . . . may assert the rights described in subsection (a)” and that the



1 “district court shall take up and decide any motion asserting a victim’s right  
2 forthwith.”

3 “Crime victim” for purposes of Section 3771 is defined as “a person directly  
4 and proximately harmed as a result of the commission of a Federal offense or an  
5 offense in the District of Columbia.” 18 U.S.C. § 3771(e). Each of the Victim-  
6 Interveners will provide evidence, if given the opportunity, that he or she has been a  
7 crime victim of defendant McMahan or co-defendant Zuckerman or both. In  
8 particular, the Victim-Interveners will provide evidence that they have been directly  
9 and proximately harmed as a result of the commission by either or both of the  
10 defendants, while on pretrial release in the instant cases, of federal offenses,  
11 including but not limited to securities fraud in violation of 18 U.S.C. § 1348, wire  
12 fraud in violation of 18 U.S.C. § 1343, witness retaliation in violation of 18 U.S.C.  
13 § 1513, threatening communications in violation of 18 U.S.C. § 875, and money  
14 laundering in violation of 18 U.S.C. § 1956. (Declaration of Richard Kincaid ¶ 4.)

15 That the federal offenses are not the offenses for which defendants currently  
16 face sentencing is immaterial. Section 3771(e) expressly provides that a “crime  
17 victim” includes any person harmed by the commission of “a federal offense,” not  
18 “the federal offense.” Moreover, subsection (d)(3) expressly contemplates that no  
19 prosecution may be currently underway for the particular offenses at issue. Thus,  
20 Victim-Interveners have the right to present evidence of the crimes they have  
21 suffered in connection with the upcoming sentencing proceedings as to defendants  
22 McMahan and Zuckerman.

## 23 II. Victim-Interveners Have Relevant Evidence to Present to the Court

24 At a hearing held by this Court on August 29, 2011, after hearing from  
25 Victim-Interveners Darren Meade and Charlene Eglund, this Court found that  
26 evidence that defendant had engaged in criminal conduct since the time of his guilty  
27 plea would be relevant to defendant’s sentencing and ordered an evidentiary  
28

1 hearing on October 31, 2011. (RT 42-62.)<sup>1</sup> Such evidence is indeed highly  
2 relevant to the sentencing of defendant McMahan, and will likewise be relevant to  
3 that of co-defendant Zuckerman. Under 18 U.S.C. § 3553(a), the Court must  
4 consider, among other things, “the history and characteristics of the defendant,” and  
5 the need for the sentence “to afford adequate deterrence to criminal conduct,” and  
6 “to protect the public from further crimes of the defendant.” As the Court  
7 observed, at issue in defendant McMahan’s sentencing is whether he should receive  
8 a downward variance based on his leading a “law-abiding” and “righteous” life (RT  
9 42-44), and to make that determination it is necessary to consider evidence that the  
10 defendant in fact has been committing further crimes (RT 53-55).

11 Accordingly, to consider this relevant evidence, the Court stated that it  
12 “want[ed] an inquiry made into these allegations,” “want[ed] an evidentiary  
13 hearing” at which “we’ll call witnesses” and the Court would “get to the bottom of  
14 it.” (RT 57.) The Court also noted that the “Government is going to call the  
15 relevant witnesses,” and the Court was “hoping there are going to be more  
16 witnesses.” (RT 59.)

17 The court also specifically held that the evidentiary hearing should be a  
18 coordinated proceeding as to both defendants Zuckerman and McMahan. (RT 60-  
19 62.) As the Court explained, because the witnesses had identified conduct by both  
20 Zuckerman and McMahan, “it doesn’t make sense to me to have two separate  
21 evidentiary hearings, especially if they’re going to be involved. I don’t think that’s  
22 fair to the witnesses, that they’ll have to come to two separate hearings.” (RT 62.)

23 Despite the Court’s expressed desire to have a coordinated evidentiary  
24 hearing at which witnesses would be called, the government has indicated it does  
25 not intend to call any witnesses. (Declaration of Becky Walker James ¶ 3.) The  
26 government apparently filed a document with the Court under seal, presumably

27 \_\_\_\_\_  
28 <sup>1</sup> “RT” refers to the Reporter’s Transcript from the August 29, 2011 hearing, a copy of which is  
attached hereto as Exhibit A.

1 addressing this issue, but because that document was filed under seal, neither  
2 Victim-Interveners have been able to review the government's filing, and Victim-  
3 Interveners specifically request that they be given access to that document so they  
4 may respond appropriately. (Declaration of Becky Walker James ¶ 4.) Moreover,  
5 it appears that the evidentiary hearing will proceed only in McMahan's case and  
6 will not include defendant Zuckerman. (Declaration of Becky Walker James ¶ 3.)

7 Victim-Interveners are precisely the witnesses the Court should be hearing  
8 from at the evidentiary hearing. They wish to present relevant evidence regarding  
9 additional crimes committed by defendants McMahan and Zuckerman.  
10 (Declaration of Becky Walker James ¶ 2.) Moreover, there are many more  
11 witnesses with much more evidence than that which was presented at the hearing on  
12 August 29, 2011, and most of these witnesses have not yet been heard from at all.

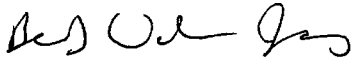
13 Although the government was made aware of a number of these victims  
14 (Declaration of Glenn Puit ¶ 2), most of them have not been interviewed by the  
15 government. Highly experienced private investigators, themselves former FBI  
16 agents, however, have investigated these victims' claims and have concluded they  
17 have relevant evidence of further federal crimes being committed by these  
18 defendants. (Declaration of Richard Kincaid ¶ 4.) Given the large number of  
19 victims and the large amount of material that these investigators have been  
20 reviewing to support these claims, Victim-Interveners require additional time to  
21 prepare for the evidentiary hearing and to compile the admissible evidence the  
22 Court sought regarding whether the defendants have been leading "law-abiding"  
23 lives or whether, to the contrary, they have been engaging in further criminal  
24 conduct. (Declaration of Becky Walker James ¶ 5; Declaration of Richard Kincaid  
25 ¶ 5.) Accordingly, Victim-Interveners request that the evidentiary hearing  
26 scheduled for October 31, 2011, be continued for approximately one month, and be  
27 ordered to include defendant Zuckerman, to give Victim-Interveners the reasonable  
28 opportunity to be heard.

1 III. Conclusion and Relief Requested

2 For the foregoing reasons, Victim-Interveners assert their rights under 18  
3 U.S.C. § 3771(a) and specifically request the following relief:

- 4 (a) that they be given the opportunity to present evidence and appear and  
5 be heard at the evidentiary hearing and any subsequent sentencing  
6 hearing;
- 7 (b) that the evidentiary hearing scheduled for October 31, 2011, be  
8 continued approximately one month, to November 28, 2011, or a date  
9 convenient for the Court;
- 10 (c) that the evidentiary hearing be a coordinated proceeding to include  
11 evidence regarding defendant Zuckerman as well as defendant  
12 McMahan; and
- 13 (d) that the government's under seal filing of October 21, 2011, be  
14 supplied to counsel for Victim-Interveners.

15 Dated: October 26, 2011

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19 Becky Walker James  
20 LAW OFFICES OF BECKY WALKER JAMES

21 *Counsel for Victim-Interveners*  
22 VINCE ANDRICH, DON ASPINAL, SCOTT  
23 CONNELLY, JEFF CORBETT, CHARLENE  
24 EGLAND, JERRY GILBERT, RACHEL GREEN,  
25 KEITH LEWIS, DARREN MEADE, GLENN  
26 PUIT, MICHAEL ROBERTS, and MARK  
27 WARNER  
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DECLARATION OF BECKY WALKER JAMES

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I, Becky Walker James, declare as follows:

1. I am an attorney licensed in California and admitted to practice in the Central District of California. I was recently retained to represent 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. I make this declaration in support of Victim-Interveners Motion to Intervene and Be Heard at Evidentiary Hearing and Sentencing, Request for Continuance and Other Relief.

2. Each of the Victim-Interveners has indicated they wish to be heard in connection with the evidentiary hearing and any subsequent sentencing hearings for defendants McMahan and Zuckerman, for the purpose of presenting evidence that they were the victims of further crimes committed by these defendants.

3. On October 24, 2011, I spoke with Assistant United States Attorney Jennifer Waier and FBI Special Agent Paul Bondurant. I notified them that I represented additional victims who had relevant information and wished to be heard regarding further crimes committed by defendants McMahan and Zuckerman. During my conversation, Ms. Waier stated that the government does not intend to call any witnesses at the evidentiary hearing scheduled for October 31, 2011. She also stated that her understanding is that the hearing will proceed as to defendant McMahan only and will not include defendant Zuckerman.

4. I have reviewed the publicly available dockets for defendant McMahan's and Zuckerman's pending cases. Defendant Zuckerman's docket does not include any reference to the evidentiary hearing on October 31, 2011. Defendant McMahan's docket reflects an under seal filing by the government on October 21, 2011. In my conversation with Ms. Waier on October 24, 2011, she indicated that the under seal filing pertained to information the government had regarding the evidence provided by the witnesses who appeared at the August 29,

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2011 hearing.

5. I am requesting that the hearing scheduled for October 31, 2011, to give the Victim-Interveners adequate time to prepare for and present the relevant information they have to the Court. Because I have only very recently become involved in this case, I require additional time to review documentary evidence and interview witnesses so as to effectively assist the Victim-Interveners present admissible evidence to the Court at the evidentiary hearing.

6. Attached hereto as Exhibit A is a true and correct copy of the Reporter's Transcript from the August 29, 2011 hearing before this Court.

I declare under penalty of perjury that the foregoing is true and correct.  
Executed this 26th day of October 2011 in Los Angeles, California.

  
BECKY WALKER JAMES

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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. During my career I was involved in investigating complex multi-jurisdictional/multi-national investigations in Organized Crime, White Collar Crime, Violent Crime, Public Corruption, Drugs, Gangs, International Terrorism and Money Laundering. I served as the Primary Relief Supervisor and was recognized by the United States Attorney's Office, Central District of California as well as the Los Angeles County Sheriff for investigative efforts in multiple cases of national significance. Prior to joining the FBI, I graduated from the United States Naval Academy in Annapolis, Maryland and served as a Naval Officer at various commands for approximately six years.

2. At Arixmar, I work closely with Anthony Arismendi. Mr. Arismendi had a highly decorated and distinguished career of 20 years in law enforcement. As a Supervisory Special Agent with the Federal Bureau of Investigation (FBI) he was involved in organizing and leading complex task-force investigations of a multi-jurisdictional / multi-national nature. Through the course of his career he investigated White Collar Crime, Organized Crime, Violent Crime, Public Corruption, Drugs, Gangs, Domestic/International Terrorism and Money Laundering. Mr. Arismendi was also a member of the FBI's SWAT Team, participating in high-risk operations. Mr. Arismendi was promoted to the rank of Chief in the FBI's Criminal Investigative Division at FBI Headquarters. In that capacity, he was responsible for the administrative and operational management of national and international matters related to money laundering. He was selected as the Acting Legal Attaché at the U.S. Embassy in Madrid, Spain to serve as an advisor to the U.S. Ambassador and was chosen as the FBI's representative to the

1 Financial Action Task Force (FATF) based in Lyon, France. He is the recipient of  
2 the Hispanic Police Command Officer's Association's (HAPCOA) Medal of  
3 Meritorious Service, the Internal Revenue Service (IRS) Commissioner's Criminal  
4 Investigator's Award and the "Special Act Award" from the Drug Enforcement  
5 Administration (DEA). He was also nominated for the FBI's 2000 Director's  
6 Award for Excellence in investigations.

7 3. Our firm was previously retained by Krane and Smith and more recently  
8 by Becky Walker James to investigate allegations of criminal misconduct by Adam  
9 Stuart Zuckerman and Kirk McMahan. I make this declaration in support of  
10 Victim-Interveners' Motion to Intervene and Appear at Evidentiary Hearing and  
11 Sentencing and Request for Continuance.

12 4. As part of our investigation, I have interviewed numerous witnesses,  
13 reviewed court case files, reviewed hundreds of electronic mail communications  
14 and reviewed hundreds of pages of documents. Our investigation has revealed  
15 substantial evidence that Adam Stuart Zuckerman and Kirk McMahan, at  
16 Zuckerman's direction, have orchestrated and been involved in numerous federal  
17 offenses, including but not limited to violations of Title 18 United States Code,  
18 Section 1348 (Securities Fraud), Title 18, United States Code, Section 1343 (Fraud  
19 by Wire, Radio or Television), Title 18, United States Code, Section 1513  
20 (Retaliating Against a Witness, Victim or an Informant), Title 18, United States  
21 Code, Section 875 (Interstate Communications) and Title 18, United States Code,  
22 Section 1956 (Laundering of Monetary Instruments), since the time of their guilty  
23 pleas in this case. During the course of the investigation we have identified  
24 numerous individuals who were victims of Mr. Zuckerman and Mr. McMahan,  
25 including the Victim-Interveners in this case. A pattern of behavior has been  
26 identified in which Mr. Zuckerman and Mr. McMahan utilized deceptive practices,  
27 engaged in intimidation, readily offered threats of physical harm and propagated  
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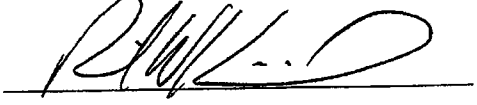
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online defamation. Other convicted felons also participated in the various federal violations.

5. Our investigation is ongoing. To assist the victims in presenting their information to the Court, it would be helpful to continue the evidentiary hearing currently scheduled for October 31, 2011, for approximately one month so that we may gather supporting documentation and develop admissible evidence regarding the criminal conduct suffered by the victims.

6. On or about August 24, 2010, Mr. Arismendi and I met with FBI Special Agent Paul Bonin and provided him with a summary of our findings and with supporting documentation regarding the fraud being perpetrated by Adam Stuart Zuckerman. A copy of that summary is attached hereto as Exhibit B. On or about September 3, 2010, Dr. Scott Connelly, Mr. Arismendi and I met again with FBI Special Agent Paul Bonin and AUSA Robert Keenan and provided an additional summary of our findings and additional supporting documentation regarding the fraud against Dr. Connelly. A copy of that summary is attached hereto as Exhibit C. In total, we provided Agent Bonin with four binders of documentation regarding the frauds. It should be noted that since this information was presented to the FBI over one year ago, a great deal more evidence of criminal conduct has been developed.

I declare under penalty of perjury that the foregoing is true and correct.  
Executed this 25th day of October 2011 in Orange County, California.



RICHARD KINCAID

DECLARATION OF GLENN PUIT

I, Glenn Puit, declare as follows:

1. I am an investigative journalist and for 11 years was the lead criminal justice system reporter for the *Las-Vegas Review Journal*. I was twice voted "Best Print Reporter" in Las Vegas. I am the author of five true-crime books and have made over 30 appearances on national television. I have conducted an investigation to verify allegations of deceptive business activities of Adam Stuart Zuckerman. I make this declaration in support of Victim-Interveners' Motion to Intervene and Be Heard at Evidentiary Hearing and Sentencing in *United States v. McMahan*, No. SACR 07-249-CJC (C.D. Cal.).

2. As part of my investigation, I have interviewed in detail over ten individuals, many of whom are among the Victim-Interveners in this case, who have been victimized by Mr. Zuckerman and/or his associate Mr. McMahan since November 2007. On or about September 22, 2011, I sent a letter to Assistant United States Attorney Jennifer Waier and FBI Special Agent Paul Bondurant describing my interviews and urging them to contact these individuals and myself to investigate Mr. Zuckerman's criminal conduct. A true and correct copy of this letter, redacted to protect the privacy of certain of the victims and to omit my personal contact information, is attached hereto as Exhibit C. I had also previously provided much of the same information to Ms. Waier and Pretrial Services in April 2011. To date, I have not been contacted by Ms. Waier or Agent Bondurant.

3. Within days after submitting the September 22, 2011 letter, I discovered a false and defamatory online post about me.

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

Executed this 25th day of October 2011 in Traverse City, Michigan.


  
\_\_\_\_\_  
GLENN PUIT

EXHIBIT A

SACR 07-00249-CJC - 08/29/2011 - SENTENCING

1 UNITED STATES DISTRICT COURT  
2 CENTRAL DISTRICT OF CALIFORNIA

3 HONORABLE CORMAC J. CARNEY, JUDGE PRESIDING

4 CERTIFIED TRANSCRIPT

5 - - - - -

6 UNITED STATES OF AMERICA, )  
7 Plaintiff(s), )  
8 vs. ) No. SACR 07-00249-CJC  
9 KIRK MCMAHAN, ) SENTENCING  
10 Defendant(s). )  
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15 REPORTER'S TRANSCRIPT OF PROCEEDINGS  
16 SENTENCING

17 SANTA ANA, CALIFORNIA  
18 MONDAY, AUGUST 29, 2011  
19

20 *Maria Beesley-Dellaneve, RPR, CSR 9132*  
21 *Official Federal Reporter*  
22 *Ronald Reagan Federal Building*  
23 *411 W. 4th Street, Room 1-053*  
24 *Santa Ana, CA 92701*  
25 *(714) 564-9259*

SACR 07-00249-CJC - 08/29/2011 - SENTENCING

1 **APPEARANCES OF COUNSEL:**

2 FOR THE PLAINTIFF: ANDRÉ BIROTTE, JR.  
3 UNITED STATES ATTORNEY  
4 BY: JENNIFER WAIER,  
5 ASSISTANT UNITED STATES ATTORNEY  
6 411 W. 4TH STREET, 8TH FLOOR  
7 SANTA ANA, CALIFORNIA 92701

8 FOR THE DEFENDANT: DAVID WIECHERT LAW OFFICE  
9 BY: JESSICA MUNK, AAL  
10 115 AVENIDA MIRAMAR  
11 SAN CLEMENTE, CALIFORNIA 92672  
12 (949) 361-2822  
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**MARIA BEESLEY-DELLANEVE, OFFICIAL REPORTER**

SACR 07-00249-CJC - 08/29/2011 - SENTENCING

1                   **SANTA ANA, CALIFORNIA, MONDAY, AUGUST 29, 2011**

2                   **SENTENCING**

3                   (9:13)

09:13 4                   THE CLERK: Item one, SACR 07-00249-CJC. USA versus  
09:28 5 Kirk McMahan.

09:28 6                   Counsel, please state your appearances for the record.

09:28 7                   MS. WAIER: Good morning, Your Honor. Jennifer Waier on  
09:28 8 behalf of the United States.

09:28 9                   THE COURT: Hello, Ms. Waier.

09:28 10                  MS. MUNK: Good morning, Your Honor. Jessica Munk on  
09:28 11 behalf of Mr. Kirk McMahan, who is present at counsel table to my  
09:28 12 right.

09:28 13                  THE COURT: Hello, Mr. McMahan; and hello, Ms. Munk.

09:28 14                  Okay. We're here for the sentencing of Mr. McMahan. I  
09:28 15 received the presentence investigation report, the government's  
09:28 16 position papers as well as the defendant's position papers.

09:28 17                  Ms. Munk, I just want to confirm at the outset that you  
09:28 18 received the presentence investigation report and went over it  
09:28 19 with Mr. McMahan?

09:28 20                  MS. MUNK: I did, Your Honor.

09:28 21                  THE COURT: Very well. Let me be candid. I'll give you  
09:28 22 my sentencing guideline range calculation, then I'll go over the  
09:28 23 3553 analysis and then tell you some of the issues I'm concerned  
09:29 24 about. I did not have a tentative sentence. I want to hear  
09:29 25 argument and the parties' position.

**MARIA BEESLEY-DELLANEVE, OFFICIAL REPORTER**

SACR 07-00249-CJC - 08/29/2011 - SENTENCING

09:29 1 I calculated the sentencing guideline range at 33 to 41  
09:29 2 months. The way I got there was, first, the offense level I  
09:29 3 calculated at 16, base offense of seven, a loss involving greater  
09:29 4 than \$1 million, less than \$2.5 million. So that's a 16-level  
09:29 5 enhancement. A three-level downward adjustment for acceptance of  
09:29 6 responsibility and a four-level downward adjustment for  
09:29 7 substantial assistance, 5K1.1. If my math is correct, that totals  
09:29 8 16.

09:29 9 Criminal history, I put Mr. McMahan in criminal history  
09:29 10 category four. He had a 1999 DUI conviction assessed one point, a  
09:30 11 2000 unlicensed driver conviction assessed one point, 2003  
09:30 12 possession for sale conviction assessed three points, a 2004 under  
09:30 13 the influence conviction assessed two points. And then two more  
09:30 14 points are added for committing this offense while he was on  
09:30 15 probation for I believe the drug offense. That totals nine  
09:30 16 points. Seven, eight or nine is criminal history category four.

09:30 17 The next step in my analysis is to identify in the  
09:30 18 limited record before me any aggravating or mitigating facts and  
09:30 19 circumstances that are not fully captured in this guideline range  
09:30 20 as well as to think about the very important objectives of  
09:30 21 sentencing.

09:31 22 Mr. McMahan, you may remember these objectives, but just  
09:31 23 so the record is clear let me set forth on the record what they  
09:31 24 are. I have to consider the nature and circumstances of the  
09:31 25 offense, your unique history and personal characteristics. I need

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SACR 07-00249-CJC - 08/29/2011 - SENTENCING

09:31 1 to make sure that any sentence imposed reflects the seriousness of  
09:31 2 the offense, promotes respect for the law and provides just  
09:31 3 punishment.

09:31 4 I need to afford adequate deterrence to criminal  
09:31 5 conduct. I need to protect the public from any further crimes  
09:31 6 that you might commit. I need to provide you with needed  
09:31 7 educational or vocational training, medical care or other  
09:31 8 correctional treatment. I need to avoid unwarranted sentencing  
09:31 9 disparities among people similarly convicted for this type of  
09:31 10 offense, and then I need to provide restitution to any victims of  
09:31 11 the offense if there are any.

09:31 12 My understanding is that there is no issue of  
09:31 13 restitution in this case.

09:31 14 Am I correct, Ms. Waier?

09:31 15 MS. WAIER: Yes, Your Honor.

09:31 16 THE COURT: Okay. So with those factors and with the  
09:32 17 record before me, let me identify the aggravating and mitigating,  
09:32 18 and this will probably be a good segue into some of the issues  
09:32 19 that I'm struggling with.

09:32 20 I don't know if it's fully captured within this  
09:32 21 guideline range, but one of the most troubling things about this  
09:32 22 offense from my perspective is the nature of the offense. It's a  
09:32 23 serious offense in that it was committed at least over a year  
09:32 24 period. There were numerous transactions as part of it. Mr.  
09:32 25 McMahan I believe did play an important role in the offense. In



SACR 07-00249-CJC - 08/29/2011 - SENTENCING

09:32 1 fact, his role was critical to its completion.

09:32 2           The amount of loss I know is taken into account in the  
09:32 3 guideline calculation, but that is a significant amount of loss.  
09:32 4 And we all know from our current economy that the lending and the  
09:33 5 financial markets are critical to our economy, and it's this type  
09:33 6 of conduct that I believe has gotten us into the very unfortunate  
09:33 7 position we're in. So I do think it's a serious offense. I don't  
09:33 8 believe any adjustments to that guideline range are appropriate  
09:33 9 based on his role in it. Even though there might be some people  
09:33 10 who could be given an aggravating role, I don't believe Mr.  
09:33 11 McMahan should receive downward departures.

09:33 12           I do recognize several mitigating factors. First of  
09:33 13 all, it sounded like in the early 2000s, around the 2003, 2004  
09:33 14 time period, right around the time that this offense was committed  
09:34 15 that Mr. McMahan was struggling with a drug addiction problem.  
09:34 16 It's not an excuse, but obviously someone under the influence of  
09:34 17 drugs or alcohol and has a problem with them does stupid things  
09:34 18 and doesn't exercise the best judgment.

09:34 19           And on the flip side of that is my understanding it's  
09:34 20 uncontested in the record that he has been drug-free and alcohol-  
09:34 21 free for several years. And I commend him for that.

09:34 22           None of his criminal history involves violence, which is  
09:34 23 a good thing to see, although I do always get concerned when I see  
09:34 24 a DUI because the fact of the matter is when you get behind a  
09:34 25 vehicle under the influence of drugs or alcohol, you turn that

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09:35 1 vehicle into a killing machine or a deadly weapon. And I have had  
09:35 2 the unfortunate, tragic experience of seeing victims from people  
09:35 3 who are under the influence of alcohol and unfortunately having  
09:35 4 loved ones died because of people who get behind a wheel under the  
09:35 5 influence of alcohol or drugs.

09:35 6 The next mitigating factor -- and I'm struggling to  
09:35 7 characterize it as a mitigating factor, but it's a problem that I  
09:35 8 have in this case and I don't know whether that's reasonable or  
09:35 9 unreasonable, and I'm not here to cast any judgment on whether  
09:35 10 it's reasonable or unreasonable. It is what it is. And that is  
09:35 11 the passage of time. It's been, I think, almost four years since  
09:36 12 Mr. McMahan pled guilty, and over that four-year period of time he  
09:36 13 has provided cooperation. He has been law-abiding. He has been  
09:36 14 drug-free. He has been married. He has been gainfully employed,  
09:36 15 and he's engaged and participated in very noble community service  
09:36 16 such as working with Working Wardrobes which serves at-risk women,  
09:36 17 men and young adults with reentering the work force.

09:36 18 He's worked directly with the Santa Ana Police  
09:36 19 Department to help raise money for the family of fallen police  
09:36 20 officers, and other activities. And you know, I'm struggling  
09:36 21 with, given such a long period of time that has passed, if he was  
09:36 22 spending it cooperating and assisting the government, then isn't  
09:36 23 it worth more than four levels? Because I have this notion that  
09:37 24 justice delayed is justice denied. And without sounding preachy,  
09:37 25 if you have someone who committed a serious crime, you need to as

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09:37 1 efficiently and fairly as possible impose sentence.

09:37 2 I don't particularly like the person that Mr. McMahan,  
09:37 3 was in the 2003, 2004, 2005 period, but I like the person that I  
09:37 4 see now who is before me. And I'm having a problem with imposing  
09:37 5 a significant custodial sentence to someone who, in many respects,  
09:37 6 has redeemed himself. But then on the other hand I'm very  
09:37 7 troubled by his crime that he committed, admittedly a while ago.  
09:38 8 But it's a very serious crime. It's serious money. And we have  
09:38 9 people that steal DVD'S, alcohol, and they're spending 60, 90 days  
09:38 10 in custody for that, across the street. And when I look at this  
09:38 11 fraudulent scheme, not to have custody time is shocking and very  
09:38 12 troubling to me, too.

09:38 13 So that's what I'm struggling with. And I don't know  
09:38 14 how to reconcile these two competing concerns. What I'd like to  
09:38 15 do is hear from Mr. Abrams first unless either side wants to  
09:38 16 present more evidence before we hear argument and comments and  
09:38 17 views.

09:38 18 Ms. Waier, is there any evidence that you would want to  
09:38 19 present?

09:38 20 MS. WAIER: Not evidence, Your Honor, but I do want to  
09:39 21 address just very briefly the factor of the passage of time. This  
09:39 22 defendant was in a position to maybe testify at trial. Not  
09:39 23 everybody did exactly what this defendant did and came in,  
09:39 24 accepted responsibility right away, which is what he did, entered  
09:39 25 into an information and then said hey, I'll cooperate against

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09:39 1 other people.

09:39 2           Some of the defendants decided, you know what? I'm  
09:39 3 going to have to be indicted. When that happened, their defense  
09:39 4 attorneys had to take time to go through a tremendous amount of  
09:39 5 discovery and determine whether or not they were going to go to  
09:39 6 trial.

09:39 7           So unfortunately, Mr. McMahan had to sit back and wait.  
09:39 8 And that's why he only got four levels, because inevitably his  
09:39 9 discovery was handed over and inevitably those defendants decided  
09:39 10 I'm going to go ahead and take the deal. And as you know, we give  
09:39 11 more credit to people that actually get up on the stand and  
09:39 12 testify. So he was holding out hope that that was going to have  
09:39 13 to happen.

09:39 14           It was an unfortunate circumstance outside the control  
09:39 15 of the government and the defendant because those people have  
09:40 16 rights to have a fair trial and competent counsel, and only that  
09:40 17 counsel can be competent enough after they have seen all the  
09:40 18 discovery. So, unfortunately, sometimes the passage of time isn't  
09:40 19 beneficial. However, in this case it is beneficial to the fact  
09:40 20 that the defendant did make useful changes in his life, and I  
09:40 21 think that the Court has pointed that out.

09:40 22           THE COURT: Okay. Ms. Munk, before we get into argument  
09:40 23 and hearing everybody's views, I'm going to give you and Mr.  
09:40 24 McMahan as much time as you want, but is there any evidentiary  
09:40 25 matters you want to present before me?

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09:40 1 MS. MUNK: No, Your Honor.

09:40 2 THE COURT: Okay. Well, then why don't I hear from Mr.  
09:40 3 Abrams first and then I'll turn it over to Ms. Waier.

09:40 4 And then Ms. Munk, I'd like to hear from you and Mr.  
09:40 5 McMahan.

09:41 6 MR. ABRAMS: Thank you, Your Honor. Your Honor, the  
09:41 7 Probation Office assessed this case like we assess every other  
09:41 8 case. That is, we looked at and considered all the information  
09:41 9 that we were aware of concerning the offense as well as Mr.  
09:41 10 McMahan's background. And we tried to identify all the relevant  
09:41 11 sentencing factors under both the guidelines, which we agree with  
09:41 12 the Court in terms of its guideline findings as well as the  
09:41 13 factors under 3553(a). Again, we agree with much of the Court's  
09:41 14 sentencing analysis in that regard as well. And we --

09:41 15 THE COURT: Let me interrupt you, not to be rude or lose  
09:41 16 track, but one thing I don't think I was clear on, Mr. Abrams, in  
09:41 17 the papers there was an argument, and I guess a request that I  
09:41 18 apply a minor role adjustment. And then also, I think it might  
09:42 19 even be undisputed between the parties that there should be a  
09:42 20 departure or variance for overstatement of criminal history.

09:42 21 If you would be kind enough to give your thoughts on  
09:42 22 that. If I wasn't clear, I think I addressed why I didn't think a  
09:42 23 minor role adjustment was appropriate. And although I thought it  
09:42 24 certainly was worthy of consideration under the 3553 analysis, I  
09:42 25 didn't believe it rose to the level of a departure of criminal

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09:42 1 history being overstated in that I do think the DUI offense is  
09:42 2 serious. I thought the narcotics conviction was very serious.  
09:42 3 And then he was also under the influence, and then he committed  
09:42 4 this crime while he was on probation for the drug conviction.

09:42 5 So I didn't feel that although this isn't the most  
09:43 6 severe and troubling criminal history, category four, which is a  
09:43 7 significant criminal history, I didn't feel it rose to the level  
09:43 8 of a departure.

09:43 9 MR. ABRAMS: Well, Your Honor, the Probation Office  
09:43 10 essentially takes the exact same view as the Court just expressed.  
09:43 11 We did file an addendum to the PSR responding to the parties'  
09:43 12 objections. I don't know if the Court received that or not.

09:43 13 THE COURT: No, I didn't.

09:43 14 MR. ABRAMS: That was filed a few days ago. But  
09:43 15 essentially there wasn't any revisions to the report. We were  
09:43 16 just responding to the issue of role and overstatement of criminal  
09:43 17 history. And our response was exactly what the Court stated. Mr.  
09:43 18 McMahan had a -- he was not a bit player in this scheme. He had  
09:43 19 an important role. There were more culpable participants. In our  
09:43 20 view, those were the owners of the leasing companies who actually  
09:43 21 owned and controlled the leasing companies themselves. And there  
09:43 22 were less culpable participants. Again, in our view, the lessees  
09:44 23 who operated small businesses and went to Mr. McMahan and others  
09:44 24 to obtain these loans.

09:44 25 So we viewed Mr. McMahan essentially as an average

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09:44 1 participant where there was no downward or upward adjustment  
09:44 2 warranted. And in my view that treats him pretty beneficially  
09:44 3 because he did have a very important role in this offense.

09:44 4 With respect to the criminal history issue, again, he  
09:44 5 doesn't have the most serious criminal history that we have ever  
09:44 6 seen obviously, but it is a serious criminal history for the  
09:44 7 reasons the Court stated. And he was very nearly in criminal  
09:44 8 history category five. And considering the totality of his  
09:44 9 criminal history, we felt that four, again, treated him fairly and  
09:44 10 we didn't think a further departure was warranted based on the  
09:44 11 plain language of the guidelines.

09:44 12 THE COURT: I apologize. I did interrupt you. I just  
09:45 13 thought that for purposes of the guideline analysis I wanted to  
09:45 14 get your feedback on it.

09:45 15 MR. ABRAMS: Absolutely. So again, we agree with the  
09:45 16 Court where the Court came out on the guideline calculations, in  
09:45 17 terms of where the advisory sentencing range is.

09:45 18 So again, after trying to identify all the relevant  
09:45 19 sentencing factors, we do our best to apply those factors and  
09:45 20 submit a sentencing recommendation to the Court that we think is  
09:45 21 the most appropriate sentence in the case. In this particular  
09:45 22 case we did identify some mitigating factors that weren't fully  
09:45 23 accounted for within the guideline range. Particularly Mr.  
09:45 24 McMahan's education, his employment history. The issue the Court  
09:45 25 talked about, his past drug addiction and recovery from that, and

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09:45 1 his post-offense rehabilitation as well as his family  
09:45 2 circumstances. We saw all those issues as important and  
09:45 3 mitigating, and we did recommend a downward variance from the  
09:46 4 guideline range which I believe amounted to about two levels.

09:46 5 THE COURT: I think it was about nine months, wasn't it?

09:46 6 MR. ABRAMS: I think so. It went from the low end of 51  
09:46 7 to a 42-month recommendation. But in terms of the sentencing  
09:46 8 table that's essentially a two-level downward variance.

09:46 9 As the Court knows, the one factor, the sole factor that  
09:46 10 we do not consider taking into account at all is a defendant's  
09:46 11 cooperation. It's our view that it's up to the government and  
09:46 12 ultimately the Court to decide how much a defendant's cooperation  
09:46 13 is worth in terms of sentencing reduction.

09:46 14 THE COURT: The guidelines say, don't they, though, Mr.  
09:46 15 Abrams, that I have to give substantial deference to the  
09:46 16 government because really, in fact, they have all the key relevant  
09:46 17 information?

09:46 18 MR. ABRAMS: Correct? I think that makes sense. Again,  
09:46 19 we're really not in a position to weigh in very much on this, I  
09:46 20 mean, other than we believe Mr. McMahan deserves the full benefit  
09:47 21 of his cooperation obviously. But in terms of whether that  
09:47 22 cooperation occurred over three months, or in this case apparently  
09:47 23 four years, we don't take a position on whether he is entitled to  
09:47 24 more or less than the government has recommended. Presumably the  
09:47 25 government has taken into account all aspects of his cooperation



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09:47 1 in making their motion.

09:47 2 So giving him the full benefit of the government's  
09:47 3 motion and our independent analysis of variance in this case, I  
09:47 4 think we end up at a guideline range low end of 27 months. And to  
09:47 5 me that accounts for all the mitigating factors in this case and  
09:47 6 would be the appropriate sentence.

09:47 7 THE COURT: 27. Let's see --

09:47 8 MR. ABRAMS: If you apply the 5K1 and the two-level  
09:47 9 variance that we previously recommended.

09:47 10 THE COURT: Okay. So instead of nine months, it would  
09:47 11 be two levels.

09:48 12 MR. ABRAMS: Yeah, we were one month short of a  
09:48 13 two-level variance.

09:48 14 THE COURT: 16.

09:48 15 MS. WAIER: I think the government's recommendation  
09:48 16 actually takes into account the nine-month variance. I think when  
09:48 17 you do that, you get to a 24-month, 24 to 30-month imprisonment.  
09:48 18 But I can address that.

09:48 19 MR. ABRAMS: I believe that includes the downward  
09:48 20 adjustment and criminal history; correct?

09:48 21 MS. WAIER: No, I was able to do it as a variance and  
09:48 22 come back to the same calculation as you.

09:48 23 MR. ABRAMS: Okay. Well, whether we are 22, 23, 24 or  
09:48 24 27 months, it seems to me that is where the sentence should lie,  
09:48 25 somewhere in that range.

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09:48 1 THE COURT: Obviously in what you are saying you agree  
09:48 2 with my view that this offense is so serious that it's hard to get  
09:48 3 to a position where no custody time is appropriate, I assume.

09:49 4 MR. ABRAMS: I absolutely agree with that. Again, the  
09:49 5 issue here is Mr. McMahan's cooperation, how the Court is going to  
09:49 6 address that. But it seems like under any circumstance, that a  
09:49 7 noncustodial sentence in this case, regardless of what the Court  
09:49 8 believes he should receive in terms of cooperation, there still  
09:49 9 are broader sentencing objectives that the Court has to be mindful  
09:49 10 of, of course.

09:49 11 And in terms of reflecting the seriousness of the  
09:49 12 offense, punishment, deterrence, all the other objectives that the  
09:49 13 Court has already gone over, any lesser of a sentence than I  
09:49 14 believe of 24 months, but certainly a noncustodial sentence would  
09:49 15 completely fail to achieve any of those objectives as well as  
09:49 16 raise the issue of sentencing disparity. There are a lot of  
09:49 17 similarly charged codefendants that have yet to be sentenced that  
09:49 18 are very unlikely to receive that type of sentencing reduction.

09:50 19 But again, there is a lot of other factors that need to  
09:50 20 be taken into account that a noncustodial sentence would  
09:50 21 essentially ignore.

09:50 22 THE COURT: I hear you. So I'm not disagreeing, but do  
09:50 23 you share my concern that he has been out of custody now for over  
09:50 24 four years; right? And it's hard now, okay, to let's put him back  
09:50 25 in custody for a significant period of time after that long

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09:50 1 passage of time. We're not talking about a year. We're not  
09:50 2 talking about two years. We're talking about four years. That's  
09:50 3 a long time to be out. And he's now changed all -- as I can see,  
09:50 4 he has really changed his life, Mr. Abrams.

09:50 5 So I hear what you are saying, but it's supposedly just  
09:50 6 punishment. How can it be -- how do you reconcile that this is  
09:51 7 just punishment putting him in for over two years when he has been  
09:51 8 law-abiding and living a very noble life for so long?

09:51 9 UNIDENTIFIED SPEAKER: I need to say something.

09:51 10 THE COURT: No, ma'am. You don't need to say something  
09:51 11 until I ask you to say something, okay?

09:51 12 MR. ABRAMS: Your Honor, I hear the words that the Court  
09:51 13 is saying, and it certainly is a valid point on a certain level,  
09:51 14 but in my own mind the way I reconcile it is I look at the  
09:51 15 offense, I look at the sentencing laws, including the guidelines  
09:51 16 and 3553(a) and everything else that's been considered, including  
09:51 17 the government's motion for downward adjustment, our  
09:51 18 recommendation for a downward variance, which includes the fact  
09:51 19 that he has been out and has rehabilitated himself, but I think  
09:51 20 there is only so much weight the Court can give to those types of  
09:52 21 factors when it also has to balance the offense and the objectives  
09:52 22 of sentencing.

09:52 23 It's unfortunate in a lot of respects, but I don't know  
09:52 24 what the answer is other than being fair and objective and  
09:52 25 imposing a sentence that takes into account those mitigating

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09:52 1 factors, but also serves the objectives of sentencing. And I  
09:52 2 don't know there is any way around it, in my view anyway.

09:52 3 THE COURT: Okay. I'm going to take a break, Michelle.  
09:52 4 I'd like CSOs here or marshals.

09:52 5 And Ms. Waier, I'd like you to be kind enough to talk to  
09:52 6 any folks in the audience. If there is something that they want  
09:52 7 to say, I have no problem with them presenting their views,  
09:52 8 especially if they're victims, absolutely. But it is a court of  
09:52 9 law and we do things certain ways, and I don't want to have this  
10:05 10 kangaroo court where I'm dealing with the peanut gallery, okay?

10:05 11 MS. WAIER: Yes, Your Honor.

10:06 12 (Recess taken from 9:52 to 10:06.)

10:06 13 THE COURT: Okay. Ms. Waier, as I understand it, some  
10:06 14 of the folks in the audience want to be heard and I think that's  
10:06 15 where we should start first. And then I'll hear positions of  
10:06 16 counsel.

10:06 17 MS. WAIER: To be very clear to the Court, as you know,  
10:06 18 in this case the conduct affected banks and banks are the victims  
10:06 19 in this case. It's the government's understanding that the people  
10:06 20 that want to speak have nothing to do with the underlying case,  
10:06 21 are not victims in the case, and under the Victims For All Act do  
10:06 22 not have a right to speak unless the Court thinks otherwise in  
10:06 23 terms of this particular case.

10:06 24 THE COURT: Well, it's hard for me to make a meaningful  
10:07 25 informed decision on whether they have a right to speak unless I

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10:07 1 know what they're going to say or what is their involvement. So  
10:07 2 why don't I hear from them. As I understand there are only two  
10:07 3 people.

10:07 4 MS. WAIER: Yes. And they also have been told to keep  
10:07 5 the outbursts down and they apologize for any disrespectful  
10:07 6 behavior that they may have shown to you before.

10:07 7 THE COURT: Apology is accepted. It's just as you can  
10:07 8 imagine, if I have a proceeding where people in the audience are  
10:07 9 running it and interrupting, then you really can't I think  
10:07 10 administer justice, quite frankly.

10:07 11 With that said, I think it's important that everybody  
10:07 12 who has relevant information to bear on the sentence for this  
10:07 13 individual be heard and I want to consider it. I take this job  
10:08 14 very, very seriously. I have many duties. One of the most  
10:08 15 humbling duties that I have is imposing sentences on people, and  
10:08 16 if you could just think about that for a moment, I have to  
10:08 17 determine if someone is going to go to prison for several years,  
10:08 18 for life. On occasion I have to determine whether the government,  
10:08 19 the people can take the person's life. And I have had to do that.  
10:08 20 And I don't relish that. I don't enjoy that. But I have to do  
10:08 21 what I have to do.

10:08 22 That's a long-winded way of saying is maybe no one can  
10:08 23 appreciate your frustration, your anger unless you were the person  
10:08 24 who went through that. I respect that. But at the same time I  
10:08 25 have a very important job to do for the system, and I can't do it

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10:09 1 unless it's presented to me in an orderly, as best we can, calm  
10:09 2 manner.

10:09 3 So with that, who is going to speak to me first?

10:09 4 MS. EAGLIN: Yes, my name is Charlene Eaglin. And I'm  
10:09 5 not affiliated so much with McMahan, but I had went to a seminar  
10:09 6 back in 2006, Business Credit Services, and some people that are  
10:09 7 affiliated with him were at the seminar. They took our -- they  
10:09 8 stole the list with our names on it, and in 2008 I received a call  
10:09 9 from a Mark Kukla indicating that he was with X-Banker. X-Banker  
10:10 10 was at the seminar. And when they called me, I assumed that they  
10:10 11 were still together, you know, because I saw them at the seminar.

10:10 12 So he signed me up for a program to get me a credit,  
10:10 13 tier two credit. I had already established credit with Business  
10:10 14 Credit Services for tier one where I had business credit cards,  
10:10 15 but I was trying to move to tier two because I was trying to form  
10:10 16 a youth program for my community because of all the drugs and the  
10:10 17 gang violence and everything.

10:10 18 So I utilized all my money, took all of my time from  
10:10 19 2003 up until 2008 when I was supposed to get all these  
10:10 20 supposed-to-be loans from this thing that they had me sign up for  
10:10 21 with X-banker. And it was all fraud.

10:10 22 Going into the seventh month I was supposed to have  
10:10 23 credit like from \$50,000 to \$100,000 in credit to get my business  
10:11 24 going. However, when the seventh month came, there was no money.  
10:11 25 And when I called to find out what was going on, they put me in

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10:11 1 another program and told me they had made a mistake and put me in  
10:11 2 tier one program when I should have been in tier two.

10:11 3 So I had a coach and everything, and the coach indicated  
10:11 4 that without a good personal credit, you wouldn't ever get  
10:11 5 anything in this program. So I called X-banker and I talked to  
10:11 6 someone called Miriam Zuckerman. And Miriam explained to me they  
10:11 7 had another program. They put me in it. I signed up for it and  
10:11 8 she told me I would get all this credit all this money and stuff,  
10:11 9 and I haven't gotten anything.

10:11 10 However, going back to X-Banker, apparently there is a  
10:11 11 guy named Ryan Page that worked for Business Credit Services. He  
10:11 12 stole the list from Business Credit Services and gave it to these  
10:11 13 people, the X-Banker, and they had me under the assumption that  
10:12 14 they were still with Business Credit Services; however, they  
10:12 15 weren't.

10:12 16 They were going around taking people's names off the  
10:12 17 list getting them in this program. They took \$107 out of my  
10:12 18 account every since 2008. I stopped that in February of this year  
10:12 19 when I started following the case on here. When I put in the  
10:12 20 computer "Miriam Zuckerman," all kinds of stuff came up and that's  
10:12 21 how I came up with his name. X-Banker, Shared Success, all of  
10:12 22 these people are all hooked up together and they just keep  
10:12 23 scamming, scamming, scamming people and nobody is getting  
10:12 24 anything.

10:12 25 If you go on BBB, you'll see all of them on there where

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10:12 1 people have complained where they're taking their money. I had to  
10:12 2 stop -- I had to close my checking account for these people not to  
10:12 3 take \$107.40 out. I owed them \$6000. That was the only  
10:13 4 agreement. \$6000. I put \$3000 down. And when I put the \$3000  
10:13 5 down, the payments were going to be \$107.40. The seventh month  
10:13 6 they told me I would have all this money and I could pay the \$6000  
10:13 7 back and I'll be stabilized where I could use the other money to  
10:13 8 get my program going. None of that happened. So I paid \$107.40  
10:13 9 from March of 2008 until February of 2011 and I'm still nothing.

10:13 10 THE COURT: How much total have you lost, ma'am?

10:13 11 MS. EAGLIN: \$3995.45. \$3,995.45.

10:13 12 THE COURT: And I heard Ryan Page, Miriam Zuckerman.  
10:13 13 You indicated an individual at the outset.

10:13 14 MS. EAGLIN: Ryan Page. He was the one that worked with  
10:13 15 BCS, and my understanding is that they fired him. And before he  
10:14 16 left BCS, he stole the list of everybody that went to that seminar  
10:14 17 and then they started calling people conning them into this  
10:14 18 program telling them they could get them all this money, and we  
10:14 19 haven't gotten anything. And they're still taking \$107.40 out.  
10:14 20 That's why I closed my account, because the bank wouldn't stop the  
10:14 21 payments because I had signed like an agreement.

10:14 22 So I even went in January and I wrote my bank and told  
10:14 23 them about this. They got me two of my payments back. They got  
10:14 24 my December payment and January payment back for me, but then they  
10:14 25 sent me a letter and said they couldn't get anymore back because



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10:14 1 it could be some kind of conflict of interest or something because  
10:14 2 they had something to do with -- they were affiliated with  
10:14 3 whatever banks they were dealing with. So they couldn't get no  
10:14 4 more of my money back.

10:14 5 So I ended up following this case with him coming to  
10:14 6 court. And I wanted to come to let everybody know that he's been  
10:14 7 very busy. You guys are giving him all this credit, but he's  
10:15 8 ruined me. I have nothing. I'm about ready to file bankrupt, you  
10:15 9 know. I'm just so frustrated.

10:15 10 THE COURT: I appreciate that. Let me ask you a few  
10:15 11 questions, though. I thought you indicated there was another  
10:15 12 individual besides Mr. Page and Ms. Zuckerman at the beginning  
10:15 13 affiliated with X-Banker, the original.

10:15 14 MS. EAGLIN: Mark Kukla.

10:15 15 THE COURT: And he was one of the speakers at this  
10:15 16 program?

10:15 17 MS. EAGLIN: I don't think his name was Mark Kukla. I  
10:15 18 think it was actually this guy here that called me. I'm not sure,  
10:15 19 but that's my opinion.

10:15 20 THE COURT: That was going to be my next question. Is  
10:15 21 there any information that you have that --

10:15 22 MS. EAGLIN: I sent you some papers. I sent a letter to  
10:15 23 you.

10:15 24 THE COURT: Involving Mr. McMahan?

10:15 25 MS. EAGLIN: Involving this whole incident.

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10:15 1 THE COURT: Well, my question is more precise. What  
10:15 2 information do you have to suggest Mr. McMahan was one of the  
10:16 3 individuals?

10:16 4 MS. EAGLIN: He controlled X banker. He was the head  
10:16 5 man for X-Banker. He had all these little people doing all this  
10:16 6 stuff on the side so he wouldn't be involved, but he was involved.  
10:16 7 He was the head person of X-Banker.

10:16 8 THE COURT: And it's a general question. How do you  
10:16 9 know he was the major player in X-Banker?

10:16 10 MS. EAGLIN: That's what I read on the internet.

10:16 11 THE COURT: The internet of X-Banker?

10:16 12 MS. EAGLIN: When I first started with them back in  
10:16 13 2008.

10:16 14 THE COURT: Okay.

10:16 15 MS. EAGLIN: But when the guy called me, Mark Kukla, he  
10:16 16 told me he was the X-Banker. I didn't know anything about  
10:16 17 McMahan. I just read all of that after -- I been doing a lot of  
10:16 18 research on this, and that's how I came up with Miriam and all of  
10:16 19 this. When I put Miriam in there, that's when her son came up.  
10:17 20 When I Googled him, things were popping all out the wall about  
10:17 21 him.

10:17 22 They're all hooked up together. Shared Success,  
10:17 23 something Concepts. All of them are hooked up together. And I  
10:17 24 was so shocked the other day to know that all of these people that  
10:17 25 were in all of these, the X-Banker, Shared Success, all of them

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10:17 1 were located in one location on Airport Loop Drive. All of them  
10:17 2 were right there in one little -- they can touch each other, they  
10:17 3 were right there. It's all a scam. All of them in there, a scam.  
10:17 4 Then they moved. They moved. The early part of this year they  
10:17 5 changed their address to another address in Orange County. But  
10:17 6 then that came off of BBB. I have been doing a lot of research on  
10:17 7 this.

10:17 8 All of them are hooked up together. They're all scams.  
10:17 9 They call people and get them all hooked up into something. Take  
10:17 10 everybody's money and they go and open up another something else.  
10:18 11 It's gotta stop. It's gotta stop because he's going to keep on  
10:18 12 and on and on. And I don't want to be hurt. I don't want nobody  
10:18 13 to threaten me or -- cause I have already made police reports. If  
10:18 14 something happened to me, they already know where to turn. You  
10:18 15 don't have to investigate. They already know where to look.

10:18 16 But I had to say something. I didn't mean to come out  
10:18 17 loud, but I wanted you guys to know that I was here and I didn't  
10:18 18 know how to do it. So I just want -- all I want is my money back.  
10:18 19 And I just want maybe some of the other people can get their money  
10:18 20 back too, because these people are getting rich over people. They  
10:18 21 do it to people that can't -- I can't afford a judge -- I mean a  
10:18 22 lawyer. I can't afford a lawyer. So they do it to people that  
10:18 23 they know don't have money to get a lawyer. That's why I followed  
10:18 24 this case. I came a long ways to come here to this courtroom.

10:18 25 THE COURT: Well, thank you for coming.

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10:18 1

MS. EAGLIN: Okay.

10:18 2

THE COURT: I appreciate it.

10:18 3

MS. EAGLIN: Thank you, sir.

10:19 4

MR. MEADE: I was the chief executive officer of a

10:19 5

company called Progenex.

10:19 6

THE COURT: Could I have your name?

10:19 7

MR. MEADE: My name is Darren Meade.

10:19 8

When I went to work at Progenex, Mr. McMahan was using

10:19 9

an alias, McMahan. There was also another codefendant, Adam

10:19 10

Zuckerman using an alias called Adam Stewart. They have set up a

10:19 11

total of two new criminal enterprises. One is the X-Banker that

10:19 12

Ms. Eaglin was talking about. If you go into the Better Business

10:19 13

Bureau website in L.A. you'll see that Kirk was the manager for

10:19 14

this entity.

10:19 15

They also have just set up a new Reputation Management

10:19 16

Company. What they're planning to do --

10:20 17

THE COURT: When you say "they," who is "they"?

10:20 18

MR. MEADE: Adam Zuckerman, Paul Arnold, Kirk McMahan,

10:20 19

Ryan Page, Cameron Verde, who's one of the other people.

10:20 20

What they're doing is they're going to re-victimize all

10:20 21

the people from X-Banker. They're going to destroy their

10:20 22

reputations, then call from the Reputation Management Company,

10:20 23

offer for \$995 to fix the problem and then put them into a monthly

10:20 24

maintenance fee that they call ransom fees.

10:20 25

If the person ever misses the monthly maintenance fee,

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10:20 1 the defamation goes up times five.

10:20 2 THE COURT: I didn't follow you on that.

10:20 3 MR. MEADE: Initially what they'll do is they're going  
10:20 4 to destroy your personal reputation and your business reputation.

10:20 5 THE COURT: Because of credit?

10:20 6 MR. MEADE: They're going to do it to create customers  
10:21 7 for the Reputation Management Company.

10:21 8 I have about 12 hours of consensual audio recordings of  
10:21 9 this all planned out with Mr. McMahan, Mr. Zuckerman. I have been  
10:21 10 trying to give it to Jennifer Waier, Pretrial Services. So I  
10:21 11 don't know who to present it to. I asked Ms. Waier today. I said  
10:21 12 I have a thumb drive, I have documents, and she said she doesn't  
10:21 13 take evidence.

10:21 14 I had a death threat made against me at my home that if  
10:21 15 I came here, testified, brought any of this information up, I'd be  
10:21 16 killed.

10:21 17 THE COURT: Tell me about that death threat.

10:21 18 MR. MEADE: Well, there is a first one, which I have on  
10:21 19 audio recording, which is if I ever became a problem to them, that  
10:21 20 they were going to take a gun with a .50 caliber bullet to explode  
10:21 21 my brain, but they didn't want to kill me initially because they  
10:22 22 didn't know if I would wind up going to the courts and to the  
10:22 23 authorities with the information that I had.

10:22 24 THE COURT: Who left that? Was it a male voice. You  
10:22 25 said it was a...

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10:22 1 MR. MEADE: Well, the planning of it was Adam Zuckerman.

10:22 2 THE COURT: How do you know that?

10:22 3 MR. MEADE: Because I have it on tape.

10:22 4 THE COURT: It's his voice?

10:22 5 MR. MEADE: Yes.

10:22 6 MS. WAIER: Your Honor, it's the government's

10:22 7 understanding that the San Clemente Police Department is

10:22 8 investigating this. I don't know if you want him to discuss stuff

10:22 9 that may impact a criminal investigation.

10:22 10 MR. MEADE: I don't have a problem stating anything

10:22 11 because I have -- I've been confused because I have gone to

10:22 12 Pretrial Services, the AUSA, nobody will come get the information

10:22 13 that I have had. And as I mentioned, I have documents, tapes, and

10:22 14 they're continuing to set up criminal enterprises and they're all

10:23 15 utilizing aliases.

10:23 16 MS. MUNK: Your Honor, it appears that somehow Mr.

10:23 17 McMahan is being lumped in with other people here, and I just

10:23 18 think we're here for his sentencing and people keep talking about

10:23 19 Adam Zuckerman and other people involved that don't have to do

10:23 20 with Mr. McMahan. I'm just concerned that the Court is somehow

10:23 21 going to be -- accusations from people who showed up who have

10:23 22 either been ripped off by other people or, you know, it's my

10:23 23 understanding he used to work at Progenex like he said, and

10:23 24 apparently is no longer there. There's some civil lawsuit going

10:23 25 on, is clearly upset about that.

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10:23 1           Again, this has nothing to do with Mr. McMahan and the  
10:23 2           sentencing, so I would ask the Court that the Court not consider  
10:23 3           this and we could move on with the sentencing, Your Honor.

10:23 4           MR. MEADE: Is it possible for you to review the Better  
10:23 5           Business Bureau and go look at it right now and see that Kirk  
10:23 6           McMahan was the manager?

10:24 7           THE COURT: Well, that's one of the problems is we need  
10:24 8           to do this in an orderly fashion. Let me give you some comments  
10:24 9           off the top of my head, which maybe is not a good thing, but I  
10:24 10          respectfully disagree with Ms. Waier and Ms. Munk that I shouldn't  
10:24 11          be hearing this.

10:24 12          I have a very humbling task of determining what the  
10:24 13          appropriate sentence is. What I'm hearing, maybe we're hearing  
10:24 14          different things, but what I'm hearing is that Mr. McMahan is  
10:24 15          involved in this. This is not something that he is just getting  
10:24 16          thrown in with.

10:24 17          Now, it might not be true. I'm not saying that. But to  
10:24 18          say that it has no relevance and that I shouldn't be considering  
10:24 19          this for the appropriate sentence when we have gone over what the  
10:25 20          objectives of sentencing are is to deter criminal conduct, to  
10:25 21          protect the public, this certainly is relevant.

10:25 22          It is not, I will agree with counsel, it is not at this  
10:25 23          point in an admissible or reliable format. And please, I don't  
10:25 24          want any of these victims to feel that that's a disparagement.  
10:25 25          You need to understand for me to be relying on anything you are

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10:25 1 telling me it has to be, I don't want to say in strict conformity  
10:25 2 with the evidence code, but it has got to be presented in a way  
10:25 3 where it's just not hearsay.

10:25 4 One of the great things about our country is we don't  
10:25 5 rely on hearsay because anybody can say oh, I heard this person  
10:25 6 said A, B or C. Well, if that person said A, B or C, let's get  
10:26 7 that person here under oath subject to cross-examination. That's  
10:26 8 a fair way to do it. That's what makes our country great. That  
10:26 9 goes back to the founding of this country.

10:26 10 The founders realized what was happening in England,  
10:26 11 that people were being tortured into giving confessions or  
10:26 12 indicting their neighbors, and they said we want a fair process  
10:26 13 where your accuser is subject to cross-examination and brings the  
10:26 14 evidence.

10:26 15 Again, Mr. Meade, I'm interested in what you have to  
10:26 16 say. But at this point it is not in a format or presented in a  
10:26 17 way that I can use it to impact the sentence of Mr. McMahan. That  
10:26 18 just wouldn't be fair.

10:26 19 And I'm not trying to give you a history lesson and I'm  
10:27 20 not trying to, please, think that I'm talking down to you, but we  
10:27 21 have in this country the separation of powers. All right? And  
10:27 22 it's not my job and, in fact, I can get in trouble for violating  
10:27 23 my duties if I start playing prosecutor. I cannot be the  
10:27 24 prosecutor. I cannot be the one who gathers the evidence, hears  
10:27 25 the subpoena, issues the subpoenas. I'm supposed to be the

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10:27 1 impartial referee or judge, and then in certain circumstances be  
10:27 2 the decision-maker on who wins, who loses.

10:27 3 But I do not have the authority to, okay, I'm going to  
10:27 4 start getting this evidence here. I'm going to start evaluating  
10:27 5 this evidence. I'm going to start asking you questions and cross-  
10:28 6 examining you. I'm doing her job. I can't do her job.

10:28 7 MR. MEADE: I understand. Are you allowed to let me  
10:28 8 know -- I have gone to Teresa Loza, supervisor of Pretrial  
10:28 9 Services. She told me that they can put information into the  
10:28 10 file, but it's up to the AUSA to decide what you are going to see.

10:28 11 I have been trying to get this information to the AUSA.  
10:28 12 I have offered it to the FBI for six months. And the threats  
10:28 13 against me have escalated, and I'm just trying to get it in the  
10:28 14 hands of somebody who can determine that.

10:28 15 THE COURT: Well, what I can do is I can legitimately  
10:28 16 and appropriately question Ms. Waier, what about this. And I  
10:28 17 will. But I'd like to get a better sense of what information you  
10:28 18 have and particularly, so the record is clear, this relates to Mr.  
10:29 19 McMahan; right?

10:29 20 MR. MEADE: Correct.

10:29 21 THE COURT: I realize that there is a connection between  
10:29 22 Mr. Zuckerman and Mr. McMahan. And so if your dealings are with  
10:29 23 Mr. Zuckerman, let me know that. If they're with both  
10:29 24 Mr. Zuckerman and Mr. McMahan, let me know that. If they're just  
10:29 25 with Mr. Zuckerman, let me know that so I can then have at least

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10:29 1 an informed basis to ask meaningful questions to counsel.

10:29 2 MR. MEADE: Yes. It was with both Mr. McMahan,  
10:29 3 Mr. Zuckerman, Mr. Arnold was also there. It was in Costa Mesa at  
10:29 4 the Progenex office of which I was the CEO. At the time that I  
10:29 5 met both Mr. Zuckerman and Mr. McMahan, they were utilizing an  
10:29 6 alias. They were winding down this X-Banker enterprise and  
10:30 7 getting ready to start up a new company.

10:30 8 THE COURT: And when was this?

10:30 9 MR. MEADE: I became the CEO in July of 2010. I  
10:30 10 resigned on February 27.

10:30 11 THE COURT: And so when was this meeting, though?

10:30 12 MR. MEADE: We worked daily at the offices together.

10:30 13 THE COURT: So you worked daily with them?

10:30 14 MR. MEADE: Correct.

10:30 15 THE COURT: Okay. Continue.

10:30 16 MR. MEADE: The X-Banker at the time, they were worried  
10:30 17 that they were starting to get too many complaints. So they  
10:30 18 wanted to wind that company down so it wouldn't impact the  
10:30 19 sentencing of Mr. McMahan or Mr. Zuckerman.

10:30 20 THE COURT: Okay.

10:30 21 MR. MEADE: Then there were discussions of a Reputation  
10:30 22 Management Company that was going to come up. And as I was  
10:30 23 mentioning, what that company was going to do was take the  
10:31 24 X-Banker customer list, destroy all those people's reputation and  
10:31 25 then this new company that they had would call these people and

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10:31 1 say, we realize that you are destroyed on the internet. For \$995  
10:31 2 we'll remove it and you should pay our monthly maintenance fee.

10:31 3 The only reason the maintenance fee is important is that  
10:31 4 was going to be an installment contract and they would be able to  
10:31 5 step back and say that they don't own that paper anymore. They  
10:31 6 sold it to a finance company. So it was to give them some  
10:31 7 shielding in between.

10:31 8 THE COURT: Okay. Tell me how you have been hurt by  
10:31 9 what they have done.

10:31 10 MR. MEADE: I personally have had my reputation  
10:31 11 destroyed. I had a triple dissection of my aorta in 2008, so I'm  
10:31 12 not supposed to be in any stressful situations. Death threats.  
10:32 13 Speaking to victims on a daily basis from X-Banker and other  
10:32 14 people that have been harmed by Mr. McMahan and Mr. Zuckerman,  
10:32 15 it's a lot of stress. And just trying to figure out this system  
10:32 16 of how to give these audio recordings and documents so they can be  
10:32 17 considered evidence for.

10:32 18 And I just wanted to come here today primarily because I  
10:32 19 was listening to how reformed Mr. McMahan is. Well, he's still  
10:32 20 working and defrauding people and they have a new reputation  
10:32 21 company that's up. And if you look at the Better Business Bureau,  
10:32 22 you see the F rating. So he hasn't changed at all. He worked  
10:32 23 daily with three other convicted felons out of that building. And  
10:32 24 I notified Pretrial Services about that.

10:32 25 Now, one of those convicts was remanded to Nevada High

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10:32 1 Desert Prison, but Pretrial Services here didn't think it was a  
10:33 2 big deal for the convicted felons to be working together.

10:33 3 THE COURT: Thank you for coming.

10:33 4 All right. Ms. Waier?

10:33 5 MS. WAIER: Yes, Your Honor.

10:33 6 THE COURT: I'd like to hear obviously your position on  
10:33 7 the sentencing guideline range, on the 3553 analysis, but why  
10:33 8 don't you start with give me your response or your comments to  
10:33 9 what I have heard from what I will call victims.

10:33 10 MS. WAIER: I guess so the record is clear, in case we  
10:33 11 ever have to go anywhere else, under Title 18 section 3771 there  
10:33 12 is a definition of what a crime victim is. And it's a person  
10:33 13 directly or approximately harmed as a result of the commission of  
10:33 14 the federal offense.

10:33 15 So I don't know if they fall under the Victim For All  
10:34 16 Act, or if their testimony should be considered as terms of being  
10:34 17 a victim in this particular case.

10:34 18 Second, and most important, the Court did point out that  
10:34 19 this is all evidence that I think I can say, as I'm standing here,  
10:34 20 hearing for the first time. Second, from what I understand, it's  
10:34 21 again, as presented here today -- and no disrespect to anybody  
10:34 22 else -- unsubstantiated in terms of any evidence put forth that is  
10:34 23 reliable in terms of I hear a lot of "I think," speculation, "I  
10:34 24 found it on the internet." Unfortunately, that does not meet the  
10:34 25 preponderance of the evidence standard that's used in sentencings

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10:34 1 and by no means would ever reach the level of beyond a reasonable  
10:34 2 doubt, which if this is new criminal conduct, which would have to  
10:34 3 be proven up to this Court in order to have any meaningful  
10:34 4 significance here today.

10:35 5 That's not to undermine both victims in this court. In  
10:35 6 fact, I do know that agents did reach out to Mr. Meade, and so I  
10:35 7 don't know where that is or how that was left.

10:35 8 As a prosecutor, as this Court will know, I do not take  
10:35 9 evidence. I do not want to be a witness sitting on that witness  
10:35 10 stand saying how the evidence is authenticated, and that's not  
10:35 11 what we do. We have agents that work for various agencies. I  
10:35 12 have also encouraged Mr. Meade to go to his local agency.

10:35 13 As you know, the district attorney has a lot of  
10:35 14 wonderful people. In fact, it's my understanding that he has been  
10:35 15 working with a Detective Bowman. And I'm sure that in terms of  
10:35 16 his threats, I hope that will be addressed in terms of making sure  
10:35 17 that nothing happens to him on that.

10:35 18 So I understand that's happened. I definitely  
10:35 19 encourage Charlene to definitely do the same thing; to reach out  
10:36 20 to your district attorney's office or other law enforcement to  
10:36 21 file a complaint. And it sounds like they have done that.

10:36 22 Since none of this is in the presentence report, he has  
10:36 23 been on pretrial release, if it rose to the level that there had  
10:36 24 been police reports filed against Mr. McMahan, I hope that that  
10:36 25 would be within the -- under pretrial's watch. And that should

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10:36 1 have been in here. I understand that Mr. Abrams is also a very,  
10:36 2 very good presentence officer and none of that is in the  
10:36 3 presentence report.

10:36 4 So I'm kind of a little bit at loss at this point  
10:36 5 because I don't want it to adversely affect in the sentencing in  
10:36 6 the extent that it's prohibited by the code in terms of the  
10:36 7 credible evidence that's coming in, and I want to make sure that  
10:36 8 Mr. McMahan does get a very fair sentence.

10:37 9 So that's the only thing really I can add to any of  
10:37 10 this.

10:37 11 THE COURT: Okay. Let me respond to what you are saying  
10:37 12 because I agree with a lot of what you said. I don't know if you  
10:37 13 and I have a disagreement. The record should be clear, I am not  
10:37 14 going to use any of this in the way it was presented today against  
10:37 15 Mr. McMahan. It's not in a reliable evidentiary format to do  
10:37 16 that. That would be an unlawful sentence.

10:37 17 So there is no disagreement between Ms. Waier and myself  
10:37 18 that I cannot rely on what I have heard to impact the sentence.  
10:37 19 But the allegations that have been made I do think are serious in  
10:37 20 that they do go to whether Mr. McMahan is continuing to engage in  
10:37 21 criminal conduct or not. I don't see how we can seriously say  
10:38 22 that doesn't impact what a fair sentence is if he has been  
10:38 23 engaging in conduct or not, especially when I have recommendations  
10:38 24 that there should be a variance for his law-abiding conduct, and I  
10:38 25 had the concern from the get-go that he has been -- he has pled

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10:38 1 guilty and been, from what I understood, living a very noble,  
10:38 2 righteous life for four years. Now I'm now hearing allegations  
10:38 3 that that's not the case.

10:38 4 So with those allegations, and these people feel  
10:38 5 strongly enough that they sacrifice their time to come here to  
10:38 6 make those allegations, I feel I have a duty and a responsibility  
10:38 7 to inquire and see is there any merit or truth to those because if  
10:38 8 there is, that does impact sentencing the way I see it.

10:39 9 Mr. Abrams, you, I think, were actually the officer who  
10:39 10 did the presentence investigation report, weren't you?

10:39 11 MR. ABRAMS: Yes, Your Honor.

10:39 12 THE COURT: And I'm not trying to curry your favor, you  
10:39 13 are about the best officer in this Probation Department. You are  
10:39 14 very thorough. You can never be accused of being naive or too  
10:39 15 lenient. Am I missing something here? Isn't this relevant to  
10:39 16 sentencing under 3553? And then even under the guidelines, isn't  
10:39 17 there an enhancement for conduct that is arguably unlawful or  
10:39 18 misleading?

10:39 19 MR. ABRAMS: Well, Your Honor, first of all, the  
10:39 20 Probation Office, in terms of looking at the evidence and cases,  
10:40 21 is in a similar position as the parties and the Court. I mean, we  
10:40 22 have to insure that the information we put in the presentence  
10:40 23 report is -- there is a sufficient indicia of reliability to that  
10:40 24 evidence. So we're not going to include every allegation or every  
10:40 25 piece of information we might come across.

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10:40 1 I was aware of the reports made to Pretrial Services  
10:40 2 that Mr. McMahan may have been involved in some ongoing criminal  
10:40 3 conduct. But based on the response of Pretrial Services in terms  
10:40 4 of not making any actions on it, they never violated him, we're  
10:40 5 not going to take the position that he hasn't adjusted under  
10:40 6 Pretrial Services.

10:40 7 It's a complicated issue in terms of balancing different  
10:40 8 types of information that we might come across during our  
10:40 9 investigation, but we are also bound by the rule of relying on  
10:40 10 information that is sufficiently reliable, and that's the crux  
10:40 11 here.

10:40 12 Maybe I'm not answering the Court's question, but I  
10:41 13 think the interesting point about all of this, regardless of what  
10:41 14 position you take on the statements the individuals made, I think  
10:41 15 it emphasizes the important objectives again of sentencing. I  
10:41 16 think in every case where you have someone like Mr. McMahan who  
10:41 17 has committed a very serious major fraud, the objectives of  
10:41 18 sentencing are there for a reason in terms of deterring criminal  
10:41 19 conduct and protecting the public. I think in a case such as  
10:41 20 this, those are maybe even more critically important to make sure  
10:41 21 the sentence achieves those objectives.

10:41 22 Based on my experience, people who commit these types of  
10:41 23 offenses, it's very difficult to fully rehabilitate from that part  
10:41 24 of their personality, if you want to call it that, in terms of the  
10:41 25 propensity to engage in fraud.

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10:41 1 Our variance was a modest variance. It was based on a  
10:41 2 lot of background factors that even precede this case in terms of  
10:42 3 his education, his family circumstances, his drug addiction,  
10:42 4 recovery from that drug addiction. It didn't so much have to do  
10:42 5 with the fact that we felt he was Saint Teresa since he committed  
10:42 6 this offense. We never stated that there has been no criminal  
10:42 7 violations, there has been no pretrial violations. We assume he  
10:42 8 is doing what he needs to do and has done so appropriately. So  
10:42 9 from our position there is nothing more we can say or speculate  
10:42 10 on.

10:42 11 THE COURT: The last thing we can do is speculate and I  
10:42 12 will not speculate. If the way this has come up or any of the  
10:42 13 comments I have made it sounds like I'm pointing the fingers at  
10:42 14 somebody or being critical, I apologize. That is not my intent.

10:42 15 What has happened has happened. The issue for me is  
10:42 16 where do we go from here? And this is a question, not an  
10:43 17 argument. If, and it could be an if with no basis, if Mr.  
10:43 18 McMahan, if he is engaging in continuing fraud at this time  
10:43 19 period, isn't that relevant to the sentencing of this case?

10:43 20 MR. ABRAMS: That absolutely is relevant. But again, it  
10:43 21 does depend on what information that is based on. For example, if  
10:43 22 he was arrested and there was a police investigation and a report  
10:43 23 submitted, that is something to go on, or if there was some sort  
10:43 24 of violation alleged by pretrial and they worked up some sort of  
10:43 25 investigation and letter to the Court.

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10:43 1           Again, it's sort of a matter of degree in terms of how  
10:43 2 the information is presented and in what form. That's what we  
10:44 3 always come back to, because this is a very important proceeding  
10:44 4 that needs to be based on reliable information.

10:44 5           THE COURT: I agree with that. We don't have any  
10:44 6 disagreement. I guess where I'm getting to, is this one of those  
10:44 7 issues that I should have Ms. Waier and her colleagues,  
10:44 8 particularly the case agents, investigate and give me a report if  
10:44 9 they think there is any merit or issue of concern that should  
10:44 10 impact sentencing? Or is this something that I just say, you know  
10:44 11 what, I'm just going to focus on what the factual basis was, and  
10:44 12 the application of the guidelines?

10:44 13           MS. MUNK: Your Honor, may I address the Court? I think  
10:44 14 it's important to reiterate that Ms. Waier said that the FBI did  
10:44 15 investigate this and they didn't find anything founded. So I kind  
10:44 16 of --

10:44 17           THE COURT: I didn't hear that. Maybe I was  
10:44 18 listening -- Ms. Waier --

10:44 19           MS. MUNK: I thought she said an agent spoke with  
10:45 20 Mr. Meade.

10:45 21           THE COURT: That's one thing. Maybe there was contact,  
10:45 22 but investigated and saying there was no merit to it is a very  
10:45 23 different thing.

10:45 24           MS. WAIER: Right. And as you know, Your Honor, we do  
10:45 25 not comment on going criminal investigations. What I will say is

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10:45 1 this is the first time I have ever heard from Charlene.

10:45 2 I think it's the first time I ever met you.

10:45 3 And on Mr. Meade, I am aware that the agents did try to  
10:45 4 reach out to him and that he has been in contact with law  
10:45 5 enforcement I believe in San Clemente.

10:45 6 THE COURT: I haven't made a decision. I'm going to  
10:45 7 give everybody a chance to be heard, but we have got to now at  
10:45 8 least reach an agreement where should we go from here. Should we  
10:45 9 go ahead and sentence him, or should we take a break to have an  
10:45 10 inquiry done to see whether there is any concern about these  
10:45 11 allegations? That's the issue as I see it.

10:46 12 MS. WAIER: I guess, Your Honor, I'm quite concerned on  
10:46 13 two levels. One, as you pointed out, these are just allegations.  
10:46 14 And there has been a substantial amount of time already since the  
10:46 15 commission of the offense, the pleading to the offense and now  
10:46 16 ultimately the sentencing.

10:46 17 And I guess I would be concerned as to, one,  
10:46 18 investigations take time. And just from hearing some of the  
10:46 19 comments here it sounds like there was some consensual recordings  
10:46 20 that were done in violation of California law. It sounds like  
10:46 21 there is going to be lots of documents to be looked at. It sounds  
10:46 22 like people are not speaking from personal knowledge.

10:46 23 It sounds to me to the extent there would want to be an  
10:46 24 investigation, that's going to take some time because we're  
10:46 25 talking about -- I took some very short notes, but 2008, 2009.

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10:46 1 We're talking about some time that has passed from that, if that's  
10:46 2 the accuracy of that.

10:47 3 I have also heard that this particular defendant, at  
10:47 4 least from Charlene, she didn't have any direct contact. She  
10:47 5 didn't have any direct conversation as she knows with this  
10:47 6 defendant. That's mere speculation based on internet research.

10:47 7 As to Mr. Meade, I don't understand what he had to do  
10:47 8 with X-Banker or whatever that is, but what I do know if it was a  
10:47 9 criminal enterprise, he worked there for a good year. That's  
10:47 10 going to be problematic too in terms of that as well.

10:47 11 I don't know what rights he may or may not have. I  
10:47 12 don't know what evidence he may or may not have. I don't know  
10:47 13 what biases he may or may not have. But what I'm trying to say in  
10:47 14 a long-winded way is it's going take a tremendous amount of time  
10:47 15 to do that. And Pretrial Services I guess have been aware of  
10:47 16 these allegations. I have encouraged anybody who would come to me  
10:47 17 with any allegation to either talk to agents, talk to police  
10:47 18 officers, or talk to Pretrial Services.

10:47 19 But, I mean, in order to get evidence in front of this  
10:48 20 Court in a presentable fashion, not mere allegation, is going to  
10:48 21 take some significant amount of time and it may very well not  
10:48 22 be -- not come to fruition. You know how long these fraud  
10:48 23 investigations take. Bank records would have to be got. Money is  
10:48 24 going to have to be followed. There's going to be a whole host of  
10:48 25 events that would have to go on. And then if that happened, what

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10:48 1 happens if we are able to find additional criminal conduct? How  
10:48 2 do we deal with that?

10:48 3 But in terms of sentencing I believe we should go  
10:48 4 forward with the evidence that we have here now. And it's already  
10:48 5 been four years and I'm at a loss as to what to do next.

10:48 6 THE COURT: Okay. Mr. Abrams.

10:48 7 MR. ABRAMS: I essentially agree with Ms. Waier. I  
10:48 8 don't see any reason to not proceed with sentencing based on this  
10:48 9 information because really it does potentially impact this case if  
10:49 10 those investigations are at least far enough along to maybe you  
10:49 11 could conclude well, there is a preponderance of evidence of new  
10:49 12 criminal conduct and therefore it's a sentencing factor.

10:49 13 But it certainly doesn't sound like it's relevant  
10:49 14 conduct to this offense under the guidelines and hasn't even  
10:49 15 reached the level of being a sentencing factor under 3553(a)  
10:49 16 because there hasn't been any investigation done.

10:49 17 So it sort of is what it is, and it's where it's at, at  
10:49 18 this point in time. It doesn't impact this case as I see it at  
10:49 19 this point because the investigation doesn't establish anything in  
10:49 20 terms of impacting Mr. McMahan's sentencing.

10:49 21 THE COURT: Well, let me try to tell you why. And  
10:49 22 everyone knows me well enough that you can strongly disagree.  
10:49 23 Just give me specifics on why you disagree.

10:49 24 I am contemplating a variance to the guideline range for  
10:49 25 Mr. McMahan. A variance, downward variance is based on what I

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10:50 1 believe the passage of time where he has lived a very law-abiding  
10:50 2 life. He has cooperated with the government. He is drug-free.  
10:50 3 He is married. He is gainfully employed. He is doing wonderful  
10:50 4 community service. If there is any truth or legitimacy that he is  
10:50 5 engaging in these fraudulent schemes, I have got it wrong.

10:50 6 And so can I use what I heard today to say I'm going to  
10:50 7 make his sentence more aggravated? Absolutely not. I won't do  
10:50 8 that. But the defense, understandably, the probation officer and  
10:50 9 the government are asking me to make a downward variance. They  
10:50 10 might disagree on how much that variance should be, but they're  
10:50 11 all saying, do a downward variance. And it's part on -- I think  
10:50 12 you are all part on he has lived a law-abiding life and he has  
10:51 13 turned his life around.

10:51 14 There's allegations that that's not true. That  
10:51 15 everybody is asleep at the switch.

10:51 16 MR. ABRAMS: I would just go back to my earlier comments  
10:51 17 in terms of the probation officer's recommendation in this case.  
10:51 18 We recommended a variance. Again, it was what I would describe as  
10:51 19 a fairly modest variance based on specific factors: Education,  
10:51 20 past drug addiction, family circumstances. And there was this  
10:51 21 issue of no new criminal conduct over a period of four years.

10:51 22 That's a fact. That's one of the combination of  
10:51 23 factors. That itself doesn't carry all the weight.

10:51 24 THE COURT: No, but Ms. Munk -- and I'm not trying to  
10:51 25 interrupt you to be rude -- Ms. Munk is going to be arguing for a

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10:51 1 probationary sentence. That's what her position papers state.

10:51 2 MR. ABRAMS: I understand that.

10:51 3 THE COURT: She can only get there -- I'm not there, but  
10:51 4 she doesn't even have a hope unless she can tell me that he has  
10:51 5 lived a righteous life. I mean, we don't have anything to talk  
10:51 6 about. Because I have a problem getting there even if he has  
10:52 7 lived a righteous life. But if he hasn't lived a righteous  
10:52 8 life...

10:52 9 MR. ABRAMS: Your Honor, I think that's a very difficult  
10:52 10 judgment to make. That's why when the Court indicated it was very  
10:52 11 open to a very significant variance, or maybe it asked the  
10:52 12 question if a noncustodial sentence is appropriate, my view was  
10:52 13 that the government's motion for downward departure is  
10:52 14 appropriate. Our modest variance I still think is appropriate  
10:52 15 based on the specific factors we cited, and that should be it  
10:52 16 because there are these important sentencing objectives that would  
10:52 17 be overlooked and not achieved, particularly protection of the  
10:52 18 public and deterring future criminal conduct.

10:52 19 So I'm very comfortable with our recommendation, which I  
10:52 20 came out at 27 months. Whether it's 24 months on the government's  
10:52 21 calculation, that would be it. I never suggested or was in the  
10:52 22 mindset to support a lower sentence.

10:52 23 THE COURT: I kind of feel we're passing. I understand  
10:52 24 your position. I understand Ms. Waier's position. I think I do.  
10:53 25 And what I'm saying is I'm entertaining the defense position. And

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10:53 1 for me to give that any serious consideration, I feel I have to  
10:53 2 know, has he lived a law-abiding life for the past four years?  
10:53 3 And if he has, then I will consider it.

10:53 4 MR. ABRAMS: Maybe that's where we disagree. To me I  
10:53 5 don't see that as...

10:53 6 THE COURT: You don't think I should even consider  
10:53 7 whether he has lived a law-abiding life or not?

10:53 8 MR. ABRAMS: I think it's considered already in our  
10:53 9 recommendation as well as the government's motion for downward  
10:53 10 departure.

10:53 11 THE COURT: How about if he has been engaging in crime?  
10:53 12 Would that change your position at all?

10:53 13 MR. ABRAMS: It would if it were established by at least  
10:53 14 a preponderance of the evidence, yes.

10:53 15 THE COURT: Okay. And as I have heard it, no one has  
10:53 16 investigated the legitimacy of these allegations. Maybe there has  
10:53 17 been more than Ms. Waier is aware that's been done, but to her  
10:54 18 knowledge she is hearing some of this for the first time.

10:54 19 MR. ABRAMS: Correct. And again, that's why it wasn't  
10:54 20 in the presentence report and not part of our recommendation  
10:54 21 consideration. It hasn't changed today.

10:54 22 MS. WAIER: Your Honor, I totally agree with Mr. Abrams,  
10:54 23 the fact that the passage of time really should not be considered  
10:54 24 by this Court because anecdotally speaking, I get calls from a lot  
10:54 25 of defense counsel for additional continuances on sentencing.

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10:54 1 Maybe they need to spend time to get letters together or to do  
10:54 2 other things. And it never has crossed my mind that that would be  
10:54 3 a reason for a variance in sentence.

10:54 4 And we hear all the time that people that are picked up  
10:54 5 for crimes, 20 years later changed their whole lives around. It  
10:54 6 does not deter from the conduct that occurred, the deterrent  
10:54 7 effect we need to send to society for committing crimes, and the  
10:54 8 fact that in this case the government was trying to give the  
10:54 9 defendant time to cooperate.

10:54 10 And I really think it's a slippery slope if we start  
10:54 11 looking into the passage of time that both the government nor the  
10:55 12 defendant has anything to really control. As you can see in this  
10:55 13 case it's actually causing more problems in the fact that now we  
10:55 14 have allegations of other things that here are just  
10:55 15 unsubstantiated that now is impacting a sentence that on its face  
10:55 16 seemed to be relatively straightforward.

10:55 17 MS. MUNK: Your Honor, may I address the Court briefly?

10:55 18 THE COURT: Yes.

10:55 19 MS. MUNK: First of all, I absolutely think the Court  
10:55 20 should consider the fact that he has changed his life and turned  
10:55 21 his life around for a variance. The probation officer's report  
10:55 22 did not -- that was not a ground for further variance. So I think  
10:55 23 it's important to note that that wasn't one of the reasons that  
10:55 24 they considered in their nine-month variance.

10:55 25 Obviously, I have concerns. I don't want the Court to

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10:55 1 be considering allegations that aren't substantiated because we  
10:55 2 completely deny those. Mr. McMahan has completely turned his life  
10:55 3 around and is a completely different person than he was six years  
10:56 4 ago and when he had a prior criminal history. And I think that's  
10:56 5 significant for the Court. I believe the Court, you recognize  
10:56 6 that -- I mean, I know you haven't made a decision yet -- but that  
10:56 7 we should care when people are able to become alcohol and  
10:56 8 drug-free when they suffered from addictions and moved on and be  
10:56 9 lawful abiding members of society.

10:56 10 So I absolutely think you should entertain that. And I  
10:56 11 would ask that you not consider everything here given that it is  
10:56 12 unreliable and unsubstantiated, Your Honor.

10:56 13 THE COURT: Well, I'm not trying to put my job off on  
10:56 14 you and Mr. McMahan, but this is the bottom line. I will not  
10:56 15 consider this to aggravate his sentence, but if you want me to  
10:56 16 consider the fact that he has been law-abiding, gainfully employed  
10:56 17 and doing wonderful things for the community, I need to know with  
10:57 18 credible evidence that these allegations are not supported, if  
10:57 19 that makes sense.

10:57 20 It's very difficult for me. That's why I'm a little  
10:57 21 frustrated in what I'm hearing is I have to consider whether he is  
10:57 22 living a law-abiding life or not over a significant period of  
10:57 23 time. Four years is a long period of time. And what I'm being --  
10:57 24 quite frankly, what both sides are telling me now, I guess three  
10:57 25 sides, is you don't have to worry about this. You are saying it

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10:57 1 in a nicer way and more legal way. Don't worry about this. How  
10:57 2 can I not worry about this?

10:57 3 MS. WAIER: Your Honor, I don't think we're not saying  
10:57 4 don't worry about this because we do care about victims' rights.  
10:57 5 What we're saying is it's not in a package that you can consider  
10:58 6 it.

10:58 7 THE COURT: Today I agree with you, I cannot consider it  
10:58 8 today. The question is, do we take a break and have the FBI check  
10:58 9 into this and then tell me is there any merit to this and give Mr.  
10:58 10 McMahan and Ms. Munk due process where they see if there is any  
10:58 11 merit to this?

10:58 12 You're saying that's going to take a long time. Well,  
10:58 13 my option is you are saying ignore it, or don't take this into  
10:58 14 consideration, these accusations. And I just don't see it that  
10:58 15 easily because I have got to -- one of the objectives of  
10:58 16 sentencing is make sure I protect the public from further crimes  
10:58 17 he might commit. I need to make sure I impose just punishment. I  
10:58 18 need to deter him from engaging in criminal conduct.

10:58 19 MS. WAIER: Agreed. But, Your Honor, I guess if that's  
10:58 20 the direction we're going to take, I would like to do some  
10:58 21 briefing on it, because I don't know if the Court can direct us to  
10:59 22 go get additional evidence, or can only consider what has been  
10:59 23 presented to you in credible evidence at a sentencing hearing.  
10:59 24 And I think that's what Mr. Abrams and I are both trying to say to  
10:59 25 you, is the fact that, look, we have what evidence we have and

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10:59 1 we're asking you to consider it.

10:59 2           And it's great that people, I think, that came all the  
10:59 3 way out here to talk to you about some allegations, and I'm very  
10:59 4 happy they got to speak to the Court. But I think the bottom line  
10:59 5 is this Court has to just look at the evidence presented that goes  
10:59 6 with any evidence code and is appropriate for the Court and make a  
10:59 7 decision on that.

10:59 8           I do not know if the Court can order additional evidence  
10:59 9 in terms of -- in a sentencing hearing. I just want to make sure  
10:59 10 we're on all fours on this because I do have reservations that  
10:59 11 this probably will be an issue, maybe be an issue later on down  
10:59 12 the line and I just want to make sure we're all on the same page  
10:59 13 on it. It would be kind of an unusual situation that I have seen.

11:00 14           THE COURT: Definitely an unusual situation. Not trying  
11:00 15 to get preachy, I don't consider myself a constitutional scholar.  
11:00 16 I'm not. But I was nominated by the President, confirmed by the  
11:00 17 senate, and then appointed by the President for my judgment. I'm  
11:00 18 not here to be a potted plant.

11:00 19           And I have now have the humbling task of sentencing Mr.  
11:00 20 McMahan. And hopefully I'm giving him comfort that this is -- I'm  
11:00 21 not on copilot here where I just, you know, another case, then  
11:00 22 impose the sentence. Ridge application of the guidelines.

11:00 23           I don't work that way, sir. And I'm going to try to do  
11:00 24 my darndest to impose a fair sentence in this case.

11:00 25           I came into this hearing struggling with some issues and

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11:01 1 it was based on a certain evidentiary record. I have now heard  
11:01 2 allegations that are not substantiated, not in a basis that I can  
11:01 3 rely on them which totally changed that assumption of facts. That  
11:01 4 assumption of facts, I assumed Mr. McMahan was a righteous  
11:01 5 individual, totally redeemed himself. And maybe that is, in fact,  
11:01 6 the case. And if it is, he is going to get credit from this  
11:01 7 Court. But if that's not the case, if he is engaging in crime and  
11:01 8 continuing to cheat people, there are going to be consequences to  
11:01 9 that for this sentence.

11:01 10 Whether there's other consequences, other cases brought  
11:01 11 against him, so be it. But for purposes of this sentences if he  
11:01 12 is living a righteous life, he is going to get credit for it. If  
11:01 13 he is not, there are going to be consequences to it. That's how I  
11:01 14 see it.

11:01 15 And I'm baffled that everybody on that side of the bench  
11:02 16 is telling me, "You can go forward." I don't see how I can go  
11:02 17 forward. I have to see is there any merit to these  
11:02 18 unsubstantiated allegations. If there is, there are going to be  
11:02 19 consequences to the sentence. If there is not, there's going to  
11:02 20 be very positive consequences for Mr. McMahan. How much, we can  
11:02 21 disagree, but that's the way I see it.

11:02 22 MS. WAIER: I guess what we're all saying is we don't  
11:02 23 know how to go about something like that in terms of, okay, well,  
11:02 24 if there are allegations, do we let him continue to be out?

11:02 25 THE COURT: Yes.

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11:02 1 MS. WAIER: They're just merely allegations. And how --  
11:02 2 so what do we tell the FBI to do?

11:02 3 THE COURT: The FBI has to, at the very at least,  
11:02 4 interview these two folks. They have got to, I assume with your  
11:02 5 help -- come on, Ms. Waier. You know what you have to do. This  
11:03 6 is not that complicated. You've just gotta -- is there any merit  
11:03 7 to these allegations? If there is some merit, then just give me  
11:03 8 whatever evidence you have to support them or not to support them.

11:03 9 MS. WAIER: Your Honor, I agree with you on that, but  
11:03 10 like I said before, these allegations are stemming from 2008, go  
11:03 11 through a substantial period of time. Talking about a lot of --  
11:03 12 again, because nobody has any personal knowledge, it's going to  
11:03 13 take some time to determine just to get the records alone, it  
11:03 14 sounds like. I don't even know where the bank records are, where  
11:03 15 the bank accounts are. Maybe they all know. Maybe, what I'm  
11:03 16 saying is.

11:03 17 But I guess in terms of going out and trying to find --  
11:03 18 to try to find evidence and substantiate or not substantiate  
11:03 19 something I think is going to take some time. And I know the  
11:03 20 Court was already concerned about the amount of time already. And  
11:04 21 to the extent it impacts other sentencings or other people that  
11:04 22 have already been sentenced, I don't know how to handle that in  
11:04 23 terms of the disparity of sentencing.

11:04 24 But again, the government -- I think the government, the  
11:04 25 probation office, and defendant just want a very fair sentencing

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11:04 1 that will withstand any kind of appeal.

11:04 2 THE COURT: Well, I don't profess to say what the Ninth  
11:04 3 Circuit will do or not do, but I have sat on designation by the  
11:04 4 Ninth Circuit. I have had a lot of conversations about issues,  
11:04 5 dealings with sentencing with some of our most respected judges on  
11:04 6 the Ninth Circuit. And my gut is they would be very disappointed  
11:04 7 in me if I did what all you three are asking me to do.

11:04 8 I could be wrong. I can't speak for them. But we have  
11:04 9 evidentiary hearings all the time. We have evidentiary sentencing  
11:05 10 hearings all the time. So maybe the government doesn't have to do  
11:05 11 a full analysis and investigation into these allegations. Just  
11:05 12 call the witnesses. Get the meaningful witnesses to put on an  
11:05 13 evidentiary hearing dealing with this so I can make an informed  
11:05 14 decision.

11:05 15 MS. WAIER: But those evidentiary hearings are usually  
11:05 16 about the victims of the case or proving up specific enhancements.  
11:05 17 Here, we're trying to prove up additional conduct which would, if  
11:05 18 shown to be true, enhance his sentencing. For instance, if he was  
11:05 19 found to commit a crime while on Pretrial Services, he can be  
11:05 20 charged with an additional crime which carries a ten-year  
11:05 21 sentence. He also can be opening up to a lot of other criminal, I  
11:05 22 guess, charges that could happen based on an order by this Court  
11:05 23 to go and do that investigation.

11:05 24 So I think the difference is, yes, we usually have  
11:05 25 evidentiary hearings about evidence regarding the conduct of the

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11:06 1 specific case in front of the Court. I'm just a little concerned  
11:06 2 when we're starting to talk about conduct that is completely  
11:06 3 outside of this that is not being used to prove up an enhancement,  
11:06 4 but might be used to enhance a sentence or create additional  
11:06 5 criminal conduct that might be prejudicing him in a different way.

11:06 6 And that's the only reason. Look, I absolutely respect  
11:06 7 and I have had many sentencings front of you and I obviously  
11:06 8 defer. I just want to make sure we're on really solid ground here  
11:06 9 because it's very, very, very different and a very unusual set of  
11:06 10 circumstances that I think I have seen. And maybe you have done  
11:06 11 this before.

11:06 12 But I don't know if, Mr. Abrams, if you have seen this  
11:06 13 either, and you have done at lot more of these than I have, but I  
11:06 14 just want to do the right thing, and I know that's what you want  
11:06 15 to do, too. But whatever the right thing is, I think that's what  
11:06 16 all three of us are trying to do here. But most particularly we  
11:06 17 just want a fair sentence for Mr. McMahan.

11:06 18 THE COURT: Allright. What I'm saying is how can we  
11:06 19 have a fair sentence without getting some comfort level where he  
11:07 20 is living a righteous life for the past four years or not? That's  
11:07 21 why I feel like we don't have a choice.

11:07 22 MR. ABRAMS: Your Honor, if I could just say something  
11:07 23 very briefly, then maybe we can make a decision. But the fact  
11:07 24 that the Court wants to learn more about these allegations is  
11:07 25 obviously a very fair point. And if the Court wanted to continue



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11:07 1 the sentence to do that, that's well enough, and I'm sure the  
11:07 2 Ninth Circuit would approve if this were ever appealed.

11:07 3 I guess this whole discussion -- I don't mean disrespect  
11:07 4 to the Court whatsoever -- but this whole discussion in my view  
11:07 5 anyway, sort of emphasizes the risk and the fallacy, in my view,  
11:07 6 of putting so much undue weight I think on this factor, this  
11:07 7 post-offense rehabilitation factor that the Court is open to a  
11:07 8 very, very significant variance and maybe a probationary sentence  
11:07 9 since that has been requested.

11:07 10 THE COURT: Please don't -- I don't want to give him  
11:07 11 false hope. I'm not close to probation. But my sentencing range  
11:08 12 is 33 to 41 months. And so teeing up the issue, all right, I have  
11:08 13 a sentencing guideline range of 33 to 41 months. I have the  
11:08 14 government, probation, and defense saying you should go below  
11:08 15 that. And now I have people saying, okay, you shouldn't give much  
11:08 16 weight, or don't give a lot of weight to the fact that he has been  
11:08 17 law-abiding for over four years.

11:08 18 At least that's my information before me. He has  
11:08 19 cooperated with the government. He has committed no crimes. He  
11:08 20 is now drug-free. He is married. He's gainfully employed. He's  
11:08 21 doing this wonderful community service.

11:08 22 Then I have two people who look like very descent  
11:08 23 individuals. I didn't ask them to come. They show up and they  
11:08 24 say, judge, you have no idea what is going on. You have no idea  
11:09 25 what is going on. He is not being law-abiding. He is, in fact,

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11:09 1 continuing to engage in fraud and cheat people.

11:09 2 So I have that record. So now what do I do now that I  
11:09 3 have that? Do I just say I'm sorry, law enforcement is going to  
11:09 4 have to do what they have to do, what they want to do, and I'm  
11:09 5 just going to worry about the factual basis that I have before me  
11:09 6 and the plea agreement, and then the guideline sentence.

11:09 7 I think I could do that if I just had to worry about  
11:09 8 your position and Ms. Waier's position, but I have defense saying  
11:09 9 we want a probationary sentence.

11:09 10 Or put it another way, Mr. Abrams, and maybe this is  
11:09 11 ludicrous. If they're right, if they're right, if he has been  
11:09 12 engaging in fraud and I grant a motion, give him probation, what  
11:09 13 does that say about our justice system? What does that say about  
11:10 14 me?

11:10 15 MR. ABRAMS: Well, Your Honor, I would strongly  
11:10 16 recommend against that type sentence regardless if these folks  
11:10 17 came here today --

11:10 18 THE COURT: Whether their allegations are true or not?

11:10 19 MR. ABRAMS: My assumption -- our recommendation assumes  
11:10 20 that Mr. McMahan has been a law-abiding citizen as the Court has  
11:10 21 said so. It doesn't assume necessarily to the extent -- maybe the  
11:10 22 Court has in its mind in terms of his good deeds and everything  
11:10 23 else connected to it, it's very hard for us or I think anyone to  
11:10 24 try to assess that and place such significant weight as a  
11:10 25 sentencing factor on that. He is receiving a six-level departure

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11:10 1 based on his cooperation, him not being arrested, sustaining any  
11:10 2 new convictions, not being violated by pretrial.

11:10 3 And that's what a sentencing consideration should entail  
11:10 4 and nothing more. If these allegations were further advanced and  
11:10 5 there was, again, some preponderance of evidence of their truth,  
11:10 6 then the Court can consider it as a sentencing factor to go up.

11:11 7 So he is not going to be hurt depending on the outcome  
11:11 8 of the investigation in terms of this sentencing. It may result  
11:11 9 in new charges. But even if the Court were to delay this  
11:11 10 sentencing, there was some investigation, how much evidence is the  
11:11 11 Court going to require before it starts bumping its sentence back  
11:11 12 up?

11:11 13 THE COURT: If you got to some level that you thought  
11:11 14 there was truth to these allegations, would your recommendation  
11:11 15 change?

11:11 16 MR. ABRAMS: If it were not at least preponderance of  
11:11 17 the evidence, no.

11:11 18 THE COURT: It was not --

11:11 19 MR. ABRAMS: I was aware of the reports to Pretrial  
11:11 20 Services, but they were just too minimal in terms of the  
11:11 21 information and Pretrial Services' lack of action on them to  
11:11 22 consider them really one way or the other. We're sort of at the  
11:11 23 same spot today as I see it.

11:11 24 THE COURT: Yeah, because everybody says, well, these  
11:11 25 are allegations, but we don't have reliable evidence before us.

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11:12 1 What I'm gathering from Ms. Waier, no one has asked these people,  
11:12 2 give me the evidence you have to support your allegations, your  
11:12 3 belief. And so what you are suggesting is go ahead and continue  
11:12 4 the -- we're not going to look. See no evil, hear no evil.

11:12 5 MR. ABRAMS: I don't think that's the case. I don't.

11:12 6 MS. WAIER: And you got to talk to these people. And  
11:12 7 they came in with what they had to say. And so they did present  
11:12 8 their evidence to you. So to the extent that -- they were talked  
11:12 9 to today.

11:12 10 THE COURT: Ms. Waier, I can't rely on that evidence.

11:12 11 MS. WAIER: Neither can I.

11:12 12 THE COURT: I know. So let's --

11:12 13 MS. WAIER: We're all in the same position.

11:12 14 THE COURT: Well, I think we have come to a point where  
11:12 15 now it's clear to me what I have to do. And I have three people I  
11:12 16 respect that disagree with me. But I'm going to continue the  
11:12 17 sentencing hearing. I'm going to continue it for at least 60  
11:13 18 days.

11:13 19 I'd like, if we can set this up before 60 days, great.  
11:13 20 If not, so be it. But I want an inquiry made into these  
11:13 21 allegations. I want to have an evidentiary hearing. And we'll  
11:13 22 call witnesses. And then I'll get to the bottom of it. If people  
11:13 23 want to assert their Fifth Amendment right or have to be apprised  
11:13 24 of their Fifth Amendment rights, it is what it is. But at least  
11:13 25 I'll have a record and we'll know what we're doing.

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11:13 1 MS. WAIER: Will the Court say who the Court wants to  
11:13 2 hear from? Does the Court want the government to make that  
11:13 3 determination?

11:13 4 THE COURT: I want the government to make that  
11:13 5 determination.

11:13 6 MS. WAIER: Do I provide that discovery to the defense?  
11:13 7 Obviously, there are implications. So every time -- it would be  
11:14 8 kind of like we're starting all over with new discovery. So new  
11:14 9 discovery would be given to them. Then they could issue subpoenas  
11:14 10 of their own?

11:14 11 THE COURT: It would be like a motion to suppress.  
11:14 12 Treat it like a motion to suppress. Whatever requirements on  
11:14 13 disclosure -- like many other evidentiary hearings we have,  
11:14 14 whatever the disclosure is. And I can assure Ms. Munk that she'll  
11:14 15 be given opportunity to be heard and present whatever evidence  
11:14 16 they want, but it's going to be an evidentiary hearing.

11:14 17 MR. ABRAMS: Since we're talking procedure, would the  
11:14 18 Court want a revised PSR from the Probation Office including  
11:14 19 whatever new information comes out of this evidentiary hearing?  
11:14 20 Because again, at that point it could rise to a level of impacting  
11:14 21 what our recommendation might be. It might not. But if there is  
11:14 22 new evidence in this case even though it's not related to the  
11:14 23 charge of conviction, it is related to sentencing factors.

11:15 24 THE COURT: Good question, and it's hard to answer.  
11:15 25 What I'm envisioning is we're going to have an evidentiary

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11:15 1 hearing. Government is going to call the relevant witnesses. I  
11:15 2 know who two of the witnesses will probably be. Right? I'm  
11:15 3 hoping that there are going to be more witnesses. And then I'll  
11:15 4 hear the evidence and then I'll apply the appropriate standard and  
11:15 5 then I'll make a finding.

11:15 6 So to answer your question, I don't think I want you  
11:15 7 here, but I don't think at this point it would be productive for  
11:15 8 you to prepare an amended report because all you are going to be  
11:15 9 doing is giving me hearsay information that I cannot rely on for  
11:15 10 purposes of the sentencing. I have got to have the evidentiary  
11:15 11 record.

11:15 12 MR. ABRAMS: We'll wait for the findings of the Court,  
11:15 13 and if it's appropriate to do a revised report, we'll do it then.  
11:15 14 Thank you very much.

11:15 15 THE COURT: And I would ask Ms. Waier and Ms. Munk to  
11:16 16 coordinate on the logistics for the evidentiary hearing, but we  
11:16 17 need an evidentiary hearing is where I'm coming out. And I'd like  
11:16 18 to do that in 60 days. If we can't do it -- if we can do it  
11:16 19 sooner, great, if you can agree on that. If we have to do it a  
11:16 20 little later, so be it.

11:16 21 MS. WAIER: Since there are rules of evidence that do  
11:16 22 apply to evidentiary hearings, the Court will understand if  
11:16 23 certain witnesses are not called or certain documents are not  
11:16 24 introduced in terms of dealing with an evidentiary hearing. Or is  
11:16 25 it going to be the rule of evidence don't apply?

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11:16 1 THE COURT: To answer your question is I would want  
11:16 2 everybody to assume that there will be strict application of the  
11:16 3 rules of evidence. However, we all know that for sentencing  
11:16 4 evidentiary purposes, strict compliance is not necessary. But  
11:16 5 there is some, I don't want to say conflicting Ninth Circuit law  
11:17 6 on this, but the Ninth Circuit has made it clear that hearsay  
11:17 7 statements from case agents is not good enough to support  
11:17 8 sentencing enhancements. But then they also say strict conformity  
11:17 9 with the rules of evidence aren't necessary either.

11:17 10 So where is that line in between those two? I'm not  
11:17 11 entirely sure. But what I suggest is let's operate under strict  
11:17 12 application of the rules of evidence. And that, I imagine, will  
11:17 13 only benefit Mr. McMahan. And that's the way it should be.

11:17 14 Michelle, can you give me a date approximate date 60  
11:17 15 days out.

11:18 16 (Court has discussion with clerk.)

11:18 17 THE COURT: November 28, 2011 at 9:00 a.m.

11:18 18 Just so we're clear, Ms. Waier, I'm going to ask you to  
11:18 19 obviously be the one responsible for calling the witnesses that  
11:18 20 I'm going to hear on this issue.

11:18 21 MS. WAIER: On a separate matter but very related,  
11:18 22 Mr. Zuckerman is also going to be sentenced around that time. I  
11:18 23 don't have his file here. So are we going to probably be doing --  
11:18 24 as you heard from these witnesses, the name Zuckerman came up a  
11:18 25 lot more than I heard from this defendant. Will we be doing the

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11:18 1 same procedures? Because we have the same kind of record in terms  
11:18 2 of there was nothing on Pretrial Services. There are just  
11:19 3 allegations.

11:19 4 And if that's the case, I think I would like to let the  
11:19 5 agent start doing that as well so we can be on the same page and  
11:19 6 I'll let Mr. Houston know that we're also going to be doing that  
11:19 7 with Mr. Zuckerman.

11:19 8 THE COURT: Thank you. You are right. Like it or not,  
11:19 9 these individuals complained about the activity of both Mr.  
11:19 10 McMahan and Mr. Zuckerman. Certainly that's what I heard from  
11:19 11 Mr. Meade.

11:19 12 And I recall we had a pretrial hearing -- right, Ms.  
11:19 13 Waier? -- where there was a lot of people that were outraged that  
11:19 14 Mr. Zuckerman was still on bond?

11:19 15 MS. WAIER: And I think one of those individuals are  
11:19 16 here.

11:19 17 THE COURT: So this should be coordinated and now is the  
11:19 18 time to hash this out. So maybe it should be -- I'm thinking out  
11:20 19 loud -- maybe it should a coordinated proceeding where  
11:20 20 Mr. Zuckerman is allowed to participate and put on whatever  
11:20 21 evidence he wants to, to state his position.

11:20 22 MS. MUNK: Your Honor, the defense -- I mean, we're  
11:20 23 definitely concerned about Mr. McMahan getting wrapped up with  
11:20 24 Mr. Zuckerman. I heard Mr. Zuckerman's name pretty much this  
11:20 25 entire time, but not Mr. McMahan. So I just have concerns on him



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11:20 1 having a right to a fair hearing if it gets mixed in with  
11:20 2 Mr. Zuckerman.

11:20 3 THE COURT: Well, I can assure you he will get a fair  
11:20 4 hearing and I can separate the two. Maybe I'd be a little more  
11:20 5 concerned if it was a jury trial. But as you know, even in a jury  
11:20 6 trial codefendants can be tried together. In fact, that's the  
11:20 7 preference. And it doesn't make sense to me to have two separate  
11:20 8 evidentiary hearings, especially if they're going to be involved.  
11:20 9 I don't think that's fair to the witnesses, that they'll have to  
11:20 10 come to two separate hearings. And I have heard these witnesses  
11:21 11 to say that it's both Mr. Zuckerman and Mr. McMahan, although  
11:21 12 Mr. Zuckerman, according to the allegation, has a more culpable  
11:21 13 role.

11:21 14 MS. MUNK: Just to clarify, I know you said 60 days out.  
11:21 15 Was it November 28? I think that's about 90 days out. Or October  
11:21 16 you were looking at?

11:21 17 THE CLERK: I'm sorry. It would be October 31.

11:21 18 THE COURT: October 31. Thank you. October 31 at  
11:21 19 9:00 a.m. And it will be an evidentiary hearing on how do we want  
11:21 20 to tee this up, post plea conduct.

11:21 21 Anymore questions?

11:21 22 MS. WAIER: No, Your Honor. Thank you.

11:21 23 THE COURT: All right. Thank you.

24 *(Whereupon the proceedings were adjourned at*  
25 *11:21.)*

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-oOo-

CERTIFICATE

I hereby certify that pursuant to Section 753, Title 28, United States Code, the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter.

Date: September 2, 2011

/s/ MARIA  
BEESLEY

Digitally signed by MARIA BEESLEY  
DN: cn=MARIA BEESLEY, o, ou,  
email=amaria1957@yahoo.com,  
c=US  
Date: 2011.09.02 15:33:06 -0700

OFFICIAL COURT REPORTER

**EXHIBIT B**

### Background

In November, 2007 the FBI investigation OPERATION LEASE FLEECE charged 23 individuals for their roles in a \$20,000,000 fraud against several lending institutions including Citicapital, Wells Fargo and GE Capital during 2004 and 2005. Court documents indicate that the defendants devised and executed a scheme to defraud and obtain money and property by means of materially false and fraudulent pretenses, representations and promises, and the non-disclosure and concealment of material facts in connection with a fraudulent equipment lease scheme.

Defendants used contracts to arrange financing for small business that needed money. Capitalwerks and Brickbanc, the primary companies involved, took lucrative commissions from the money they raised from banks to finance purchase of leased equipment. Hundreds of bogus equipment-lease packages with fake invoices were prepared and presented to financial institutions by Capitalwerks and Brickbanc.

The developer and primary organizer of this scheme was Adam Stuart Zuckerman, owner of Costa Mesa based Brickbanc. In 2008 Zuckerman pled guilty to charges of mail fraud and is currently out on bond waiting to be sentenced. Sentencing was originally set for July 19, 2010 and has now been postponed until July 11, 2011. According to Zuckerman's own statements, he is cooperating with the FBI in its continuing investigation. Zuckerman has continued to devise and execute new financial fraud schemes.

Under the alias of "Adam Stuart," Zuckerman has continued to operate with impunity devising and executing newly concocted fraud schemes. In an effort designed to obfuscate his involvement, Zuckerman established a layered network of companies all involved in the financial industry. According to an online news source which cited Zuckerman himself, he indicated that he is involved in "investing" and utilizing a "pen name" to conduct his work.

An online profile for "Adam Stuart" indicates that he is the Managing Director of Mercury Ventures, LLC. Zuckerman has enlisted the assistance of Ryan Page of Washington State to establish the network of corporations. The companies controlled by Zuckerman and utilized to facilitate his latest fraud schemes include:

- **Mercury Ventures LLC**, incorporated in Wyoming on September 5, 2002 and has a mailing address in Newport Beach, CA. Mercury Ventures is controlled by two entities, Amidah LLC and Page 10 Ventures, LLC. This company is operated out of 3197 B Airport Loop Drive, Costa Mesa, CA. (Tab 50)
- **Amidah LLC** is incorporated in Wyoming on October 15, 2007 with an address in Newport Beach and is controlled by Ryan Page. (Tab 52)
- **Page 10 Ventures, LLC** incorporated in Wyoming on October 15, 2007 with a Washington address and is controlled by Ryan Page and his wife Lindsay. (Tab 51)
- **Shared Success, LLC** incorporated in Wyoming on October 15, 2007 with a mailing address of 3197 B Airport Loop Dr, Costa Mesa, CA 92626. This address is the main office of all the

- listed companies and the location where the majority of the fraud is taking place. Shared Success, LLC is controlled by Mercury Ventures, LLC. (Tab 53)
- **Shared Financial Group, LLC** incorporated in Wyoming on July 14, 2008. Although the Wyoming Secretary of State indicates the company became inactive September 9, 2009, Shared Financial still maintains an active website soliciting businesses that need loans. The mailing address was for the agent for a post office box in Jackson, Wyoming. Shared Financial Group is controlled by Tomas Zubicek, a subordinate of Zuckerman and operated at the 3197 B Airport Loop Drive address. (Tab 54)
  - **Capital Partners Society, LLC** incorporated in Wyoming on March 12, 2009 with a mailing address at 3197 B Airport Loop Drive. This company is controlled by Andrew Medal, a subordinate of Zuckerman. The Capital Partners Society website lists the following companies as part of their portfolio: **Progenex Dairy Bioactive, First String, Ambition Magazine, Socialinvest and The Elan Project**. The Elan Project is claimed to be a 501(c)(3) charity however, no such charity was identified on the IRS website. (Tab 55)
  - **Progenex Dairy Bioactive** incorporated in Delaware in 2009 and is operated at he 3197 B Airport Loop Drive address. (Tab 56)
  - **The X Banker (TXB, LLC)** incorporated in Wyoming on October 15, 2007 with a Jackson Wyoming address. This company is controlled by Shared Success. Email's indicate that The X Banker is operated out of the 3197 B Airport Loop Drive address. (Tab 57)
  - **VenturePharma, LLC** incorporated in Wyoming on December 26, 2007 with Jackson, Wyoming address. This company is controlled by Shared Success. (Tab 58)

The most recent victim of Adam Zuckerman's fraudulent activities is Dr. Scott Connelly. Dr. Connelly is a world famous physician who has devoted his life to the science of nutrition and fitness and is considered around the world as a leading expert in the field of human nutrition and metabolism. Among his notable accomplishments, Connelly created the high quality protein formulation that became the key ingredient in MET-Rx, the high protein, low-fat vitamin and mineral enriched drink mix he invented. Connelly is the namesake of UCLA's Connelly Laboratory for Applied Nutritional Sciences at the UCLA School of Medicine, Division of Clinical Nutrition and is a visiting professor at UCLA's School of Medicine with teaching responsibilities in the area of the physiology of nutrition and muscle metabolism.

For more than a decade, Connelly has also researched into developing medical products from specific dairy bioactive whey protein fractions to exploit their profound regenerative properties. Whereas traditional high protein nutritional products serve as fuel for muscle and strength, dairy bioactive nutritional products contain one or more specific protein fractions that serve as an ignition system to spark other positive aspects of proteins such as wound healing and tissue regeneration.

In 2006, Dr. Connelly initiated discussions with the Murray Goulburn Cooperative (MGC) to form a joint venture to commercialize the dairy bioactive protein faction called Whey Growth Factor Extract (WGFE). In 2009, based upon successful medical studies, Dr. Connelly and MGC decided to seek additional outside financing for further development and commercialization of the dairy bioactive. That decision, in March 2009, led to Dr. Connelly's introduction to Adam Stuart (Zuckerman) and Ryan Page both whom

represented that they were directors of Mercury Ventures. Dr. Connelly first met Zuckerman in person in March 10, 2009, under the alias of Adam Stuart. He continued to use that name and be referred to by that name throughout Dr. Connelly's dealings with him from March 2009 through April 2010.

Beginning in March 2009 and continuing through the time Dr. Connelly entered into the a Contribution and Investment Agreement in November 2009, Page told Dr. Connelly that Zuckerman had experience that would be valuable to the business transactions involved. In particular, Page said that Zuckerman had expertise in the "nutraceutical" sector and had raised money for at least 30 deals including ones for sports clubs. Page also told Dr. Connelly that "Adam has never failed to raise the money needed to close a deal."

Zuckerman and Page indicated that Mercury Ventures could raise the required funds through Shared Success and VenturePharma. As a result of meetings and discussions Dr. Connelly had with Zuckerman and Page, they agreed to set up a new company that would further develop and commercialize the three dairy bioactive protein products that Dr. Connelly was currently marketing. In return, Zuckerman and Page were to raise \$5,000,000 to finance the operation of the new company and to fund medical research. Dr. Connelly agreed to personally invest \$1,000,000 of that amount into the new company to be used solely for medical research.

In April 2010, Dr. Connelly learned for the first time that Zuckerman's real name was "Adam Stuart Zuckerman." Dr. Connelly soon discovered Zuckerman's criminal history and that he had been out on bond awaiting sentence for a conviction involving a \$20,000,000.00, financial fraud scheme investigated by the FBI. Dr. Connelly also discovered that Zuckerman had been convicted in an assault case involving for criminal threats in Orange County, California in 2001.

**Had Zuckerman and Page not concealed Zuckerman's true identity, Dr. Connelly would never have signed business agreements and would not have suffered a loss of \$1,000,000.**

The revelation of the details surrounding Zuckerman's 2001 felony criminal threats conviction were extremely alarming to Dr. Connelly in light of other disturbing behavior he had observed. According to court documents, Zuckerman had directed two individuals to detain an individual suspected of stealing \$20,000 from him. The victim had his jaw broken and a gun put to his head as Zuckerman threatened to kill him and his family if he did not have his money returned. Zuckerman pled guilty to the criminal threats charges, served three years probation. Several other extremely troubling incidents that clearly display Zuckerman's violent tendencies are described below:

- In November 2009, Dr. Connelly was present in a meeting when Zuckerman exploded in anger, screaming and threatening to cause physical harm to David Meltzer, a one-time business partner.
- In their first meeting in March 2009 Dr. Connelly received a metal business card in the name Adam Stuart from Zuckerman. Zuckerman proceeded to boast of his ability to smuggle the

metal cards past the screeners at airports and proudly indicated that one could slash the throats of the flight crew with the business cards.

- In another instance of Zuckerman's violent disposition, he wrote an email to Ryan Page on April 10, 2010 (Tab 22) which discussed forcing Dr. Connelly to sign a new agreement with Zuckerman and company. A link to a clip from the movie Mad Max was included in which the main character holds a victim (representative of Connelly) at gun point and forces him to handcuff his ankle to a car that was leaking fuel and soon to explode. The decision for the victim was to cut off his own foot or be incinerated in the explosion.

Unfortunately, Dr. Connelly was not the only victim of Zuckerman's and Page's financial fraud. Nearly 40 other individuals were enticed by Zuckerman and Page to invest approximately \$2,000,000. The failure of Zuckerman and Page to raise the required \$5,000,000 for Progenex Dairy Bioactive caused the exclusive deal with MGC and Dr. Connelly to expire. A renegotiation was attempted until Dr. Connelly and MGC became aware of Zuckerman's true identity and background. For five months a number of Zuckerman and Pages investors were clamoring for their stock certificates and answers to the causes for the delay. Zuckerman and Page conveniently blamed Dr. Connelly while continuing to keep Zuckerman's true identity and the accurate terms of the deal they signed hidden from the investors.

In order to prevent a mass exodus of investors Zuckerman planned a meeting with Mike Carey in New York City on May 2, 2010. Prior to the meeting, Andrew Medal, a subordinate of Zuckerman, sent Mike Carey an email which included a completely fabricated Power Point presentation related to the acquisition of the retail company Max Muscle (Tab 24) by VenturePharma.

During the May 2, 2010 meeting between Zuckerman and Mike Carey, Zuckerman indicated that VenturePharma now controlled the entire deal with MGC; owned in perpetuity all of Dr. Connelly's name, voice and license for all additional products he was marketing; and that an exclusive deal had been signed with Zimmer Orthopedics. (Tab 25) Zuckerman further indicated that the VenturePharma investors had already doubled their money (Carey was a Progenex investor). All of Zuckerman's selling points were absolutely false and fraudulent. With the promise of doubling his investment, Carey gladly reinvested his Progenex funds into VenturePharma and added an additional \$25,000. Approximately 10 days later, again dissatisfied with the performance of Zuckerman and Page, Carey's demands for a return of his money were denied.

#### **Zuckerman Possibly Working with Kirk McMahan from OPERATION LEASE FLEECE**

Through an analysis of Zuckerman's emails, it became apparent that Zuckerman may be working with fellow OPERATION LEASE FLEECE defendant and Brickbanc employee, Kirk McMahan. In an email dated January 15, 2010, (Tab 12) Zuckerman included "Kirk McMahan" [kirkm@thexbanker.com](mailto:kirkm@thexbanker.com) in the to line. During a March 26, 2009 email (Tab 5) Zuckerman indicated that "As for Kirk, his job is to determine what can bite me and my partners in the ass and/or annoy me ... He's evaluated and commissioned deals for me that produced 45M annually." These statements would seem to indicate that Zuckerman and McMahan have a long standing relationship.

**Potential Zuckerman Email Impersonation**

In another fraudulent act, Zuckerman appears to have created emails in order to impersonate certain individuals in order to threaten and intimidate Dr. Connelly and those close to him. For instance, it appears that Zuckerman created an email aaront@progenexusa.com, nearly identical to the real email (aaron@progenexusa.com) for Aaron Thomas, one of his subordinates and fundraisers. This email conveyed a message of dire warning of lawsuits to Dr. Connelly.

In another example of impersonation (Tab 30), it appears that Zuckerman created an email vince.andrch@gmail.com, nearly identical to the authentic email vince.andrich@gmail.com belonging to Vince Andrich, an associate of Dr. Connelly's. Andrich denied writing any emails utilizing the email vince.andrch@gmail.com only utilized the vince.andrich@gmail.com email for his communications. The first email is fraudulent and was intended to spread lies about Dr. Connelly to another of his associates.

In still another instance of email impersonation (see Tabs 27, 28 & 29), it appears that Zuckerman created an email account (mshields23@gmail.com) and persona based upon a genuine VenturePharma investor named Mark Shields. The emails were sent to Dr. Connelly and his legal team and threatened a class action law suit against Dr. Connelly from a group of investors. When asked, the genuine Mark Shields that invested in VenturePharma stated that he did not write the emails sent in his name.

The length of time Zuckerman has operated combined with the boldness and sophistication of the schemes denotes a formidable criminal organization. Equally alarming is Zuckerman's violent tendencies and outbursts if faced with adversity. Per the attached email (Tab 14) Zuckerman is clearly in charge of the entire organization. In this email, Luke Adams provides Zuckerman a status report on the accounting financial entries into Quickbooks of nearly all the companies referenced above. The organization Zuckerman established has acted with impunity, perpetrating financial fraud on the individuals identified causing severe hardship to all that have mistakenly fallen for his trap.

**Dr. Connelly and his attorneys have all referenced documents and supporting evidence and will provide them upon request. Dr. Connelly may be reached at:**

Telephone: [REDACTED]

Email: [REDACTED]



EXHIBIT C

To Jennifer Waier  
United States Attorney's Office  
Central District of California

From Glenn Puit  
[REDACTED]  
[REDACTED]

September 22, 2011

Cc: FBI Agent Paul Bondurant  
Honorable Cormac J. Carney  
U.S. Attorney Andre Birotte

Dear Ms. Waier:

My name is Glenn Puit. I am an investigative journalist originally contracted by Dr. Scott Connelly to independently verify the various deceptive business activities of Adam Stuart Zuckerman during the period of his supervised release by the US Attorney's Office of the Central District of California.

I am now writing a book on this matter separate from my prior work for Dr. Connelly.

I was previously a lead investigative reporter with the Las Vegas Review-Journal. I've covered the criminal justice system for 20 years. I'm a five-time published author with Berkley in New York. I'm committed to documenting how this individual has been able to victimize multiple citizens while pending sentencing in a \$20 million bank fraud.

During the past eight months I have identified and interviewed ten individuals who have been victimized by Zuckerman during the time frame of November 2007 to the present while he was using the alias "Adam Stuart." It is my understanding that an evidentiary hearing has now been ordered in before Judge Cormac Carney on 31 Oct. to discover the conduct of Adam Zuckerman and codefendant Kirk McMahan while on supervised release.

If the U.S. Attorney's Office and the FBI of Southern California are truly interested in documenting Mr. Zuckerman's criminal conduct since his guilty plea in Operation Lease Fleece, you need to contact the following individuals, each of whom I've interviewed in detail:

**Mark Warner** -- A Dallas real estate executive scammed by Mr. Zuckerman while using an alias (Adam Stuart) and while pending sentencing. As is often the case, Zuckerman's scam was made facilitated by complicit civil attorneys in Southern California who either concealed Zuckerman's true identity or who used the civil courts to further a criminal enterprise by a convicted felon.

[REDACTED]

[REDACTED]

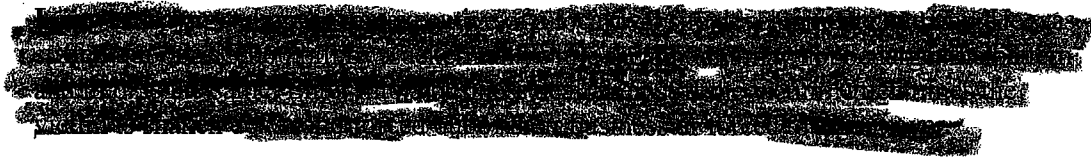
[REDACTED]

**Charlene England** -- Targeted with the X-Banker scam as was evidenced in court in front of Judge Carney. Zuckerman controls this company and was engaged in this criminal behavior while pending sentencing in your case. Kirk McMahan served as manager of this Zuckerman controlled entity while using the alias "Kirk McMahon."

**Jeff Corbett** -- Mr. Corbett -- a resident of North Carolina -- pursued a business venture with Zuckerman and Page and other associates to develop his start-up website company. Corbett told me he was eventually strong-armed out of his business by Zuckerman, who at the time also went by "Adam Stuart." Mr. Corbett lost three years of his work due to Zuckerman's actions.

**Scott Connelly** -- Dr. Connelly entered into a business negotiation with a man he knew only as "Adam Stuart." He subsequently came to learn "Stuart" is actually Zuckerman. This happened while Zuckerman was pending sentencing in his current case. Connelly eventually wired \$1 million to business interests controlled by "Stuart" for the purpose of developing a start-up nutraceutical product called Progenex. The \$1MM investment was never used for its directed purpose of medical research and Zuckerman instigated a baseless lawsuit against Connelly to obfuscate his theft of the money. Through his complicit lawyers Zuckerman has been stalling discovery (recovery of bank records) in the hopes that the delay will produce a settlement before bank records are reviewed by the SEC and the court. Additionally, Zuckerman has instigated a frenetic campaign of online defamation and e-personation against Dr. Connelly and continues to offer removal of the online content as part of an extortion based settlement agreement.

**Michael Roberts** -- Mr. Roberts, founder of a Nevada-based Internet company called Rexxfield, entered into business negotiations with Zuckerman, Page and other associates of Zuckerman. He was eventually forced out of his business and fled to Finland because Zuckerman threatened his life. Roberts was forced to sign a legal agreement in which he would not speak about this matter, but I have gathered this information through alternate sources.



**Darren Meade** -- Former CEO of Progenex. His allegations were documented in court in front of Judge Carney. The abuse of Mr. Meade by Zuckerman is prolific, but perhaps most disturbing is the death threats made by Zuckerman against him and the ongoing malicious online defamation campaign carried out by Zuckerman against Mr. Meade.

**Vince Andrich** -- Mr. Andrich is a colleague of Dr. Connelly's and former Sales and Marketing Director for Progenex. Mr. Andrich was named as an additional codefendant in the baseless litigation filed against Dr. Connelly in May of 2010. The purpose of including him was purely to attempt to pressure Dr. Connelly into entering into settlement discussions with Zuckerman. This rapacious tactic has escalated to include Zuckerman's institutionalized technique of online defamation against Mr. Andrich. Zuckerman also instigated an email campaign of identity theft using the email account [Vince.Andrich@gmail.com](mailto:Vince.Andrich@gmail.com) to attempt to surreptitiously gain information about Dr. Connelly's litigation strategy. Mr. Andrich is filing a complaint in Federal court in the immediate future noticing these causes of action and others.

I would strongly urge you as well to probe the conduct of Mr. Zuckerman's civil attorneys in these matters. They are actively concealing his identity and abusing the civil courts to pry money out of victims. It is extortion.

If you need further information please don't hesitate to contact me. Someone has to stop this individual and his co-conspirators. I understand that he is likely to face prison time for Operation Lease Fleece, but his conduct while pending sentencing shows he truly is an extreme menace to society. He has caused extreme pain to all the individuals listed above, and it is worth noting that this is after his guilty plea in your case.

Thank you,

Glenn Puit

EXHIBIT D

## **One Million Dollar Fraud:**

### **Investor Fraud By Adam Stuart Zuckerman**

#### **Of Dr. Scott Connelly**

The most recent victim of Adam Zuckerman's fraudulent activities is Dr. Scott Connelly. Dr. Connelly is a world famous physician who has devoted his life to the science of nutrition and fitness and is considered around the world as a leading expert in the field of human nutrition and metabolism. Among his notable accomplishments, Connelly created the high quality protein formulation that became the key ingredient in MET-Rx, the high protein, low-fat vitamin and mineral enriched drink mix he invented. Connelly is the namesake of UCLA's Connelly Laboratory for Applied Nutritional Sciences at the UCLA School of Medicine, Division of Clinical Nutrition and is a visiting professor at UCLA's School of Medicine with teaching responsibilities in the area of the physiology of nutrition and muscle metabolism.

For more than a decade, Connelly has also researched into developing medical products from specific dairy bioactive whey protein fractions to exploit their profound regenerative properties. Whereas traditional high protein nutritional products serve as fuel for muscle and strength, dairy bioactive nutritional products contain one or more specific protein fractions that serve as an ignition system to spark other positive aspects of proteins such as wound healing and tissue regeneration.

In 2006, Dr. Connelly initiated discussions with the Murray Goulburn Cooperative (MGC) to form a joint venture to commercialize the dairy bioactive protein fraction called Whey Growth Factor Extract (WGFE). In 2009, based upon successful medical studies, Dr. Connelly and MGC decided to seek additional outside financing for further development and commercialization of the dairy bioactive. That decision, in March 2009, led to Dr. Connelly's introduction to Adam Stuart (Zuckerman) and Ryan Page both whom represented that they were directors of Mercury Ventures. Dr. Connelly first met Zuckerman in person in March 10, 2009, under the alias of Adam Stuart. He continued to use that name and be referred to by that name throughout Dr. Connelly's dealings with him from March 2009 through April 2010.

Zuckerman and Page indicated that Mercury Ventures could raise the required funds through Shared Success and VenturePharma. As a result of meetings and discussions Dr. Connelly had with Zuckerman and Page, they agreed to set up a new company that would further develop and commercialize the three dairy bioactive protein products that Dr. Connelly was currently marketing. In return, Zuckerman and Page were to raise \$5,000,000 to finance the operation of the new company and to fund medical research. Dr. Connelly agreed to personally invest \$1,000,000 of that amount into the new company to be used solely for medical research.

### Dr. Connelly's Investment to be Used for Medical Research

The Progenex formulas controlled by the company Progenex Dairy Bioactive and originally developed in a joint venture between Dr. Connelly and Murray Goulburn Cooperative (MGC) were to be marketed in two fields: Medical and Sports. Dr. Connelly recognized that the greatest potential for success would lie with the medical applications. Dr. Connelly's life goal has been to produce the most significant contribution to modern medicine based on nutrition. The sports application field is clogged with many competitors requiring large capital reserves for marketing and distribution demands in order to compete.

The primary reason for Dr. Connelly to seek the raising of monies was to fund the medical research he knew was necessary for the market to recognize the potential of the medical formula. Through numerous meetings and communications, Zuckerman and Ryan Page caused Dr. Connelly to believe, without a doubt, that the monies he was to invest and ultimately did invest in November 2009 would be used exclusively for medical research.

However, none of the monies raised from Dr. Connelly or the other investors were ever allocated or spent on medical research. Dr. Connelly's investment was withheld from him from the moment it arrived in the PDB account that Adam Zuckerman, through Ryan Page, controlled. Dr. Connelly never had access to the monies in order to finance the two clinical trials he had scheduled, never had access to the financials for PDB, was never permitted to see the list of other investors and was never able to direct the use of any of the invested funds. Once his money was invested into Progenex Dairy Bioactive (PDB) (Tab 17), under the clear understanding that it was to be used for medical research, it was gone.

It is clear from reviewed documents that the entire PDB team, including Dr. Connelly, Ryan Page, Aaron Thomas and Adam Stuart Zuckerman not only acknowledged and stated the necessity to conduct further clinical trials but elevated the medical applications of this product as the centerpiece of the PDB opportunity. Emails, memorandum's, investor information and calls from July 2009 through April 2010 illuminate the understanding that Dr. Connelly's investment was to be utilized for medical research.

Failure to direct Dr. Connelly's investment to the stated application (medical research) not only directly defrauded Dr. Connelly of his own \$1,000,000 but defrauded every investor who were clearly told to that the medical opportunity was the centerpiece of this deal and that money invested in the company would be partly used for conducting the medical research studies essential to bringing the medical formula to market.

Zuckerman and Page provided lip service to Dr. Connelly and the investors, promising access to the funds for research but never intending to relinquish control of any of the funds. These funds were and continue to be, controlled and exploited by Zuckerman and those he directs. The below listed items are intended to show that all parties concerned believed that the money was to be utilized for the required medical research:

- In an undated confidential information memorandum created by Adam Zuckerman and VenturePharma (**Tab 3**) used to solicit investment dollars, the "deal" is described as an opportunity to get into a \$5,000,000 Seed Round with significant opportunities in two lucrative sectors including Medical in which the money from the Seed Round would be used to fund clinical trials for the medical formulation. The memorandum went on to describe that the planned medical trials would be "...suitable for publication in prominent medical journals of medicine, a critical step toward adoption in to the medical community." The information memorandum also indicated that Dr. Connelly had already invested \$1,000,000 of his own funds into the Seed Round as an enticement to lure further investment.
- In an email dated 07/28/2009 from Zuckerman to a potential investor Greg Keith (**Tab 4**), Zuckerman indicated that in a financial model sent to Keith there would be two divisions, medical and sports and described this deal as "...heavily weighted toward medical." In addition, the projected monthly expenses over the first 24 months included \$1,050,000 specifically for Medical Clinical Studies.
- In an email dated 08/02/2009 from Adam Zuckerman to David Meltzer (**Tab 5**), Zuckerman stated that Dr. Connelly's position was that if the \$5,000,000 was not raised then he (Connelly) would "...fund the clinical trials, dump the sports side, and license the deal to a pharma company." This statement indicates that both Dr. Connelly and Zuckerman understand that it is the medical formulation of Progenex and the medical trials that are the core of the PDB.
- In August 2009 a Memorandum of Understanding entitled "Common Stock Financing of Progenex Dairy Bioactive, Inc" was agreed to and signed by Dr. Connelly, Leigh Steinberg Sports & Entertainment, VenturePharma LLC and Progenex Dairy Bioactives, Inc. (**Tab 6. A copy of the signed MOU is available but not currently included**). On page 4 of the MOU, under Dr. Connelly's contributions it states "Connelly agrees to invest \$1M at the initial round of this \$15M pre-money valuation (**such \$1M to be earmarked for research**) once \$4M in outside capital has been raised for the Company."
- In an email dated 08/22/2009, (**Tab 7**) Zuckerman to thank the partners of the business deal and in particular "...Scott Connelly for his contributions and lifetime efforts in pioneering this amazing opportunity is often acknowledged , **but his recent decision to invest \$1M for research** , only confirms his convictions and dedication to this effort. For investors, this is the vote of confidence that leaves very little to discuss." Once again, Zuckerman clearly indicated to all parties involved, including Dr. Connelly, that Dr. Connelly's investment would be used specifically for research.
- On September 10, 2009 (**Tab 8**) an investor call was conducted. Included in the call were approximately 30 investors and Adam Zuckerman (Identified during the call by his alias "Adam Stuart" to all call participants), Ryan Page, Aaron Thomas, Andrew Medal, Luke



Adams, Greg Keith, Dr. Scott Connelly and Dr. William Seeds. During the call Dr. Connelly indicated to the investors that the major reason for the fund raise and the reason Dr. Connelly was risking his own money, was to conduct human clinical trials. Much of the investor call, including questions posed by the investors, discussed the intended clinical trials. In response to an investor's question Dr. Connelly indicated that "...with \$1,000,000 allocated to research in the first year, you can get the fracture study completed." In response to another question from an investor, Zuckerman stated that "So the ability to put 20% of our budget (20% of total budget of \$5,000,000 raised from investors would equal the \$1,000,000 invested by Dr. Connelly) towards clinical studies right now...provide a significant capabilities to provide substantive clinical research that will give a tremendous enhancement boost to the valuation of this opportunity."

- In an email dated 09/18/2009, (Tab 9) Zuckerman indicated to Dr. Connelly that including Dr. Connelly's \$1,000,000 investment, the total raised was \$4,000,000. It appears that these inflated numbers were being used by Zuckerman to encourage Dr. Connelly to invest his own money prior to Zuckerman fully raising the other \$4,000,000 as agreed to in the August 2009 MOU.

As part of the November 8, 2009 Contribution Agreement signed by VenturePharma, Dr. Connelly and the Murray Goulburn Cooperative (MGC), PDB was to raise a total of \$5,000,000 within 90 days from the signing of the agreement or that the entire agreement could be rescinded ("Reversion Agreement"). In an email dated 11/06/2009 Zuckerman directed Aaron Thomas to remove any mention of the existence of the 90 day Financing condition and potential loss of exclusive rights. The material facts of the nature of the agreements that PDB and VenturePharma had entered into was purposely concealed from the investors. In February 2010, after having failed to raise the required money, MGC stated their intent to exercise their right to terminate the Medical License Agreement and Nutritional License Agreement thus extinguishing the exclusivity of the PDB deal sold to investors (Tab 11). This event kicked off another two months of heated renegotiations between Zuckerman, Dr. Connelly and MGC. As evidenced below, in response to Dr. Connelly's demands that he be granted access to his own invested funds for the necessary medical research continued, Dr. Connelly was repeatedly told the funds would be set aside.

- In an email from Ryan Page dated 03/24/2010 (Tab 12) to Dr. Connelly, Page stated that "the medical business must remain the primary focus, with no less than \$750 of the current capital reserves earmarked for that division, as agreed to, by and between VP (VenturePharma) and Connelly."
- In an email dated 03/26/2010 (Tab 13) from Zuckerman to Dr. Connelly, Zuckerman stated he wanted to discuss the "separate capitalization of Medical (Division of PDB) and its related budget." This email appears to show Zuckerman's continued efforts to thwart Dr. Connelly's access to the funds allocated for the medical research, five months after Dr. Connelly invested his \$1,000,000 specifically for research and even longer since investors had been

told that PDB money was going towards research. Interestingly, later in the email, Zuckerman indicated that he had invested \$1,000,000 of his own money.

- In an email dated 03/29/2010 (**Tab 14**) Ryan Page stated that his goal was to preserve "...at least \$750,000 for medical."
- In an email dated 03/31/2010 (**Tab 15**) Zuckerman recommended to Dr. Connelly that he move to the Chief Science Officer position within medical and "...we agree to partition a budget..." for that division. Zuckerman continued the blocking maneuvers which prevented Dr. Connelly to gain access to the funds necessary for the medical research.
- In an email dated 04/12/2010 (**Tab 16**) Zuckerman reported to Dr. Connelly that a separate operating account for medical was being established at Chase Bank. To Dr. Connelly's knowledge this never occurred.

As the deal with MGC fell apart, Zuckerman became increasingly desperate. He threatened to file multiple lawsuits against Dr. Connelly. It appears that Zuckerman pushed the message to the investors that the deal fell apart because of illegal actions taken by Dr. Connelly, not due to actions of anyone at Mercury Ventures, VenturePharma, Shared Success or PDB. In late April 2010 Dr. Connelly became aware of Adam Stuart's true identity and criminal history and notified MGC that they too had been misled and possibly defrauded by Adam Stuart Zuckerman.

**PROOF OF SERVICE**

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 1990 South Bundy Drive, Suite 705, Los Angeles, California 90025.

On October 26, 2011, I served the foregoing document described as **MOTION BY VICTIMS TO INTERVENE AND BE HEARD AT EVIDENTIARY HEARING AND SENTENCING PURSUANT TO 18 U.S.C. § 3771(d)(3); REQUEST FOR CONTINUANCE AND OTHER RELIEF; DECLARATIONS OF BECKY WALKER JAMES, RICHARD KINCAID, AND GLENN PUTT; EXHIBITS** on each interested party, as follows:

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Attorneys for Defendant Kirk A. McMahan

**X (BY MAIL)** I placed true copies of the foregoing document in a sealed envelope addressed to each interested party, as set forth above, for collection by the United States Postal Service.

**X (BY E-MAIL)** By causing such document to be delivered by e-mail to the above counsel at the e-mail addresses on record with the Court.

I declare that I am a member of the bar of this court and that the foregoing is true and correct.

Executed on October 26 2011, at Los Angeles, California.



Becky Walker James