APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 19-1913

Present: Pierre N. Leval, Debra Ann Livingston, Circuit Judges.*

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 14th day of November, two thousand nineteen.

Michael G. Bouchard,

Petitioner – Appellant,

v.

United States of America,

Respondent – Appellee.

Appellant, pro se, moves for a certificate of appealability. Upon due consideration, it is hereby ORDERED that the motions are DENIED and the appeal is DISMISSED because appellant has not

"made a substantial showing of the denial of a constitutional right." 28 U.S.C. 2253(c); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk of Court

/S/

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* Judge Wesley has recused himself from consideration of this motion. Pursuant to Second Circuit Internal Operating Procedure E(b), the matter is being considered by the two remaining members of this panel.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 19-1913

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 27th day of December, two thousand nineteen.

Michael G. Bouchard,

Petitioner – Appellant,

v. **ORDER**

United States of America,

Respondent – Appellee.

Appellant, Michael G. Bouchard, filed a motion for panel reconsideration, or, in the alternative, for reconsideration *en banc*. The panel that determined the appeal has considered the request for reconsideration, and the active members of the Court have considered the request for reconsideration *en banc*.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 19-1037

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

Present: Debra Ann Livingston, Raymond H. Lohier, Jr., Susan L. Carney, Circuit Judges.

In re Michael G. Bouchard,

Petitioner.

Petitioner, pro se, has filed a petition for a writ of mandamus and moves to nullify the district court's decision denying his 28 U.S.C. § 2255 motion. Upon due consideration, it is hereby ORDERED that the mandamus petition is DENIED as moot because the district court has denied Petitioner's § 2255 motion. It is further ORDERED that the motion to nullify is DENIED.

The Clerk of Court is directed to transmit the motion to nullify, 2d Cir. 19-1037, doc. 21, to the district court to be filed as a notice of appeal from the district court's order denying Petitioner's § 2255 motion. Fed. R. App. P. 4(d).

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk of Court

/S/

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

MICHAEL BOUCHARD,
Petitioner,

v. Case No. 1:12-CR-381

UNITED STATES OF AMERICA,
Respondent.

Appearances: Michael G. Bouchard, Latham, New York 12110, Petitioner, *pro se.* For United States of America: Grant C. Jaquith, United States Attorney Tamara B. Thomson, Assistant United States Attorney, 100 South Clinton Street, Syracuse, New York 13261, *Attorneys for Respondent*

Hon. Norman A. Mordue, Senior U.S. District Court Judge:

MEMORANDUM-DECISION AND ORDER

I. INTRODUCTION

Now before the Court is Petitioner's motion to vacate his conviction and sentence pursuant to 28 U.S.C. § 2255. (Dkt. No. 153). The Government opposes the motion, (Dkt. No. 161), and Petitioner

has filed a reply, (Dkt. No. 164). Petitioner has also filed a related motion for discovery. (Dkt. No. 166). The Government opposes the discovery motion, (Dkt. No. 174), and Petitioner has filed a reply, (Dkt. No. 176). Petitioner has also filed a request for an evidentiary hearing on issues related to pre-trial discovery. (Dkt. No. 177). Petitioner's motions and request for a hearing are denied, for the reasons that follow.

II. BACKGROUND

On November 30, 2012, following a two-week jury trial, Petitioner was convicted on four felony offenses, including: one count of conspiring to submit false statements to a financial institution in violation of 18 U.S.C. § 371 (Count 1); two counts of bank fraud in violation of 18 U.S.C. § 1344 (Counts 7 and 19); and one count of false statements knowingly made to a financial institution in violation of 18 U.S.C. § 1014 (Count 24). (Dkt. No. 38). Petitioner's conviction stems from his role as a closing agent, between 2000 and 2007, for a number of mortgage lenders and the submission of HUD-1 settlement statements to lenders, which falsely stated that buyers made cash down payments and contained false accounts of how mortgage proceeds were disbursed at closing. On October 12, 2014, the Court sentenced Petitioner to 48 months imprisonment on each of the four counts, to run concurrently, followed with three-years supervised release, restitution in the amount of $1,175,565.07, and a forfeiture money judgment of $11,500. (Dkt. No. 106). The Court denied Petitioner's motions for a judgment of

acquittal, (Dkt. No. 35), and a new trial, (Dkt. No. 36). (Dkt. No. 89). Petitioner filed a timely notice of appeal on November 4, 2014. (Dkt. No. 111; 2d Cir. No. 14-4156, Dkt. No. 1).

Petitioner was represented by Attorney Gaspar M. Castillo, Jr. at trial and sentencing. (*See* Dkt. Nos. 33, 106). On December 30, 2014, Petitioner filed a notice of appearance for substitute counsel, replacing Attorney Castillo with new appellate counsel, Attorney Nathaniel Z. Murmur. (2d Cir. No. 14-4156, Dkt. No. 14).

On July 7, 2016, the Second Circuit affirmed Petitioner's conviction on Count 1 for conspiracy to submit false statements to a financial institution, but reversed Petitioner's convictions on Counts 7 (bank fraud), 19 (bank fraud), and 24 (false statements to a financial institution). (Dkt. No. 122; *see also* 2d Cir. No. 14-4156, Dkt. No. 81-1). The Circuit concluded that one of the mortgage lenders involved in Petitioner's scheme, BNC Mortgage ("BNC"), was not a "financial institution" under the law because it was not federally insured. *See generally United States v. Bouchard*, 828 F.3d 116 (2d Cir. 2016). So, the Circuit held that the substantive counts for bank fraud and false statements involving BNC could not stand. *Id.* However, the Circuit found that there was sufficient evidence at trial to support Petitioner's conspiracy conviction for his role in a real estate transaction involving a mortgage backed by Fremont Investment & Loan ("Fremont"), a federally-insured lender. *Id.* The

matter was remanded for resentencing on Count 1. (Dkt. No. 122, p. 31).

On October 20, 2016, the Court resentenced Petitioner on Count 1 to a term of 48 months imprisonment with a term of three-years supervised release. (Dkt. No. 146). Following his term of imprisonment, Petitioner was released on April 13, 2018. *See* Federal Bureau of Prisons, Inmate Locator (Apr. 29, 2019), https://www.bop.gov/inmateloc/. Petitioner now seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2255 to vacate his conspiracy conviction. (Dkt. No. 153). Further, Petitioner seeks an order from this Court compelling the Government to disclose certain documents and other evidence that Petitioner believes would aid in his attempt to overturn his conviction. (Dkt. No. 166). The Government opposes Petitioner's motions. (Dkt. Nos. 161, 174).

III. DISCUSSION

A. Motion to Vacate

1. Legal Standard

Under 28 U.S.C. § 2255, "[a] prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate,

set aside or correct the sentence." 28 U.S.C. § 2255(a). "If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate." 28 U.S.C. § 2255(b). In general, a motion for habeas relief must be made within one year. 28 U.S.C. § 2255(f).

A Section 2255 motion is not a substitute for an appeal. *Sapia v. United States,* 433 F.3d 212, 217 (2d Cir. 2005). There is a strong preference to adjudicate challenges to a conviction through direct appeals rather than by collateral attack. *United States v. Vilar*, 645 F.3d 543, 548 (2d Cir. 2011). Thus, "[a] collateral attack is not a substitute for direct appeal and petitioners are therefore generally required to exhaust direct appeal before bringing a petition [pursuant to Section] 2255." *Id.* (citing *United States v. Dukes*, 727 F.2d 34, 41 (2d Cir. 1984)).

Because of his *pro se* status, Petitioner's submissions should be "liberally construed in his favor," and will be read "to raise the strongest arguments that they suggest." *United States v. Jackson*, 41 F. Supp. 3d 156, 161 (N.D.N.Y.

2014).[1] However, a court "need not assume the credibility of factual assertions, as it would in civil cases, when the assertions are contradicted by the record in the underlying proceeding." *Puglisi v. United States*, 586 F.3d 209, 214 (2d Cir. 2009).

2. Application

Petitioner's Section 2255 motion to vacate asserts seven separate grounds for the requested relief. (Dkt. No. 153). However, for the reasons that follow, each of Petitioner's proffered legal theories are insufficient to vacate his conviction. Thus, Petitioner's motion is denied.[2]

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[1] The Court notes that, "as a former attorney, Plaintiff may not be entitled to the same level of solicitude ordinarily afforded to a *pro se* litigant." *Tonogbanua v. Am. Int'l Grp., Inc*, 2018 WL 1785487, *1 n.3, 2018 U.S. Dist. LEXIS 63005, *2 n.3 (E.D.N.Y. Apr. 13, 2018); *see also Tracy v. Freshwater*, 623 F.3d 90, 102 (2d Cir. 2010) ("[T]he degree of solicitude may be lessened where the particular pro se litigant is experienced in litigation and familiar with the procedural setting presented.").

[2] Petitioner's brief, spanning 97 pages, is in clear violation of the local rules, which limit habeas petitions to 25 pages. See N.D.N.Y. L.R. 72.4(a) ("No memoranda of law filed in Habeas Corpus proceedings shall exceed twenty-five (25) pages in length, unless the party filing the memorandum of law obtains leave of the judge hearing the motion prior to filing."). Petitioner did not request leave to file an oversized brief. Although Petitioner has proceeded pro se, as a former attorney, Petitioner is reminded of each party's obligation to consult and comply with the local rules in the future.

i. Claim Preclusion

There are two general rules regarding claim preclusion that apply to collateral challenges based on a prior adjudication. *See Mui v. United States*, 614 F.3d 50, 53 (2d Cir. 2010). First, the "so-called mandate rule bars re-litigation of issues already decided on direct appeal." *Id.* (citing *Burrell v. United States*, 467 F.3d 160, 165 (2d Cir. 2006)). The mandate rule also prevents re-litigation "not only of matters expressly decided by the appellate court, but also precludes re-litigation of issues impliedly resolved by the appellate court's mandate." *Id.* (citing *United States v. Ben Zvi*, 242 F.3d 89, 95 (2d Cir. 2001)). Second, the "procedural default" rule "prevents Section 2255 claims that could have been brought on direct appeal from being raised on collateral review absent cause and prejudice." *Id.* at 54 (citing *Marone v. United States*, 10 F.3d 65, 67 (2d Cir. 1993) ("In order to raise a claim that could have been raised on direct appeal, a § 2255 petitioner must show cause for failing to raise the claim at the appropriate time and prejudice from the alleged error."); *Campino v. United States*, 968 F.2d 187, 190 (2d Cir. 1992) ("[F]ailure to raise a claim on direct appeal is itself a default of normal appellate procedure, which a defendant can overcome only by showing cause and prejudice.")).

Further filings that do not comply with the Court's local rules will be rejected.

When a petitioner has procedurally defaulted on a claim by failing to raise it on direct review, the claim may only be raised under Section 2255 "if the [petitioner] can first demonstrate either 'cause' or actual 'prejudice,' or that he is 'actually innocent.'" *Gupta v. United States*, 913 F.3d 81, 84 (2d Cir. 2019) (citations omitted). "[I]n order to meet the cause-and-prejudice standard, the prejudice that must be shown is not merely whether the [alleged error] is undesirable, erroneous, or even universally condemned, but rather whether the [error] by itself so infected the entire trial that the resulting conviction violates due process." *United States v. Frady*, 456 U.S. 152, 169 (quoting *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977)). "[T]he mere fact that counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it, does not constitute cause for a procedural default." *Gupta*, 913 F.3d at 85 (quoting *Murray v. Carrier*, 477 U.S. 478, 486 (1986)). Application of these rules to Petitioner's claims eliminate five of his seven grounds for appeal.

a. Mandate Rule (Ground 5)

Petitioner's argument that the jury's general verdict on the conspiracy count was unsound because it did not indicate the specific basis for conviction ("Ground 5") is precluded because it was raised and resolved on direct appeal. (*See* Dkt. No. 153, pp. 37–42). Specifically, Petitioner points out that the jury's general verdict on conspiracy did not indicate whether it was based

on the "legally-sound Fremont transaction" or the "legally-unsound CitiMortgage transaction." (*Id*, p. 37). But Petitioner's own motion papers freely admit that "[t]his ground was raised at the Second Circuit Court of Appeals." (*Id.*, pp. 93–94, 96). Indeed, the Second Circuit's decision clearly addressed this point, finding that:

> Without a special verdict form demonstrating that the jury convicted on a theory not supported by sufficient evidence, [ ] we can easily reconcile the jury's verdict to acquit on the substantive count involving Fremont with its finding that an overt act involving Fremont occurred as part of the conspiracy. The differing verdicts might, for example, simply reflect the fact that the Fremont closing was attended by one of Bouchard's paralegals rather than Bouchard, and the jury may reasonably have declined to find Bouchard guilty of the substantive count and simultaneously determined that his co-conspirator (the paralegal) committed the overt act charged in the conspiracy count.

Bouchard, 828 F.3d at 128 (citation omitted).

Further still, as the Government notes, Petitioner's papers fail to provide any basis for how the alleged error worked to his prejudice or would have changed the outcome. For these reasons, Petitioner's "Ground 5" does not provide a valid basis to vacate his conspiracy conviction. *See United States v. Mancuso*, 2016 WL 9241961,

at *2, 2016 U.S. Dist. LEXIS 195485, at *5–6 (N.D.N.Y. Aug. 23, 2016) (denying vacatur where petitioner's arguments were previously raised on direct appeal).

b. Procedural Default (Grounds 1, 3, 4 and 6)

Next, several of Petitioner's other alleged grounds for vacatur are precluded by his procedural default. Specifically, these include Petitioner's arguments that: (1) the jury's general verdict of guilty on Count 1 was legally insufficient because it did not indicate whether it convicted on the basis of conspiracy or the alternative basis of aiding and abetting a conspiracy ("Ground 1"); (2) that the indictment violated the ex post facto clause of the Constitution ("Ground 3"); (3) that the jury instructions regarding conspiracy were erroneous because they omitted to mention essential elements ("Ground 4"); and (4) that the conscious avoidance jury instructions were legally erroneous ("Ground 6"). (*See generally* Dkt. No. 153). Petitioner claims that none of these claims were presented until now because they either: (1) present a "permissible" constitutional issue; or (2) present issues that "arose as a direct result" of the Second Circuit's July 7, 2016 decision. (*Id.*, pp. 95–96).

Here, each of these arguments present entirely new theories that could have been raised on direct appeal. Petitioner's papers offer no cause or basis for his failure to bring these claims as part of his direct appeal, and he does not allege any

ineffective representation by his appellate counsel. Contrary to Petitioner's contentions, none of these claims arose from the Second Circuit's decision, as they relate squarely to alleged errors *at the trial level.* Moreover, Petitioner does point to any specific prejudice from these alleged errors that could have changed the outcome of the case. So, because Petitioner has not met his burden to show cause or prejudice, the Court may not vacate his conviction on any of these grounds. *See Campino*, 968 F.2d at 190 ("[F]ailure to raise a claim on direct appeal is itself a default of normal appellate procedure, which a defendant can overcome only by showing cause and prejudice."); *see also Mancuso*, 2016 WL 9241961, at *2, 2016 U.S. Dist. LEXIS 195485, at *5–6 (denying vacatur where petitioner's new arguments that could have been raised on direct appeal).

ii. Prejudicial Spillover (Ground 2)

As another basis for vacatur, Petitioner asserts that "evidence introduced at trial on the counts reversed on appeal poisoned the jury's deliberations in deciding to convict on Count 1." (Dkt. No. 153, p. 18). Petitioner claims that he did not raise this issue on direct appeal because "this issue arose as a direct result of the appellate decision." (*Id.*, p. 96). Petitioner's argument seems to suggest that "prejudicial spillover" resulted from "retroactive misjoinder," which "refers to circumstances in which the joinder of multiple counts was proper initially, but later developments—such as . . . an appellate court's reversal of less than all convictions—render the

initial joinder improper." *United States v. Hamilton*, 334 F.3d 170, 181 (2d Cir. 2003) (citation omitted). While this issue could have been argued as part of Petitioner's direct appeal, the Court finds that the Second Circuit's decision to vacate all remaining substantive fraud counts now provides greater weight to Petitioner's spillover claim. Yet, even if this issue was not already implicitly considered by the Second Circuit in the decision to affirm Petitioner's conspiracy conviction, Petitioner's theory fails on the merits.

"A defendant bears an extremely heavy burden when claiming prejudicial spillover." *United States v. Griffith*, 284 F.3d 338, 351 (2d Cir. 2002). "The defendant must show that he or she suffered prejudice so substantial as to amount to a miscarriage of justice." *Id.* The Second Circuit has established a three-part test for determining whether there has been prejudicial spillover from evidence admitted to support convictions that were later set aside. *Hamilton*, 334 F.3d at 182. The *Hamilton* test considers: (1) whether the evidence introduced in support of the vacated count "was of such an inflammatory nature that it would have tended to incite or arouse the jury into convicting the defendant on the remaining counts," (2) whether the dismissed count and the remaining counts were similar, and (3) whether the government's evidence on the remaining counts was weak or strong. *Id.* (quoting *United States v. Vebeliunas*, 76 F.3d 1283, 1294 (2d Cir. 1996)).

Here, although Petitioner cites the *Hamilton* case generally, he fails to provide any non-speculative, non-conclusory basis to show that prejudicial spillover may have occurred. (*See* Dkt. No. 153, p. 22). Petitioner claims that prejudice may have resulted from the introduction of evidence regarding BNC Mortgage, which the Second Circuit found was not a covered institution at the time of the charged conduct. *See Bouchard*, 828 F.3d at 127. However, as the Government argues, there is no indication that this evidence was inflammatory, or that it affected the jury's findings as to Petitioner's involvement in the Fremont transaction. (Dkt. No. 161, pp. 14–16). As to the conspiracy count, the Second Circuit's decision recognized that there was sufficient evidence to support a finding of Petitioner's involvement in the Fremont closing. *Bouchard*, 828 F.3d at 128. Indeed, the Second Circuit affirmed Petitioner's conspiracy conviction on that very basis. *Id.* Moreover, the verdict indicates that the jury was able to properly distinguish between counts, and separately assess the evidence as to each one. (*See* Dkt. No. 38). Partial acquittal of a defendant strongly indicates that there was no prejudicial spillover. *See Hamilton*, 334 F.3d at 183 (collecting cases).

Accordingly, Petitioner has not met his heavy burden to show prejudicial spillover, and his argument on that basis ("Ground 2") must fail. *See United States v. Jones*, 482 F.3d 60, 78–79 (2d Cir. 2006) (finding no prejudicial spillover where the evidence was discrete as to each count, and

the evidence supporting the convicted counts was "more than adequate"); *United States v. Morales*, 185 F.3d 74, 82–83 (2d Cir. 1999) (finding that no prejudicial spillover occurred from invalidated counts where the jury acquitted defendant of some charges, but convicted on others where there was overwhelming evidence of guilt); *United States v. Andrews*, 166 F. App'x 571, 572–73 (2d Cir. 2006) (rejecting petitioner's prejudicial spillover and retroactive misjoinder claims where the evidence supporting the surviving charges was admissible and supportive of the jury's decision to convict on the challenged counts).

iii. Ineffective Assistance of Counsel (Ground 7)

Petitioner's motion alleges 27 separate "examples" of ineffective assistance by his trial counsel, Attorney Gaspar Castillo. (Dkt. No. 153, pp. 48–89). The alleged professional errors cited by Petitioner include, among other claims: (1) failure to persuade prosecutors not to prosecute; (2) failure to object to certain standard conditions of release; (3) failure to make a discovery motion; (4) failure to obtain complete copies of the Government's files; (5) failure to file a trial memorandum in response to the Government's memorandum; (6) failure to file sufficient jury instructions; (7) failure to request that the jury use a special verdict sheet; (8) failure to make a motion for a bill of particulars; (9) failure to make a motion to dismiss the Indictment based on the law; and (10) stipulating to allegedly inadmissible evidence. (*Id.*).

A defendant seeking to attack his sentence based on ineffective assistance of counsel must show: "(1) that counsel's performance fell below an 'objective standard of reasonableness,' and (2) that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Kieser v. New York*, 56 F.3d 16, 18 (2d Cir. 1995) (*per curiam*) (quoting *Strickland v. Washington*, 466 U.S. 668, 688 (1984)). There is a "strong presumption" that counsel's assistance was reasonable, and "every effort [should] be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. In evaluating such a claim, a court is obliged to review the record to determine the impact of the alleged ineffectiveness within the context of the entire trial. *See Berghuis v. Thompkins*, 560 U.S. 370, 389 (2010) ("In assessing prejudice, courts 'must consider the totality of the evidence before the judge or jury.'") (quoting *Strickland*, 466 U.S. at 695)). In other words, the "question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt." *Strickland*, 466 U.S. at 694.

Unlike other Section 2255 claims, a petitioner's "failure to raise an ineffective-assistance-of-counsel claim on direct appeal does not bar the claim from being brought in a later, appropriate

proceeding under § 2255." *Massaro v. United States*, 538 U.S. 500, 509 (2003). "To warrant a hearing on an ineffective assistance of counsel claim, the defendant need establish only that he has a 'plausible' claim of ineffective assistance of counsel, not that 'he will necessarily succeed on the claim.'" *Puglisi v. United States*, 586 F.3d 209, 213 (quoting *Armienti v. United States*, 234 F.3d 820, 823 (2d Cir. 2000)).

Here, for substantially the same reasons as the Government points out in its papers, the Court finds that Petitioner's ineffective-assistance claims are unpersuasive and unsupported by the record. Petitioner's laundry list of 27 alleged examples of ineffective assistance amount to a mere airing of grievances and hindsight rehash of his representation. Crucially, Petitioner's claims fail to show that: (1) Mr. Castillo's performance was below an objectively reasonable standard; *and* (2) that, but for the deficiency, the ultimate outcome of the proceeding would have been different. *See Strickland*, 466 U.S. at 687. To the contrary, the record shows that Petitioner was initially charged with over 24 felony counts related to his alleged involvement in fraudulent real estate transactions. (Dkt. No. 1). At the conclusion of the trial, Petitioner was acquitted of 20 of the 24 original counts. (Dkt. No. 38).

On appeal, Petitioner's appellate counsel successfully argued that BNC was not a federally insured financial institution, resulting in the reversal of three of the four felony convictions. *See generally Bouchard*, 828 F.3d 116. The basis for

Petitioner's appeal was successfully preserved by Attorney Castillo at trial. Petitioner now stands convicted of the conspiracy charge only (Count 1). (Dkt. No. 146). Significantly, on this remaining charge, the trial record contains considerable evidence showing that Petitioner conspired to obtain fraudulent mortgage proceeds from the transfer of residential property through a mortgage backed by Fremont, an FDIC-insured institution. (*See, e.g.*, Dkt. No. 48, pp. 4, 13–31 (testimony of Ms. Valdez, senior training specialist Fremont); Dkt. No. 50, pp. 96–98 (testimony of Ms. Hinds, one of Petitioner's former paralegals); Dkt. No. 51, pp. 191–195 (testimony of Ms. Edgerton, one of Petitioner's former paralegals); Dkt. No. 54, pp. 126, 167 (Petitioner's testimony acknowledging that Fremont was an FDIC-insured institution). As the Government notes, the trial record shows that "[e]ach of the lending institutions, [including Fremont], provided testimony that the misstatements [on the HUD forms] were material to the decision to lend. The developers admitted that they had been guilty of defrauding the banks, and three of them testified that they discussed the scheme with Bouchard." (Dkt. No. 161, p. 22). Moreover, among Petitioner's former employees involved in the scheme, "[o]ne paralegal said she learned how to commit the fraud from Bouchard and the other paralegal said she learned it from the first paralegal." *Id.*

Indeed, even if Petitioner had demonstrated some inadequacy on the part of Attorney Castillo,

his motion to vacate on that basis would still fail given the overwhelming evidence of his involvement in the Fremont transaction. *See Bouchard*, 828 F.3d at 129 (noting that "we are satisfied based on our review of the record that there was ample independent evidence proving that Bouchard was aware of the fraudulent nature of the schemes"); *see also United States v. Simmons*, 923 F.2d 934, 956 (2d Cir. 1991) (denying ineffective assistance of counsel claim because, due to the "plethora of evidence" against defendant, there was "little reason to believe that alternative counsel would have fared any better"); *United States v. O'Neil*, 118 F.3d 65, 73 (2d Cir. 1997) ("In the face of the overwhelming evidence against him, [the defendant] cannot show that there is a reasonable probability that, but for the alleged trial errors, the outcome of the trial would have been different."); *Drayer v. United States*, 50 F. Supp. 3d 382, 393–94 (E.D.N.Y. 2014) (rejecting the petitioner's ineffective assistance of counsel claims where, even if some inadequacy was demonstrated, the "overwhelming evidence" of petitioner's guilt was presented at trial). Therefore, Petitioner's request for habeas relief on this ground is denied.

iv. Summary

In sum, after careful review of the record, none of Petitioner's seven alleged grounds for vacatur under Section 2255 provide a valid basis for reversing his Count 1 conspiracy conviction. Petitioner's motion to vacate is therefore denied.

B. Request for a Hearing

Generally, "[a] petition for habeas corpus relief requires an evidentiary hearing to resolve disputed issues of fact unless the record shows that the petitioner is not entitled to relief." *Hayden v. United States*, 814 F.2d 888, 891 (2d Cir.1987); *see also* 28 U.S.C. § 2255(b). However, no such hearing is required where: "(1) the petition lacks 'meritorious allegations' that can be established by 'competent evidence;' (2) the case files and records conclusively demonstrate that the petitioner is not entitled to relief; or (3) the allegations of the petition, even if accepted as true, would not entitle the petitioner to relief." *Rabbani v. United States*, 156 F. Supp. 3d 396, 406 (S.D.N.Y. 2016) (citation omitted). Here, after reviewing the record and the parties' arguments, the Court finds that Petitioner has failed to establish any meritorious allegation that could be established by competent evidence, or entitle him to the relief he seeks. Accordingly, Petitioner's request for an evidentiary hearing on these issues is denied. *See Puglisi v. United States,* 586 F.3d 209, 216–18 (2d Cir. 2009) (holding evidentiary hearing would be fruitless when habeas petitioner failed to provide his own affidavit and only provided an affidavit of counsel); *Bishop v. United States*, 2015 WL 893560, at *8, 2015 U.S. Dist. LEXIS 24900, at *19–20 (E.D.N.Y. Mar. 2, 2015) (denying an evidentiary hearing where petitioner failed to raise any disputed issues of fact to require a Section 2255 hearing).

C. Motion for Discovery

On November 15, 2018, Petitioner submitted a motion for discovery pursuant to Rule 6(a) of the Rules Governing Section 2255 Proceedings. (Dkt. No. 166).[3] Petitioner seeks an order compelling the Government to produce: (1) "all *Brady, Giglio*, and *Jencks* material"; (2) "all grand jury material"; (3) "the Government's files in this case and other cases -and- the files of New York State law enforcement"; (4) "Michael Bouchard's original files held by the Government"; (5) "all cooperation agreements and/or Government motions for a reduction in sentence." (*Id.*, p. 6). Petitioner also asks the Court to "compel the government to provide the identities and addresses of all Government personnel that participated in the pre-trial discovery in this case," and "to compel the Government to respond to [Petitioner's] 'interrogatories.'" (*Id.*). The Government opposes Petitioner's discovery motion. (Dkt. No. 174). On January 23, 2019, Petitioner filed a letter with the Court claiming that the Government failed to provide a discoverable tape recording before trial, and requesting "that an evidentiary hearing be

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[3] Petitioner's Rule 6(a) motion, spanning 54 pages, is another clear violation of the local rules. *See* N.D.N.Y. L.R. 12.1(a). As mentioned above, *supra* note 2, further filings that do not comply with the Court's local rules will be rejected.

scheduled with respect to this disputed issue of fact . . . ." (Dkt. No. 177). Petitioner's requests for additional discovery and evidentiary hearing are denied, for the reasons that follow.

1. Legal Standard

Under Rule 6(a), "[a] judge may, for good cause, authorize a party to conduct discovery under the Federal Rules of Criminal Procedure or Civil Procedure, or in accordance with the practices and principles of law." A petitioner has shown good cause "where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is . . . entitled to relief." *Bracy v. Gramley*, 520 U.S. 899, 908–09 (1997) (quoting *Harris v. Nelson*, 394 U.S. 286, 300 (1969)). "A habeas petitioner, unlike the usual civil litigant in federal court, is not entitled to discovery as a matter of ordinary course." *Id.* at 904. "Generalized statements about the possible existence of material do not constitute good cause." *Cardoso v. United States*, 642 F. Supp. 2d 251, 265 (S.D.N.Y. 2009) (citing *Green v. Artuz*, 990 F. Supp. 267, 271 (S.D.N.Y. 1998)). In other words, "Rule 6 does not allow 'fishing expeditions based on a petitioner's conclusory allegations.'" *United States v. Bouyea*, 953 F. Supp. 2d 363, 367 (N.D.N.Y. 2013) (citing *Williams v. Bagley*, 380 F.3d 932, 974 (6th Cir. 2004)).

2. Application

Petitioner's Rule 6(a) motion argues that "[t]he past and current suppression of discoverable

materials evidencing prosecutorial misconduct confirms Michael Bouchard's entitlement to [the requested] information now by court order." (Dkt. No. 166-2, p. 30). The Government argues that Petitioner has failed to show good cause for discovery. (Dkt. No. 174, pp. 6–12).

Here, for substantially the same reasons described above, Petitioner's speculative allegations of suppressed evidence and prosecutorial misconduct simply cannot meet the "good cause" requirement set forth in Rule 6(a). *See Mendez v. United States*, 379 F. Supp. 2d 589, 599 (S.D.N.Y. 2005) (denying Rule 6(a) discovery motion where the petitioner failed to meet the good cause requirement). Moreover, to the extent that Petitioner's motion seeks discovery related to alleged perjury by Government witness Kevin O'Connell (*See* Dkt. No. 166-2, pp. 20–21; Dkt. No. 177), the Court finds that these issues were sufficiently reviewed and resolved in the Court's order denying Petitioner's Rule 33 motion (*see* Dkt. No. 89, pp. 38–49), which was subsequently affirmed by the Second Circuit. *See Bouchard*, 828 F.3d at 128–29 (finding that O'Connell's credibly was "strongly undercut" on cross-examination which "rendered the significance of [O'Connell's] perjury minimal.").

Accordingly, Petitioner's motion for discovery and request for an evidentiary hearing are denied. *See Bouyea*, 953 F. Supp. 2d at 366–67 (denying Rule 6(a) motion where the petitioner's factual allegations contradicted the record, and even if true, would not entitle him to relief); *Cardoso*, 642

F. Supp. 2d at 264–66 (denying Rule 6(a) motion for discovery where the petitioner failed to provide specific allegations showing reason to believe that he would be entitled to relief if the facts were fully developed); *DeCarlo v. United States*, 2008 WL 141769, at *7, 2008 U.S. Dist. LEXIS 2692, at *23–24 (E.D.N.Y. Jan. 4, 2008) (denying Rule 6(a) motion where the additional evidence sought, if developed, would not have entitled the petitioner to relief under Section 2255).

IV. CONCLUSION

The Court has thoroughly reviewed Petitioner's submissions, and to the extent they raise other, additional arguments, they wholly lack merit. Petitioner has not demonstrated any basis for relief under 28 U.S.C. § 2255. The motion, files, and records of the case conclusively show that Petitioner is not entitled to further discovery, and no hearing is required. Further, because petitioner has not made "a substantial showing of the denial of a constitutional right," the Court declines to issue a certificate of appealability. *See* 28 U.S.C. § 2253(c)(2).

Accordingly, for the above-stated reasons, it is hereby

ORDERED that Petitioner's 28 U.S.C. § 2255 motion (Dkt. No. 153) is **DENIED with prejudice**; and it is further

ORDERED that Petitioner's related motion for discovery and interrogatories (Dkt. No. 166) is **DENIED with prejudice**; and it is further

ORDERED that Petitioner's letter motion requesting an evidentiary hearing (Dkt. No. 177) is **DENIED with prejudice**; and it is further

ORDERED that a certificate of appealability shall not be issued in this case; and it is further

ORDERED that the Clerk of the Court is directed to serve copies of this Memorandum-Decision and Order in accordance with the Local Rules of the Northern District of New York.

IT IS SO ORDERED.

Date: May 6, 2019
Syracuse, New York

/S/
Norman A. Mordue
Senior U.S. District Court Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 14-90008-am

SUMMARY ORDER

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

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 19th day of January, two thousand eighteen.

PRESENT: José A. Cabranes, Robert D. Sack, Richard C. Wesley, *Circuit Judges.*

In Re Gaspar Castillo,

Attorney. ORDER OF GRIEVANCE PANEL

For the reasons that follow, the record of this disciplinary proceeding, except as to the portions described below, will be disclosed to the judge presiding over, and the parties to, the 28 U.S.C. § 2255 proceeding docketed in the United States District Court for the Northern District of New York under *Bouchard v. United States*, 12-cr-381 (N.D.N.Y.).

I. Overview of Disciplinary Record

By order filed in April 2016, this Court publicly reprimanded Gaspar Castillo for engaging in conduct unbecoming a member of the bar, and barred him from representing clients in this Court pursuant to the Criminal Justice Act for a two-year period. Castillo was represented in the disciplinary proceeding by Robert Roche.

The record for this disciplinary proceeding consists of a number of filings by Castillo and Roche and several orders of this panel, including (a) a May 2014 public order imposing an interim suspension; (b) a June 2014 public order terminating the interim suspension; (c) a June 2014 non-public order imposing a private reprimand; (d) an April 2016 public order imposing a public reprimand; and (e) a July 2016 public order imposing a reciprocal suspension, based on a suspension imposed by a state court.

Until now, the only documents in the record available to the public have been the above-listed orders imposing public discipline.

Both Castillo and Roche filed documents in Castillo's disciplinary proceeding that reference medical information about themselves. That information is found in a May 2014 letter from Roche and a November 2015 affirmation from Castillo; both documents primarily address the allegations of misconduct in the disciplinary proceeding, although Roche's letter also addresses the timing of Castillo's response to the misconduct allegations.

II. The Present Request for Disclosure

Elizabeth Bouchard, on behalf of Michael Bouchard, recently requested that Castillo's disciplinary record be disclosed to her and Michael Bouchard for purposes of Mr. Bouchard's § 2255 proceeding, which commenced in October 2017. *See Bouchard v. United States*, 12-cr-381 (N.D.N.Y.), doc. 153 (§ 2255 motion, filed Oct. 17, 2017). Mr. Bouchard alleges in his § 2255 motion that, inter alia, he received ineffective assistance of counsel from Castillo, and that Castillo's disciplinary record in this Court is relevant to those claims. *Id.* at 48-88. In November 2017, this Court ordered Castillo and Roche to show cause why Castillo's disciplinary record should not be made public or, in the alternative, disclosed to Elizabeth and Michael Bouchard and/or the judge presiding over Mr. Bouchard's § 2255 proceeding.

Castillo opposes disclosure; Roche has not responded.[4]

III. Disposition

Upon due consideration, it is hereby ORDERED that, with the exceptions noted below, the disciplinary record be provided to the judge and parties in Michael Bouchard's § 2255 proceeding. The exceptions are as follows:

> (a) Roche's May 2014 letter will be redacted to delete several sentences on pages 1 and 2 concerning medical information relating to Roche (the first, third, fourth and fifth redactions), and two sentences and a portion of a sentence on page 1 concerning medical information relating to Castillo (the second redaction);
>
> (b) Castillo's November 2015 affirmation will be redacted to delete a sentence on page 2 relating to a medical issue; and
>
> (c) The documents concerning Bouchard's disclosure request will not be disclosed: the request itself, this Court's November

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[4] For present purposes, we do not deem Roche's failure to respond to be a waiver of the disclosure issue, and assume that he opposes disclosure of the medical-related information concerning him.

2017 order, and Castillo's opposition to the request, which concern only the present disclosure issue.[5]

Although Bouchard's criminal case was not at issue in Castillo's disciplinary proceeding, we conclude that the disciplinary record is arguably relevant to the ineffective assistance of counsel claims raised in Bouchard's § 2255 proceeding. We further conclude that any interest Castillo and Roche may have in keeping the entire disciplinary record confidential is outweighed by Bouchard's interest in disclosure, particularly since: Castillo's disciplinary proceeding resulted in public discipline, much of the disciplinary record is already public, and redaction of specific sensitive information will protect Castillo's and Roche's privacy interests.

This Court does not have any rule or case law governing the disclosure of disciplinary records after an attorney disciplinary proceeding results in public discipline. However, the rules of other courts and disciplinary authorities support disclosure to varying degrees.

Only a few other circuits have published rules covering the issue. The relevant Third Circuit rule

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[5] The Court's deliberative documents, such as memoranda prepared in-chambers or by counsel to the Grievance Panel that were not intended for filing, are not part of the disciplinary record and are not subject to disclosure.

makes public, with certain exceptions, any disciplinary proceeding resulting in public discipline. *See* Third Circuit Rules of Attorney Disciplinary Enforcement, Rule 15 (July 2015). The Sixth and Eleventh Circuits treat disciplinary records as confidential, with certain exceptions, but permit the chief judges of those circuits to make records public. *See* Sixth Circuit Rule 46(c)(2) (Aug. 2012); Eleventh Circuit Rules Governing Attorney Discipline, Rule 2(E) (Jan. 2002).[6]

The relevant statutes and rules of New York, Connecticut, and Vermont, governing disclosure of state disciplinary records, also would permit the disclosure of Castillo's disciplinary record.

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[6] The Sixth Circuit's Rule 46(c)(2) provides that "[a]ll records pertaining to disciplinary proceedings before the court must be filed under seal, unless the chief judge orders otherwise." The Eleventh Circuit's Rule 2(E) provides that "[e]xcept as provided in Rule 13(C) [permitting public discipline orders to be transmitted to other disciplinary authorities], unless and until otherwise ordered by the Chief Judge, all reports, records of proceedings, and other materials presented by the Court, the [Court's] Committee [on Lawyer Qualifications and Conduct], or any person to the Clerk of the Court (the Clerk) for filing shall be filed and maintained as sealed and confidential documents and shall be labeled accordingly by the Court, the Committee, or the person presenting such matters for filing."

Under New York law, state disciplinary records are initially confidential, but can be divulged upon a showing of good cause and, in any event, become public if "charges are sustained by the justices of the appellate division." N.Y. Judiciary Law § 90(10). Under Connecticut law, a disciplinary record is public, with certain exceptions that are not now relevant, if "probable cause has been found that the attorney is guilty of misconduct." Conn. Gen. Stats. § 2-50(c). Under Vermont law, in relevant part, all Professional Responsibility proceedings and records "formally submitted to a hearing panel after the filing of formal charges or stipulation shall be public unless [an interested party] obtains . . . a protective order for specific testimony, documents, or records," except that "the work product of the [Professional Responsibility] Board, hearing panel, and their counsel, as well as the deliberations of the hearing panel, Board, and Court shall remain confidential." Vt. Supreme Ct. Admin. Order No. 9, Perm. Rules Governing Estab. & Operation of Prof'l Resp. Program, Rule 12(B).

Additionally, the American Bar Association's Model Rules for Lawyer Disciplinary Enforcement provide that disciplinary proceedings become public, with certain exceptions, once there is a "determination that probable cause exists to believe that misconduct occurred" and formal charges have been filed and served. ABA, Model Rules for Lawyer Discipl. Enf., Rules 16(A) and (C) (Aug. 1989, amended Aug. 2002); *id.*, Rules 16(D)-(E) (exceptions).

For present purposes, we need not determine whether all disciplinary records, or all disciplinary proceedings resulting in public discipline, are presumed to be open to the public. Nor do we decide that all references to medical information in a disciplinary record must be redacted when the record is disclosed. We hold only that, in this case, Bouchard has shown good cause for the disclosure of Castillo's record with certain redactions, and that the redacted portions contain personally sensitive information that is either irrelevant to Bouchard's § 2255 claims (e.g., Roche's medical information) or, at most, tangential to those claims (because the sensitive information relates to why certain defaults occurred, not whether they occurred).

We reject Castillo's suggestion that disclosure of his disciplinary record by this Court is barred absent his execution of a release pursuant to the privacy provisions of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). First, this Court is not one of the entities covered by that statute. *See* 42 U.S.C. § 1320d-1(a) (stating that the statute applies to health plans, health care clearinghouses, and health care providers); Executive Order No. 13181, Dec. 20, 2000, 65 F.R. 81321 ("HIPAA applies only to 'covered entities,' such as health care plans, providers, and clearinghouses. HIPAA regulations therefore do not apply to other organizations and individuals that gain access to protected health information, including Federal officials who gain access to health records during

health oversight activities."); 45 C.F.R. § 160.103 ("Covered entity means: (1) A health plan. (2) A health care clearinghouse. (3) A health care provider who transmits any health information in electronic form in connection with a transaction covered by this subchapter.").

Second, and in any event, the redactions required by this order will avoid any unauthorized or inappropriate disclosure of medical information.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court

/S/

APPENDIX F

PUBLISHED AT 828 F.3d 116

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2015

(Argued: January 28, 2016 Decided: July 7, 2016)

No. 14-4156-cr

United States of America,

Appellee,

v.

Michael G. Bouchard,

Defendant- Appellant.

Before: PARKER, LYNCH, and LOHIER, Circuit Judges.

In this mortgage fraud case, Michael Bouchard, a former attorney, appeals from a judgment of conviction entered after a jury trial in the United States District Court for the Northern District of New York (Mordue, J.). Bouchard was convicted of filing a false statement with a federally insured financial institution, in violation of 18 U.S.C.

§1014; conspiring to do so, in violation of 18 U.S.C. §371; and bank fraud, in violation of 18 U.S.C. §1344. The substantive counts on which Bouchard was convicted involved statements made to BNC Mortgage ("BNC"), which itself was not a federally insured financial institution. The District Court held that the federally insured status of BNC's parent company supported the substantive counts of conviction. We disagree, and therefore REVERSE Bouchard's convictions on the substantive counts. Because the conspiracy count involved fraudulent misstatements made directly to a federally insured bank, we AFFIRM Bouchard's conviction on the conspiracy count and REMAND for resentencing.

Nathaniel Z. Marmur, The Law Offices of Nathaniel Z. Marmur, PLLC, New York, NY, for Defendant-Appellant. Thomas E. Booth (Steven D. Clymer, Assistant United States Attorney, for Richard S. Hartunian, United States Attorney for the Northern District of New York, Albany, NY; Leslie R. Caldwell, Assistant Attorney General, and Sung-Hee Suh, Deputy Assistant Attorney General, on the brief), Department of Justice, Washington, DC, for Appellee.

LOHIER, Circuit Judge:

Michael Bouchard appeals from a judgment of conviction entered after a jury trial in the United States District Court for the Northern District of New York (Mordue, J.), finding him guilty of one count of conspiring to file false statements with a

federally insured financial institution, one count of filing a false statement with a federally insured financial institution, and two counts of bank fraud. All four counts of conviction stemmed from Bouchard's role as a closing attorney in several real estate transactions in upstate New York from approximately 2001 until 2007, when mortgage fraud schemes were especially rampant. As part of these transactions, the Government charged, Bouchard and others fraudulently misrepresented closing prices and other important details of the real estate sales.

We focus primarily on Bouchard's challenge to the three substantive counts of conviction involving activity directed at BNC Mortgage ("BNC"). Although BNC was a mortgage lender, not a federally insured financial institution, its parent company, Lehman Brothers, was a federally insured financial institution. In this case, the substantive counts required the Government to prove that Bouchard intended to defraud or obtain the property of a "financial institution," 18 U.S.C. § 1344, or to "influenc[e] in any way the action" of a bank referenced in 18 U.S.C. § 1014. The principal question on appeal is whether evidence of fraudulent activity directed at BNC is enough to support convictions under § 1344 and § 1014 solely by virtue of the fact that BNC was owned by a federally insured financial institution. We hold that it is not, and we accordingly reverse Bouchard's convictions on the three substantive counts. By contrast, the conspiracy count of conviction involved fraudulent

misstatements made directly to a federally insured bank. We therefore affirm Bouchard's conviction on that count and remand for resentencing.

BACKGROUND

A. The Fraudulent Schemes

Because the jury found Bouchard guilty of all the charges against him, we view the evidence in the light most favorable to the Government. See United States v. Facen, 812 F.3d 280, 283 (2d Cir. 2016).

Bouchard began practicing law in 1988. In 2001 he opened his own law firm devoted largely to real estate transactions. The charges against Bouchard resulted from an investigation into two fraudulent real estate schemes in which he and his law firm participated from approximately 2001 until 2007. The "Team Title" scheme was run by Francis "Tom" Disonell and Matthew Kupic and was named after a company the two men owned.[7]

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[7] This scheme involved purchasing distressed properties from homeowners at low values and then reselling them at artificially inflated values to prospective buyers for no down payment, while falsely representing to lenders at closing that the buyers were providing a down payment. Based on these misrepresentations, Kupic and Disonell were able to obtain higher mortgages than they would have otherwise. They distributed the leftover cash from the higher mortgage

The "PB Enterprises" scheme was named after a company run by Kevin O'Connell and Michael Crowley. As part of that scheme, O'Connell and Crowley either directly resold or brokered the sales of properties at inflated prices and fraudulently obtained mortgages for the higher selling prices. At the real estate closings, O'Connell and Crowley used so-called "double HUDs"—in effect, two "HUD-1" forms,[8] each of which purported to summarize the disbursements made from the funds provided by the lender for the deal. One HUD-1 form reflected the actual, lower selling price, but was submitted only to the seller; the other HUD-1 falsely contained the artificially high purchase price and was submitted on the same day to the lender for the loan payment. The latter HUD-1 made it appear that most of the proceeds of the mortgage would be used to compensate the seller. In reality O'Connell and Crowley diverted the mortgage proceeds to themselves and to the buyer. Disonell, Kupic, O'Connell, and Crowley eventually testified at

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proceeds to other entities and to themselves as "consulting fees."

[8] A HUD-1 form is a Housing and Urban Development settlement form used in closing a property sale that details the costs and fees associated with a mortgage loan. See United States v. Kerley, 784 F.3d 327, 333 n. 2 (6th Cir. 2015).

Bouchard's trial as cooperating witnesses for the Government.

Bouchard and two paralegals he hired, Laurie Hinds and Malissa Edgerton, were closely involved in both the Team Title and the PB Enterprises real estate schemes. The focus of this appeal, however, is on the PB Enterprises scheme that formed the basis for the counts of conviction. In that scheme, Bouchard's law firm served as the closing attorney or "closing agent" purporting to represent the lenders for several transactions. The law firm was therefore responsible for disbursing mortgage funds, ensuring that the closing instructions from the lender were followed before disbursing any funds, and ensuring the accuracy of representations to the lender on the HUD-1 regarding the transaction (such as the sale price and how much money the buyer put down). Typically, Bouchard or his paralegals signed and submitted to the lender a HUD-1 certifying that the form was "a true and accurate statement of all receipts and disbursements made on [their] account or by [them] in this transaction." But in fact each of these certifications was false: the HUD-1s either contained incorrect sales prices or falsely represented that the buyers had made a down payment.

Bouchard personally attended the closings and signed fake HUD-1 forms in connection with at least two real estate transactions for which he was convicted. The first of these transactions took place in March 2005, when PB Enterprises arranged for the sale of a property in Troy, New

York to a purported buyer, Brian Haskins. In connection with the sale, Bouchard signed two obviously different HUD-1 forms, one listing the sale price as $35,000 and the other falsely listing an $85,000 sale price. The false HUD-1 form also represented that Haskins had deposited a down payment of about $17,000 at closing, when in fact he had not. After the closing, Bouchard's office submitted the false HUD-1 form to BNC, which provided Haskins a mortgage of $76,500—over $40,000 more than the actual sale price. Bouchard then disbursed funds from the mortgage proceeds, including a $33,172.03 check made payable to Haskins that Bouchard gave to Crowley, who deposited it into his personal account.

The second transaction occurred in April 2005 and, like the first, closed at Bouchard's law firm. Bouchard was present at the sale's closing and signed two HUD-1 forms in connection with a sale of property located at 4 Kaatskill Way in Ballston Spa, New York. One of the HUD-1 forms represented that the sale price was $224,000, while the other HUD-1 form, ultimately submitted to BNC, certified a higher sale price of $240,000.

Bouchard's personal involvement in signing and submitting false HUD-1 forms was only part of the Government's evidence that he knew the schemes were fraudulent. At various times, Bouchard also made direct statements that together demonstrated his knowledge and culpability. For example, Bouchard was unfazed when Disonell initially confided to Bouchard that Crowley and O'Connell, the masterminds of the

PB Enterprises fraud, used "double HUDs" at closings and then asked if Bouchard wanted their business. O'Connell later confirmed to Bouchard that he and Crowley "wanted to basically buy the property, have two closings in one day where we were buying it from somebody at a lower price and then reselling it at a higher price." Bouchard responded that it "wouldn't be a problem" and agreed to team with O'Connell and Crowley as the closing agent. Bouchard, O'Connell, and Crowley also agreed that Bouchard's firm would follow up each closing by issuing a check to the buyer reflecting the difference between the actual and the inflated sale price. And Hinds, one of Bouchard's paralegals, later testified that Bouchard authorized disbursements to parties other than those listed on the HUD-1 forms.

Finally, in July 2005, after the fraudulent schemes had stretched for more than four years, federal agents interviewed Bouchard as part of a criminal investigation of Disonell and Kupic. During the interview Bouchard admitted that "in about 50 percent of his closings" the fund disbursements were "different than indicated on the HUD-1 form" at the buyer's and seller's direction. While acknowledging that the disbursements were "weird," Bouchard insisted that they reflected "standard practice" in the real estate industry and explained that he "was only concerned that his corporate accounts that show the money that would come in from the lender had zeroed out at the end of the transaction."

B. The Defrauded Lenders

Two of the principal lenders victimized by the mortgage fraud schemes were Fremont Investment and Loan ("Fremont") and BNC. Fremont and its depository accounts were insured by the Federal Deposit Insurance Corporation ("FDIC"). BNC, while not itself federally insured, was wholly owned by Lehman Brothers, which was federally insured and provided BNC with a "warehouse line of credit" to fund BNC's mortgages.

At trial, Bouchard admitted that he knew Lehman Brothers and Fremont were both federally insured but testified that he believed that BNC was not insured (and, as explained above, it is not). There was no evidence that Bouchard knew either that BNC was owned by Lehman Brothers or that Lehman Brothers was involved in any of the loans at issue.

C. Procedural History

1. The Jury Verdict

The jury convicted Bouchard of the conspiracy count (Count One), two substantive bank fraud counts under § 1344 that arose from transactions in which Bouchard personally attended the closing and signed the fraudulent HUD-1s (Counts Seven and Nineteen), and the § 1014 false statements count (Count Twenty-Four), which arose from the same transaction as Count Seven. All three substantive counts of conviction involved mortgages funded by BNC.

The jury acquitted Bouchard of all the remaining counts, however, including several counts of bank fraud. One of the counts of acquittal (Count Seventeen) involved a false HUD-1 submitted to Fremont.

2. The Rule 33 Motion

Soon after the jury verdict, O'Connell told the Government that his testimony about meeting Bouchard was false and that, in fact, "he never met Michael Bouchard." O'Connell explained that he had initially so informed the trial prosecutors, one of whom threatened that "if you do not tell us you met with Michael Bouchard we can't help you." After learning about O'Connell's post-trial disclosure to the Government, Bouchard moved for a judgment of acquittal or, in the alternative, for a new trial under Rule 33 of the Federal Rules of Criminal Procedure. Among other things, Bouchard argued that he would have been acquitted of all the charges against him absent O'Connell's perjured testimony. He separately argued that there was insufficient evidence that BNC was a federally insured financial institution under § 1344 or § 1014.

After a hearing on the perjury issue, the District Court denied Bouchard's motion. First, the court assumed without deciding that O'Connell had committed perjury at trial. It concluded, however, that the Government was unaware of the perjury and that Bouchard failed to demonstrate that, but for the perjured testimony, he would most likely not have been

convicted. Second, after considering whether the Government needed to prove that BNC itself was a covered institution under § 1344 or § 1014, the District Court found that Bouchard in any event defrauded BNC's parent company, Lehman Brothers, which indisputably was a federally insured financial institution, and that Bouchard therefore could be liable for bank fraud. In support of that finding, the District Court pointed to (1) Bouchard's "intent to defraud," (2) "the integrated transaction involving funds from Lehman Brother[s]," and (3) "the financial injury to which Lehman Brothers was exposed as a result of its ownership of BNC and its provision of money to fund the loan[s]."

In denying Bouchard's Rule 33 motion with respect to the § 1014 false statement count, the District Court pointed out that Bouchard "was an experienced real estate attorney" who "acted as the 'bank's attorney' for numerous transactions over many years." Evidence of Bouchard's background, the court explained, was "sufficient to create an inference ... that [Bouchard] knew his statements would influence a bank."

3. Sentencing

Bouchard's presentence report ("PSR") recommended a Guidelines range of 87 to 108 months based on an offense level of 29 and a criminal history category of I. The PSR calculations were premised in part on conduct for which Bouchard had been acquitted. At sentencing, the District Court simply adopted the

PSR's findings and guidelines calculation without separately finding that Bouchard had committed the acquitted conduct. After determining that the loss amount associated with Bouchard's crimes far exceeded his personal gain, the District Court downwardly departed from the applicable range and sentenced Bouchard to concurrent terms of 48 months on each count of conviction.

This appeal followed.

DISCUSSION

A. Sufficiency of the Evidence

Section 1344 criminalizes schemes to defraud, or schemes to obtain the money of, a "financial institution." The statute provides in full: "Whoever knowingly executes, or attempts to execute, a scheme or artifice—(1) to defraud a financial institution; or (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises; shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both." 18 U.S.C. § 1344. Prior to 2009, the term "financial institution" was defined to include insured depository institutions of the FDIC, but not mortgage lenders. See id. §20(1). Similarly, Section 1014 makes it a crime to knowingly make "any false statement or report ... for the purpose of influencing in any way the action" of enumerated financial entities, which, at the time the schemes were undertaken prior to 2009, included "any

institution the accounts of which are insured by the [FDIC]," id. § 1014, but again not mortgage lenders.

As is now well known, the subprime mortgage crisis some years ago threatened the financial stability of many federally insured financial institutions. The crisis prompted Congress in 2009 to amend both § 20 (which defines financial institutions for purposes of § 1344) and § 1014 to cover mortgage lending institutions specifically. Fraud Enforcement and Recovery Act ("FERA") of 2009, 123 Stat. 1617. Timing is everything: the conduct for which Bouchard was convicted occurred prior to 2009.

We therefore consider whether Bouchard's conduct violated § 1344 and § 1014 before the enactment of FERA, recognizing that BNC, though itself not federally insured, was owned by a federally insured financial institution (Lehman Brothers), while Fremont was federally insured. Because the substantive counts of conviction involved activity directed at BNC only, we conclude that there was insufficient evidence that Bouchard intended to defraud or obtain the property of a "financial institution," as required by § 1344, or to "influenc[e] in any way the action" of an institution covered by § 1014. We therefore reverse his convictions on those counts. We separately conclude that part of the conspiracy count of conviction involved statements aimed at Fremont, which both parties agree was a federally insured financial institution. We therefore affirm Bouchard's conviction on that count.

1. Section 1344(1)

As noted, the federal bank fraud statute makes criminal the "knowing[ ] execut[ion]" of a scheme to "defraud a financial institution." 18 U.S.C. § 1344. Prior to Loughrin v. United States, 134 S. Ct. 2384, we interpreted § 1344 as a whole to be "a specific intent crime requiring proof of an intent to victimize a bank by fraud," meaning that "[a] federally insured or chartered bank must be the actual or intended victim of the scheme." United States v. Nkansah, 699 F.3d 743, 748 (2d Cir.2012) (quotation marks omitted). The Supreme Court in Loughrin rejected that interpretation, holding instead that § 1344(2) does not require an intent to defraud a bank. It confirmed, however, that § 1344(1) "includes the requirement that a defendant intend to 'defraud a financial institution'; indeed, that is § 1344(1)'s whole sum and substance." Loughrin, 134 S.Ct. at 2389–90.

The Government concedes there was no evidence that Bouchard specifically intended to defraud Lehman Brothers or was even aware of Lehman Brothers' role in the transactions involving BNC. Relying on United States v. Brandon, 17 F.3d 409 (1st Cir. 1994), the Government nevertheless argues that it satisfied the "intent to defraud" element. Bouchard's "targeting of BNC, an uninsured mortgage broker," it claims, "directly affected Lehman Brothers because Lehman Brothers funded BNC's loans and was liable for its losses." Appellee's Br. 15. We are not persuaded.

Brandon also involved a fraudulent mortgage scheme. The defendants targeted brokers and servicing agents acting on behalf of a federally insured bank that ultimately approved and provided the relevant mortgages in that case. Brandon, 17 F.3d at 418–19. The defendants argued that "there was no violation of § 1344 because the scheme to defraud was not knowingly targeted at a federally insured financial institution, but instead at the non-federally insured mortgage brokers." Id. at 426. The First Circuit rejected their argument, explaining that "the government does not have to show the alleged scheme was directed solely toward a particular institution; it is sufficient to show that defendant knowingly executed a fraudulent scheme that exposed a federally insured bank to a risk of loss." Id. (emphasis in original); see also id. at 426–27 (evidence that the defendants "fraudulently evaded a known down payment requirement, whether thought to be imposed" by the brokers, the agents, or the insured bank itself, "is sufficient to support a bank fraud conviction," so long as "the government ... establish[es] that a federally insured bank ... was victimized or exposed to a risk of loss by the scheme to defraud"); United States v. Walsh, 75 F.3d 1, 9 (1st Cir.1996) (explaining that "Brandon ... confirm[s] that a defendant can violate section 1344 by submitting the dishonest loan application to an entity which is not itself a federally insured institution" but that is funded by such an institution).

Brandon conflicts with our precedent insofar as it holds, as the Government claims, that a defendant satisfies the intent element of § 1344(1) merely by submitting the dishonest loan application to an entity which is not itself a federally insured institution without also intending to deceive the entity's insured owner. Contrary to Brandon, we have held that § 1344(1) requires the Government to show that a defendant intended to defraud the financial institution itself. See United States v. Stavroulakis, 952 F.2d 686, 694 (2d Cir. 1992); United States v. Rodriguez, 140 F.3d 163, 168 (2d Cir. 1998); United States v. Laljie, 184 F.3d 180, 189–90 (2d Cir. 1999). To be sure, the Government is not required to prove that a defendant knows that the entity targeted by the fraud is a federally insured bank. See Nkansah, 699 F.3d at 758 (Lynch, J., concurring) (noting that "for the federal government to exercise its criminal powers over an individual, it is not logically necessary for that person to know or intend that she is transgressing a particularly federal interest" (emphasis in original)). But it remains true that a defendant cannot be convicted of violating § 1344(1) merely because he intends to defraud an entity, like BNC, that is not in fact covered by the statute.

Brandon also appears to us to conflict with Loughrin, which, though focused on § 1344(2), suggests that a defendant must intend to defraud a bank in order to be convicted under § 1344(1). In Loughrin, the Supreme Court affirmed the

defendant's conviction for bank fraud, even though his "intent to deceive ran only to [a non-federally insured entity], and not to any of the banks on which his altered checks were drawn." 134 S.Ct. at 2389. The Court rejected the defendant's argument that § 1344(2) required the Government to prove "not just that a defendant intended to obtain bank property (as the jury ... found), but also that he specifically intended to deceive a bank." Id. The defendant's reading of § 1344(2) was untenable, the Court stated, because it would impose the same requirements on a conviction under § 1344(2) as apply to a conviction under § 1344(1) and thus "would render § 1344's second clause superfluous." Id. at 2389. In other words, the Court reasoned, § 1344(2) imposes no requirement that a defendant "specifically intend[ ] to deceive a bank" because § 1344(1) already requires that specific intent. Id.

For these reasons, we decline to adopt the holding in Brandon and conclude that the evidence was insufficient to sustain Bouchard's conviction under § 1344(1).

2. Section 1344(2)

The Government argues in the alternative that the evidence was sufficient to convict Bouchard under § 1344(2).[9] In rejecting this argument, we

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[9] Bouchard initially argued that we should only consider the sufficiency of the evidence under § 1344(1), but before oral argument he withdrew the argument based on the Supreme Court's supervening decision in Musacchio v. United States,

are again guided by Loughrin. Under § 1344(2), the Government must prove "that the defendant intend[ed] 'to obtain any of the moneys ... or other property owned by, or under the custody or control of, a financial institution' "—that is, "inten[ded] 'to obtain bank property.' " Id. at 2389. Although the Supreme Court ultimately determined that Loughrin had waived the argument that he did not "intend" to obtain bank property, id. at 2389 n. 3, the Court assumed that "intent 'to obtain bank property' " is an element of a conviction under § 1344(2) and that a defendant must at least know that the property belongs to or is under the custody or control of a bank.[10] See id. at 2389, 2393 n.6.

At oral argument the Government urged that BNC itself may loosely be regarded as a bank or financial institution within the meaning of 18 U.S.C. § 20 because "it is colloquially [a bank or financial institution]... [insofar as] it lends money." We reject this novel argument. First, a "financial institution" is not a loose or colloquial term, but a term of precise definition that can lead to grave criminal consequences. Second, we are mindful that § 1344(2) should not be read to

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—— U.S. ——, 136 S.Ct. 709, 715, 193 L.Ed.2d 639 (2016). See United States v.Bouchard, No. 14–4156–cr (2d Cir.), ECF Docket No. 72.

[10] As with § 1344(1), a defendant need not know that the bank is federally insured, nor aim to obtain the property of one bank in particular.

"federaliz[e] frauds that are only tangentially related to the banking system," which is § 1344's core concern. Loughrin, 134 S.Ct. at 2393 (quotation marks omitted). For that reason, and particularly when bank subsidiaries may be engaged in activities far afield of the core functions of our federal banking system, it is important (absent legislative direction to the contrary) to distinguish subsidiaries of banks from the banks themselves. See United States v. Bennett, 621 F.3d 1131, 1136 (9th Cir. 2010) (banks are distinct legal entities from their subsidiaries for the purposes of § 1344(2)); see also United States v. White, 882 F.2d 250, 253 (7th Cir. 1989) (in the context of § 1014, "it would be ... perilous to assume that Congress wanted to extend the statute's protection to [financial institutions'] affiliates, when so far as appears there is no (or only the most attenuated) federal stake in preventing fraud against affiliates of a federally insured bank, as distinct from fraud against the bank itself").

We also note that Congress has been willing and able to amend the bank fraud statute to cover new conduct by new actors that it determines does directly affect the banking system. For example, as we have already mentioned, in 2009 Congress amended both § 20 and § 1014 to cover mortgage lending institutions specifically. FERA, 123 Stat. 1617 (2009). In doing so, Congress appears to have understood that § 1344 (through § 20) and § 1014 "only applie[d] to Federal agencies, banks, and credit associations and d[id] not necessarily

extend to private mortgage lending businesses, even if they are handling federally-regulated or federally-insured mortgages." See S. Rep. 111-10, 2009 U.S.C.C.A.N. 430, 432. As the Senate committee report on FERA explained, "the bill amend[ed] the definition of 'financial institution' in the criminal code ... in order to extend Federal fraud laws to mortgage lending businesses that are not directly regulated or insured by the Federal Government." Id. at 432.

At the time of the charged conduct, all of which occurred before the 2009 congressional amendments, BNC was not a covered institution. Of course, the Government might have been able to prove that Bouchard knew that money from mortgage lenders came from banks by virtue of his knowledge of the industry. But it failed to make this argument or proffer evidence of Bouchard's extensive knowledge of the real estate and mortgage lending industry as a reason to convict him at trial.

3. Section 1014 (Count Twenty-Four)

Bouchard also challenges the sufficiency of the evidence supporting his conviction on Count Twenty-Four, which charged him with making false statements to a bank in connection with the March 2005 transaction involving the property in Troy, New York. As both the Government and Bouchard agree, § 1014 does not require the Government to prove that a defendant knew that the bank is insured by the FDIC, but it does require the Government to prove that the

defendant "kn[ew] that it was a bank ... to which he has made the false statement in his application for a loan" and that he "intended to influence." United States v. Sabatino, 485 F.2d 540, 544 (2d Cir. 1973).

The HUD-1 that Bouchard signed and submitted in connection with the March 2005 transaction did not reveal that the loan would ultimately be financed by Lehman Brothers. It listed only BNC as the lender. As we have suggested the Government might have been able to argue with respect to the § 1344 charges, it now contends that Bouchard "must have known" that the loan would ultimately be financed by Lehman Brothers because of his experience in the real estate industry. See United States v. Grasso, 724 F.3d 1077, 1081, 1088 (9th Cir. 2013) (a jury could reasonably conclude that the defendant knew that his false statements would influence an insured bank because, among other things, he "was an experienced real estate agent who ... was well-versed in the mortgage lending process" and who "targeted banks" with lenient standards for their lending agents). Under the circumstances of this case, however, we reject the Government's argument.

First, as we explained above, the Government never presented this theory of Bouchard's knowledge to the jury. We are disinclined to affirm a conviction based on a theory that was not advanced regarding a critical element. See United States v. Rigas, 490 F.3d 208, 231 n. 29 (2d Cir. 2007). Second, at trial there was no evidence of

what a real estate attorney with Bouchard's experience would have known regarding the connection between non-federally insured brokers or lenders (like BNC) and federally insured institutions (like Lehman Brothers). Nor was there any evidence that Bouchard deliberately "targeted banks" that imposed lenient standards for their lending agents. See Grasso, 724 F.3d at 1081. Accordingly, even if we entertained the Government's theory for the first time on appeal, we would conclude that there was insufficient evidence at trial to support it.

We therefore reverse Bouchard's conviction on Count Twenty-Four for violating § 1014.

4. Conspiracy (Count One)

We next turn to Bouchard's conviction on Count One of the indictment, for conspiracy to violate § 1014. Count One charged four overt acts involving the submission of false HUD-1s to three different institutions. Only one of the institutions, Fremont, was proven to be a federally insured financial institution. Pointing to his acquittal on the substantive count involving the Fremont transaction (Count Seventeen), Bouchard urges us to assume that the jury wrongly convicted on a different overt act involving one or both of the two other victimized institutions that were not proven to be federally insured.

We generally affirm convictions as long as there was sufficient evidence to support one of the theories presented. See Griffin v. United States, 502 U.S. 46, 56–57 (1991). "[I]n the absence of

anything in the record to show the contrary, the presumption of law is that the court awarded sentence on the good count only." Id. at 50 (quotation marks omitted); accord United States v. Duncan, 42 F.3d 97, 105 (2d Cir.1994). We conclude that Bouchard's acquittal on the substantive count is not "to ... the contrary." Griffin, 502 U.S. at 50, 112 S.Ct. 466. Without a special verdict form demonstrating that the jury convicted on a theory not supported by sufficient evidence, see United States v. Frampton, 382 F.3d 213, 224–25 (2d Cir. 2004), we can easily reconcile the jury's verdict to acquit on the substantive count involving Fremont with its finding that an overt act involving Fremont occurred as part of the conspiracy. The differing verdicts might, for example, simply reflect the fact that the Fremont closing was attended by one of Bouchard's paralegals rather than Bouchard, and the jury may reasonably have declined to find Bouchard guilty of the substantive count and simultaneously determined that his co-conspirator (the paralegal) committed the overt act charged in the conspiracy count. See United States v. Palmieri, 456 F.2d 9, 12 (2d Cir.1972).

For these reasons, we affirm Bouchard's conviction on the conspiracy count.

B. O'Connell's Alleged Perjury

We next consider whether Bouchard was entitled to a new trial under Rule 33 of the Federal Rules of Criminal Procedure because of O'Connell's alleged perjury. The trial judge is "in the best position to appraise the possible effect" of

newly discovered evidence on the jury's verdict, United States v. Stewart, 433 F.3d 273, 301 (2d Cir. 2006) (quotation marks omitted), and so we review the denial of a Rule 33 motion for abuse of discretion, United States v. Sessa, 711 F.3d 316, 321 (2d Cir. 2013).

In denying Bouchard's Rule 33 motion, the District Court never found that O'Connell in fact committed perjury. But it did find that the Government lacked knowledge of any perjury. Under those circumstances, even assuming perjury, we must be left with "a firm belief that but for the perjured testimony, the defendant would most likely not have been convicted." United States v. Ferguson, 676 F.3d 260, 282 n. 19 (2d Cir. 2011) (quotation marks omitted). With that standard in mind, we conclude that the District Court did not abuse its discretion in denying the motion.

First, as Bouchard acknowledges, defense counsel strongly undercut O'Connell's credibility on cross-examination. In particular, on cross-examination O'Connell (1) was unable to recall when and where he had a conversation with Bouchard about payouts not reflected on the HUD-1s, (2) confirmed that he had not had any real conversation with Bouchard, (3) admitted that it "wasn't really [his] role in the company to deal with" Bouchard and that he did not deal directly with Bouchard in connection with any of the closings that were the subject of his testimony on direct examination, and (4) acknowledged that

he did not talk to Bouchard about the use of "double-HUDs."[11] In sum, the highly equivocal nature of O'Connell's testimony about meeting with Bouchard "rendered the significance of his perjury minimal." United States v. Torres, 128 F.3d 38, 49 (2d Cir.1997).

Bouchard counters that O'Connell's testimony was unduly prejudicial because it was used to undermine his own testimony on cross-examination. He asserts that the "prosecutor effectively used O'Connell's perjury to suggest that Bouchard was lying about never having met O'Connell or Crowley." Appellant's Reply Br. 19. But the prosecutor's cross-examination focused largely on how Bouchard's knowing participation in the scheme was central to its success, not on O'Connell's testimony. And in its jury summation the Government conceded that O'Connell had not discussed the scheme with Bouchard. Moreover, we are satisfied based on our review of the record that there was ample independent evidence proving that Bouchard was aware of the fraudulent nature of the schemes. That evidence included Disonell's testimony that he disclosed to Bouchard that the closings with O'Connell and Crowley would involve "double HUDs."

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[11] Moreover, Bouchard was able to testify at trial that "[w]e have the transcript from Kevin O'Connell and he said that no such meeting occurred."

We therefore affirm the District Court's denial of Bouchard's Rule 33 motion based on O'Connell's testimony.[12]

CONCLUSION

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[12] Because we vacate the judgment of conviction in part and remand for resentencing, we need not address Bouchard's argument that the District Court committed procedural error in calculating his Guidelines range based on acquitted conduct. We nevertheless offer a few words of guidance for resentencing based on acquitted conduct. "A district court may treat acquitted conduct as relevant conduct at sentencing, provided that it finds by a preponderance of the evidence that the defendant committed the conduct." United States v. Pica, 692 F.3d 79, 88 (2d Cir.2012). With respect to conduct by a co-conspirator, "a district court must make a particularized finding as to whether the activity was foreseeable to the defendant" and must "make a particularized finding of the scope of the criminal activity agreed upon by the defendant." United States v. Studley, 47 F.3d 569, 574 (2d Cir.1995). This is true even in the case of a conspiracy conviction, because "the scope of conduct for which a defendant can be held accountable under the sentencing guidelines is significantly narrower than the conduct embraced by the law of conspiracy." United States v. Getto, 729 F.3d 221, 234 n. 11 (2d Cir. 2013) (quotation marks omitted). Insofar as it bases any resentence on acquitted conduct, the District Court must make particularized findings either that Bouchard actually committed the acts or that the acts of his co-conspirators were both foreseeable to him and fell within the scope of criminal activity to which he agreed.

For the foregoing reasons, we **REVERSE** Bouchard's convictions on Counts Seven, Nineteen, and Twenty-Four, **AFFIRM** his conviction on Count One, and **REMAND** for resentencing.

APPENDIX G

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v. Case No. 1:12-CR-381

MICHAEL BOUCHARD,
Defendant.

APPEARANCES: Gaspar M. Castillo, Jr., Esq., Law Office of Gaspar M. Castillo, Jr. Gaspar M. Castillo, Jr., Esq., 817 Madison Avenue, Albany, New York 12208, For the Defendant. Richard S. Hartunian, United States Attorney, Edward R. Broton, Assistant United States Attorney Michael C. Olmsted, Assistant United States Attorney, Tamara Thompson, Assistant United States Attorney, P.O. Box 7198, 100 South Clinton Street, Syracuse, NY 13261, For the Government.

Hon. Norman A. Mordue, Senior, U.S. District Judge:

MEMORANDUM DECISION AND ORDER

I. INTRODUCTION

On November 30, 2012, a jury convicted defendant Michael Bouchard of conspiring to make false statements to financial institutions in violation of 18 U.S.C. § 371 (Count 1), bank fraud in violation of 18 U.S.C. § 1344 (Counts 7 and 19) and making a false statement to a mortgage lender in violation of 18 U.S.C. § 1014 (Count 24).[13] The conspiracy conviction stems from defendant's role as a closing agent, between 2000 and 2007, for a number of mortgage lenders, including Fremont Investment & Loan, and the submission of HUD-1 settlement statements to lenders, which falsely stated the buyers made cash down payments and also contained false accounts of how mortgage proceeds were disbursed at closing. The bank fraud and false statement convictions stem from defendant's role as BNC Mortgage's closing agent for real estate transactions concerning 735 Burden Avenue in Troy, New York in March 2005 (bank fraud and false statement) and 4 Kaatskill Way in Ballston Spa, New York in April 2005 (bank fraud). Defendant moves (Dkt. No. 35) for a judgment of acquittal under Fed.R.Crim.P. 29(c)(2), or, in the alternative, for a new trial under Fed.R.Crim.P.

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[13] Defendant was acquitted of twenty counts of bank fraud in violation of 18 U.S.C. §1344 (Counts 2-6, 8-18, and 20-23).

33(a) (Dkt. No. 36). The government opposes defendant's motions.

II. EVIDENCE AT TRIAL

Michael Bouchard was the sole practitioner at The Bouchard Law Firm in Albany, New York. He provided general legal services wherein the bulk of his business came from conducting real estate transactions. Defendant's paralegal secretaries, Laurie Hinds and Malissa Edgerton, prepared the documents for and conducted the majority of the real estate closings at issue in this case, though he handled some personally. The role of The Bouchard Law Firm in all transactions relevant to this case was as the closing agent for the bank or mortgage lender.

A. Real Estate Consultants and Team Title

In or about 2000, The Bouchard Law Firm began conducting real estate closings that involved "Real Estate Consultants" and its owners Tom Disonell and Matt Kupic. Disonell could not recall how they met but testified that defendant was the closing agent for a number of their transactions. During the course of the conspiracy, defendant's office handled at least 20 closings that involved Disonell and Kupic. The mortgage lenders that defendant represented at these closings paid between $400 and $500 per closing.

Disonell and Kupic "structured" their transactions a number of ways in order to garner "consulting fees" for themselves from mortgage proceeds. One way they did this was with a "repair rebate" scheme. Disonell and Kupic would

find distressed properties for sale, enter agreements to buy them then recruit buyers to purchase the same properties but at much higher sales prices.[14] Disonell and Kupic promised the buyers that they would not need a down payment to buy the properties and that they would receive cash back at closing for property repairs.

The buyers sought mortgages based on the inflated sales prices. Prior to closing, the mortgage lenders would wire the mortgage proceeds to defendant's escrow account. Since only a portion of the mortgage proceeds was necessary to pay the lower sales prices, Disonell and Kupic would appropriate the remaining proceeds to themselves by directing defendant's office, the closing agent, to issue checks to them at closing for their "consulting fees" and "repair rebates".

According to the evidence at trial, in order to ensure the lenders would fund the loans, the participants had to conceal: the actual (lower) sales price of the properties; the fact that the buyers brought no cash to closing; and the disbursement of mortgage proceeds to Disonell, Kupic and persons other than the seller. Disonell explained that the checks defendant's office issued to him from the mortgage proceeds were not recorded on the HUD-1 settlement statements that defendant's office returned to the lenders, because if they were, "the bank probably wouldn't have approved the deal". Indeed, as will be

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[14] The evidence at trial indicated that few, if any, of the buyers they recruited were aware of the lower sales prices.

discussed, representatives of two of the victim mortgage lenders testified that had the lenders or underwriters who approved the loans known any of these facts, the loans would not have been funded, or would have been unwound and defunded after closing.

To conceal the actual sales price and the disbursements of mortgage proceeds, which were outside the parameters of the lenders' closing instructions, the HUD-1 the settlement statements defendant's office returned to the lenders reflected the higher sales price, falsely stated the amount of mortgage proceeds disbursed to the sellers, and did not report the disbursements to the buyers or "consultants". Concealing the absence of a down payment, however, was more involved.

The mortgage lenders victimized in this case issued mortgages for 80 or 90 percent of a property's appraised value or sales price, whichever was lower, and required the buyer to bring the remaining 10 or 20 percent in cash to the closing.[15] Disonell and Kupic, who promised their buyers they would not need to bring cash to the closing, overcame this requirement by providing the buyers with cashier's checks or certified checks in the required amounts, which

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[15] Kelly Monahan, former Chief Executive Officer of BNC Mortgage, explained that BNC Mortgage required a down payment so that the borrower would have "skin in the game" - or a vested interest in the property.

defendant's office copied, submitted as proof of funds to the lenders, then returned to the buyers uncashed. At trial, Kupic explained:

> on the HUD it said what money needed to be brought, but the check was basically, there was a copy made of it, sent to the bank, the check was supposed to go to the seller to make the [100 per cent - the total sales price of the property when added to the mortgage proceeds], but it was never given to the seller, it was always given back to us, but it wasn't -- that part, that it was given back to us was never disclosed on the HUD.

Since, unbeknownst to the lenders, only a portion of the mortgage proceeds was needed to pay the lower sales price agreed to by the sellers,[16] the down payments were unnecessary and the remainder of the proceeds could be used to give "repair rebates" to the buyers and "consulting fees" to Kupic and Disonell for bringing about the transaction. Disonell testified that on at least one occasion prior to closing, he could not recall which one, he gave defendant a list specifying how to disburse the mortgage proceeds. Disonell stated that defendant then directed his paralegals to issue checks from his escrow account to the individuals and in the amounts specified on

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[16] The evidence at trial indicated that the sellers did not know that the buyers Disonell and Kupic recruited were paying a higher sales price for the properties.

Disonell's list. Disonell testified that he and defendant:

> did so many deals together, we just knew that at the end of my closings, I was going to walk in and give him a list of checks to cut, and as long as he only disbursed what the bank sent in, he just did what I asked him to do. If the bank sent in a hundred dollars and I told him break this . . . up these 35 different ways, he would just do it.

He further stated: "I only did it a few ways, either . . . I directly walked into Mike's office or gave [the list] to him or depending on how the closing was, if it was busy I would have given it to" Laurie Hinds or Malissa Edgerton.

Kupic testified that the paralegals handled "the vast majority" of the closings he attended at The Bouchard Law Firm but that there "were a few instances where [defendant] was there" in the closing. Kupic stated that the HUD-1s prepared for these closings, the ones defendant attended personally, fraudulently reported the money paid to the seller, the disbursements that were made at the closing, and the property's sales price.

Hinds testified that when she was first asked to "cut" checks from the mortgage proceeds, she "would have initially asked Attorney Bouchard whether or not, the seller's attorney was requesting checks to be cut, whether, you know, from the proceeds if that would be acceptable, and then subsequently thereafter I didn't check every single time with him on every check that was

changed from the HUD." Hinds further testified that she was aware that the HUD-1 she sent back to the lender did not accurately disclose the disbursements that were made at closing but that "no one said it necessarily wasn't okay, it was that the checks that we cut didn't necessarily match which I had confirmed with Attorney Bouchard was originally like okay to cut those checks . . . . It was acceptable." On most occasions, Hinds or Edgerton signed the HUD-1 statements for The Bouchard Law Firm as the "Settlement Agent".

Eventually, Disonell and Kupic abandoned Real Estate Consultants and started Team Title Abstractors, which handled title insurance. They began doing title work for, among others, Michael Crowley and Kevin O'Connell, who were also doing "creative deals" in the Albany area through their company, PB Enterprises.

B. PB Enterprises and Greater Atlantic

In 2000, O'Connell and Crowley began buying properties. Crowley testified that they each bought three properties with no money down and got "money back" at closing. Crowley stated that after their initial success, they formed PB Enterprises and Greater Atlantic and started advertising to attract people who "wanted to get into investment properties". Crowley explained that people "would call us and so we would find properties that we could buy cheap and sell high basically, and make . . . a decent profit." Crowley stated that in order to do this that they used a "double HUD" scheme, which was similar to the

repair rebate scheme. They would contract to buy properties under the name Greater Atlantic, find buyers to purchase the same properties at inflated sales prices, promising no down payment and cash back at closing then assign Greater Atlantic's right to purchase the properties to the buyers they had recruited.

Like Disonell and Kupic, Crowley and O'Connell collected consulting fees from the mortgage proceeds that remained after the seller had been paid at the lower price. The double HUD scheme, however, required the closing agent to prepare two HUD-1 settlement statements. The first would reflected the lower sales price and the second would reflect the higher sales price. The closing agent would return the second HUD-1 to the lender, thus concealing from the lender the property's actual (lower) sales price. These HUD-1s would also state falsely state that the buyers brought cash to closing and would not disclose the amounts disbursed to Crowley, O'Connell or the buyer from the mortgage proceeds.

Disonell testified that after he and Kupic transitioned to Team Title, he received a call from Nickole Riley Sutliff, a mortgage broker whom they had used. Sutliff told Disonell that she had a "huge client, they're doing double HUDs," and asked whether he could "do" double HUD closings. Disonell told Sutliff that he did not. Disonell stated that after talking to Sutliff, he called defendant and said: "Mike . . . - - Nickole's got this customer who's doing double HUD closings, would you like to do it, he said yes."

Crowley testified that he and O'Connell were introduced to Disonell and Kupic by Sutliff. Crowley stated that after he explained "the whole process", Disonell told them he had "a closing agent, an attorney's office that will do that for you."

Crowley testified that he and O'Connell met defendant at his office and said "we just wanna make sure that we'll be able to buy a house for 40, sell it for 80 and get the profit and he said no problem, I'll take care of it."

O'Connell's recollection was different. O'Connell testified that he never spoke to Disonell about using defendant as a lawyer and that he and Crowley were introduced to defendant by Sutliff. O'Connell stated that when they met, they told defendant "[t]hat we wanted to basically buy the property, have two closings in one day where we were buying it from somebody at a lower price and then reselling it at a higher price." According to O'Connell, defendant responded that "[t]hat wouldn't be a problem."

On cross-examination, however, O'Connell stated that he could not recall the date or location of this conversation with defendant and explained that it "wasn't really my role in the company to deal with him." When defense counsel asked: "the point of the matter . . . is you didn't have any conversations with him, isn't that right?", O'Connell responded, "[w]ell, we had the closing so I must of." O'Connell stated that he never discussed with defendant their practice of lending

money to buyers in order to show they had sufficient funds for closing. O'Connell also stated that he did not deal "directly" with defendant "in connection with any of the closings" about which he testified at trial.

According to the evidence, defendant's office handled at least 44 closings involving PB Enterprises and Greater Atlantic during the course of the conspiracy. The mortgage lenders paid defendant's office approximately $500 per closing.

C. Closings

At trial, the government presented evidence documenting a number of closings at defendant's office that involved Real Estate Consultants or Team Title, PB Enterprises, and mortgage broker Sutliff. Below is a summary of the evidence presented at trial regarding three of these transactions. The first was alleged as an overt act in furtherance of the conspiracy charged in Count 1, the second and third transactions were the subjects of the substantive bank fraud and false statement counts (Counts 7, 19 and 24) of which defendant was convicted.

1. Count 1 - Conspiracy - Overt Act
147 Fifth Avenue

According to the evidence introduced at trial, on January 28, 2005, "Greater Atlantic Assoc. and or Assigns" contracted to purchase 147 Fifth Avenue in Troy, New York for $40,000. O'Connell testified that Brian Haskins subsequently agreed to buy the property for $110,000 and to obtain a

mortgage in the amount of $88,000, which was 80 percent of the sales price. Haskins testified that he was told (by a PB Enterprises representative) that he would receive "$7,000 back at the closing."

Haskins obtained a mortgage from Fremont Investment & Loan, which was a "wholesale lender". Irma Valdez, a senior investigation research specialist for Fremont,[17] testified that as a
wholesale lender, Fremont received mortgage applications through mortgage brokers, who helped prospective buyers complete the applications and then "shop[ped]" them to various lenders for financing. Valdez stated that Fremont reviewed the applications "in house" and, after evaluating the documentation included with the applications, including income and credit risk, underwriters approved or declined the loans.

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[17] Valdez testified that she currently works for Signature Group Holdings, a successor in interest to Fremont Reorganizing Corporation formerly known as Fremont Investment and Loan. Valdez stated she was a senior underwriter in Fremont's lending division from 1997 to 2002. Valdez testified that from 2002 to 2008 she was a senior training specialist and in that position her job was to "train account executive nationwide on Fremont's underwriting guidelines". In 2008, though her title has changed over time and is now senior investigation research specialist, her job since then has consisted of investigating mortgage fraud and stolen identity and working "closely with the legal department in investigating origination issues."

Valdez testified that once approved, an account manager and "doc. person" worked "closely with the closing agent . . . to get the docs prepared and sent out for the borrower to sign". Once the closing agent "complete[d] the closing process" the agent sent "certain paperwork back to us" and closed the loan. Valdez stated that Fremont would "fund the money to [the closing agent's] account to help . . . disburse the funds based off the information in the file." Valdez testified that Fremont used the closing agent selected by the mortgage broker, which, in this instance, was The Bouchard Law Firm.

The closing on 147 Fifth Avenue occurred on or about March 30, 2005 at The Bouchard Law Firm. That same day, Fremont wired $85,952.50 to defendant's escrow account to fund the mortgage. According to the HUD-1 that Edgerton prepared and returned to Fremont: the contract sales price was $110,000; the "Principal amount of new loan" that Fremont was lending to Haskins was $88,000; and Haskins brought $31,961.26 to the closing. The HUD-1 also indicated that from the funds brought to the closing table: $36,748.38 was paid to satisfy what remained of the seller's mortgage on the property; $2,535.50 was paid to satisfy the seller's settlement charges; and $71,906.88 was paid to the seller. The evidence at trial included a copy of a cashier's check from Haskins dated March 30, 2005 for $31,961.26.

Haskins testified that he brought no cash to the closing. O'Connell explained that they "let him borrow" the $31,961.26 check "to show that he had

enough for closing costs" and that Haskins returned the check to them after the closing. Edgerton testified that a copy of the check was faxed to The Bouchard Law Firm but was never deposited into defendant's escrow account.

According to the other HUD-1, which was not sent to Fremont: the contract sales price was $41,000; the "Principal amount of new loan" was $0; and the buyer, Haskins, brought $49,961.26 to the closing. After the payoff of the seller's mortgage on the property, as well as other settlement charges, the HUD-1 indicates that: $36,748.38 was paid to satisfy what remained of the seller's mortgage on the property; $2,535.50 was paid to satisfy the seller's settlement charges; and $1,906.88 was paid to the seller.[18]

From the Fremont mortgage proceeds left in defendant's escrow account after the seller's mortgage balance and closing costs had been paid, defendant's office issued the following checks: a check to the seller dated March 30, 2005 for $1,906.88 and a check to Haskins dated March 30, 2005 for $38,038.74. Neither HUD-1 reflected defendant's issuance of a $38,038.74 check to Haskins.

On March 31, 2005, the $38,038.74 check was deposited into PB Enterprises' account. The

[18] Both HUD-1s indicated that the Title Insurance was paid to Team Title and the mortgage broker fee was paid to Greater Atlantic.

record contains copies of five checks associated with 147 Fifth Avenue issued from PB Enterprises' account: a check to O'Connell dated March 31, 2005 for $10,000; a check to Crowley dated March 31, 2005 for $10,000; a check to Crowley dated April 11, 2005 for $15,000; a check to Haskins dated March 30, 2005 for $7,000; and a check to Kevin D. O'Connell[19] for $2,000.

Valdez testified that Fremont would not have "funded the loan if the borrower did not bring the 31,000 as indicated on the HUD, because that's the way the loan was approved." Valdez explained that Fremont relies on the documentation it receives from its closing agent as evidence that the buyer brought cash to the closing. Valdez testified that if Fremont's "underwriter was aware of this purchase contract [with a sales price of $41,000, not $110,000] this loan would not have funded [sic]." Valdez stated that had Fremont known that the seller only received $1,906.88, not $71,906.88, the amount that appeared on the HUD-1 that The Bouchard Law Firm returned to Fremont, it would have mattered "absolutely" because "[o]ur closing instructions were not followed" and if Fremont had known, "we would have requested our funds back."

2. Counts 7 and 24 - Bank Fraud and False Statement

735 Burden Avenue

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[19] Kevin D. O'Connell, O'Connell's father, collected referral fees for finding properties and buyers for PB Enterprises.

O'Connell testified that on or about February 1, 2005, "Greater Atlantic Associates"[20] entered a contract to purchase 735 Burden Avenue in Troy, New York for $35,000. O'Connell testified that Greater Atlantic again engaged Brian Haskins to purchase the property for $85,000, and obtain a mortgage in the amount of $76,500.

The mortgage for 735 Burden Avenue was funded by BNC Mortgage. Kelly Monahan, who was the Chief Executive Officer of BNC Mortgage and a vice president of Lehman Brothers Bank during the relevant time period, testified that once BNC Mortgage received a mortgage loan application, including a credit report, income information, and an appraisal, the application would go to the underwriting department, where the "creditworthiness of the borrower" would be considered. The application would also go to the appraisal department where BNC Mortgage would review the property's appraisal. Monahan explained that BNC Mortgage required a closing agent to act on its behalf during the closing. According to Monahan, BNC would hire the closing agent suggested by the mortgage broker who submitted the mortgage application as long as the closing agent passed BNC's background check and was not on BNC's "exclusionary list". Monahan testified that BNC expected the attorney who acted as its closing agent "to follow the closing instructions because it had various

[20] Greater Atlantic was an entity O'Connell and Crowley formed "to basically place bids on . . . properties."

requirements and if those requirements weren't met, then the loan shouldn't be closed."

Hinds testified that after receiving a telephone call from the loan officer or mortgage originator informing her that the loan was "clear to close", the closing would be scheduled. Hinds stated that the next phase involved "the closing package", which the lender sent along with its "closing instructions". Hinds explained that:

> Once you get the closing instructions over it details the -- all the information that's necessary to complete the HUD. So it gives you the loan number that they have assigned to the bank, or the bank has assigned to the particular file, it gives purchase price, it gives loan amount, it gives mortgage broker fees, it gives all the bank fees, short-term interest, all of the fees that are relative to the bank's portion of the transaction. We then take, either from a statement of sale provided either by . . . the buyer's attorney or by the seller's attorney to complete certain things, we generate and produce recording fees and filling in the additional fees that are required to be on a HUD in order to do the transaction . . . .

Prior to the closing on 735 Burden Avenue, BNC Mortgage sent The Bouchard Law Firm closing instructions, which stated: "Do not close or fund this loan unless all conditions in these closing instructions and any supplemental closing instructions have been satisfied. The total

consideration in this transaction except for our loan proceeds and approved secondary financing must pass to you in the form of cash." Monahan explained that these requirements are important:

> because we have approved a loan, we need to sell the loan after we've approved it and funded it and if it doesn't meet our guidelines which everything in here is, all these requirements . . . help it meet our guidelines and if that doesn't happen, then we will have an unsellable loan and therefore, a loss.

The closing instructions further stated that "All proceeds must be disbursed upon closing unless you have received a specific written authorization to the contrary from us. Do not close or fund this loan if you have knowledge of a concurrent or subsequent transactions which would transfer the subject property." Regarding the HUD-1 settlement statement, the closing instructions stated:

> the final HUD-1 settlement statement must be completed at settlement and must accurately reflect all receipts and disbursements indicated in these closing instructions and any amended closing instructions subsequent hereto. If any changes to fees occur, documents may need to be redrawn and resigned. Send the certified final HUD-1 settlement statement to us at the following address within 24 hours of the settlement.

Monahan testified that BNC funded the loan by wiring the money to the closing agent's escrow account prior to the closing but stated that the closing agent was "not supposed to close the loan until all the requirements have been met".

Edgerton testified that she prepared two HUD-1s for the closing on 735 Burden Avenue and that defendant signed both as the settlement agent. The contract sales price for the property, according to the first HUD-1, was $35,000. The contract sales price for the property, according to the second HUD-1, was $85,000. The principal amount for the mortgage was $76,500. According to the second HUD-1, the buyer, Brian Haskins, came to the closing with $17,177.97. Haskins testified that he brought no money to the closing but acknowledged that there was a check dated March 8, 2005 payable to him in the amount of $17,177.97. O'Connell testified he and Crowley let Haskins borrow the check, which had been drawn on their corporate account, "so that he could show that he had enough money at the closing." Crowley stated that a copy of the check was given to The Bouchard Law Firm and then the check was redeposited in the corporate account after the closing.

At this closing, a check was issued from defendant's escrow account to Haskins in the amount of $33,172.03. This disbursement was not on either HUD-1. O'Connell explained that this check reflected the amount of mortgage proceeds that remained after the seller and all fees had been paid. Crowley testified that he endorsed and

deposited the check into his personal account and then issued a check to O'Connell for half that amount - $16,586. Crowley testified that he wrote a check to Haskins from the PB Enterprises account in the amount of $4,000. Edgerton stated that the second HUD-1, which was signed by defendant, with the higher sales price - $85,000, was disclosed to BNC.

Both HUD-1s are signed by Haskins, the seller, and defendant. Monahan testified that BNC required that the HUD-1 be signed before the closing agent disbursed the mortgage proceeds "[b]ecause everybody needs to have agreed that this was the transaction that was being made." Monahan testified had BNC known "that the property was being sold for $35,000, it would not have provided a mortgage loan in the amount of $76,500 on the property because it issues loans for the fair market value of a property, which is the lower of the appraised value or the sales price." Monahan testified that BNC would not have allowed the mortgage loan to close if it had known the closing agent was providing "$33,000" to Haskins because the loan would not have qualified under its underwriting guidelines.

3. Count 19 - Bank Fraud - 4 Kaatskill Way

This transaction involved mortgage broker Sutliff as the buyer and took place on or about April 12, 2005, at defendant's office. There is no evidence that PB Enterprises or Team Title were involved, except that Sutliff, as previously stated,

worked for both as a broker. Sutliff testified that she, defendant, Edgerton, the seller, the seller's attorney and the real estate agents were present. According to the first HUD-1, the purchase price was $224,000. According to the second HUD-1, which was returned to BNC, the purchase price was $240,000, the mortgage amount was $228,000 and Sutliff was required to bring $16,781 to the closing. Monahan testified that BNC would not have authorized a mortgage in the amount of $228,000 if it had known the actual sales price was $224,000.

At closing, Sutliff provided Edgerton with a check for $16,781, which she had obtained from her bank. Sutliff testified that she brought the check "so it appears [to the lender] that I did bring the money". The check, however, "was not actually used at the closing table" and was handed back to her at the closing. Sutliff and the seller signed the first and second HUD-1s, acknowledging: "I have carefully reviewed the HUD-1 Settlement Statement and to the best of my knowledge and belief. It is a true and accurate statement of all receipts and disbursements made on my account or by me in this transaction. I further certify that I have received a copy of the HUD-1 Settlement Statement". Defendant also signed both HUD-1s, certifying that: "The HUD-1 Settlement Statement which I have prepared is a true and correct account of this transaction. I have caused or will cause the funds to be disbursed in accordance with this statement."

D. Interview with FBI

Michael Hensle, a supervisory special agent with the FBI testified that in 2005 was investigating Disonell and Kupic. On July 27, 2005, he interviewed defendant because he had been the real estate closing agent for a number of real estate transactions involving Disonell and Kupic. Defendant told Agent Hensle that at the time he was completing between 40 and 65 closings per month, though he did not indicate how many closings were for Disonell and Kupic except to say that "they had been in regular business practice". Agent Hensle asked defendant about the manner of distributing the proceeds of the loans during the closings with Disonell and Kupic. According to Agent Hensle:

> In general, [defendant] stated that it was typical in about 50 percent of his closings to disburse money different than indicated on the HUD-1 form. Essentially he said for insignificant costs associated with the closings, he would disburse money at the direction of the buyers and sellers. With respect to Mr. Kupic and Mr. Disonell, he would receive verbal and written instructions, both him and his staff, about how he'd like the funds disbursed. And those funds, disbursed differently than the HUD-1, were never informed to the lender if you will. . . . Actually Mr. Bouchard indicated that it was weird, were his exact words, that the proceeds that the seller was due would be disbursed not directly to the seller but to

third parties, and again, that was dictated by Mr. Kupic and Mr. Disonell.

Agent Hensle testified that when defendant was asked whether he was "disbursing funds directly as the HUD indicated and he said no." Defendant was also asked "if that was standard practice and he said yes." Agent Hensle stated that defendant "was only concerned that his corporate accounts that show the money that would come in from the lender had zeroed out at the end of the transaction" and that defendant indicated that he did not "go back and tell the lenders" about the distributions directed by Disonell and Kupic because "as long as everything zeros out, it's fine."

E. Defendant's Testimony

Defendant testified that he was not aware, during any transaction conducted in his office, that double HUDs were being used, or that there were contracts with different prices. Defendant stated that the total amount his office earned from the closings he did for Kupic and Disonell in 2002 and 2003 was $9,439, representing approximately one percent of his office's total gross income for those years. His fee for each closing was approximately $450.

In 2004, the total gross income for defendant's firm was $613,776, of that, he received $1,000 in fees from the transactions involving PB Enterprises. In 2005, defendant's firm's total gross income was $785,442, which included $20,518 in fees from transactions involving PB

Enterprises. His fee for each closing was $500. Defendant testified that the income from PB Enterprises in 2005 comprised "around 2.6 percent" of his firm's total income.

Regarding the instance when Disonell gave him a list of checks he was supposed to write, including checks back to the borrower, defendant stated that: "was the one occasion where I was in the closing room with Tom Disonell, the buyer, the buyer's attorney, the seller, the seller's attorney, and that's normal protocol if somebody asks to have a check recut for some particular reason, and Disonell and Kupic had represented themselves as being realtors."

Defendant testified that his client was the bank but that he did not read the bank's closing instructions because he: "assume[s] that everything's been done correctly." Defendant testified that Disonell gave a handwritten list to Hinds or Edgerton and that Hinds checked with him about the list of disbursements. Defendant could not recall how he responded to Hinds but acknowledged that the checks issued from his escrow account matched Disonell's request. He further stated that he "was aware of checks being written that did not match the HUD-1".

Defendant testified that he reviewed the bank statements regarding his escrow account and the wire transfers of the mortgage proceeds in connection with BNC Mortgage all referenced "DBTO Americas NYC, which . . . is Deutsche Bank trust Companies of America, and that

company is not BNC and it is not Lehman Brothers." Defendant testified that he was not aware that double HUDs were being used in any real estate transactions that occurred in his office and never authorized the utilization of double HUDs.

III. DISCUSSION

A. Motion for a Judgment of Acquittal

Defendant's principal argument for post-trial relief is that the evidence was insufficient to support the verdict, and that therefore the Court must set aside the verdict and enter an acquittal under Fed.R.Crim.P. 29(c)(2). The Second Circuit explains the applicable standard as follows:

> In considering a motion for judgment of acquittal, the court must view the evidence presented in the light most favorable to the government. All permissible inferences must be drawn in the government's favor. In addition, the court must be careful to avoid usurping the role of the jury. ... [U]pon a motion for judgment of acquittal, the [c]ourt must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. Rule 29(c) does not provide the trial court with an opportunity to substitute its own determination of the weight of the evidence

> and the reasonable inferences to be drawn for that of the jury.

United States v. Guadagna, 183 F.3d 122, 129 (2d Cir. 1999) (citations and internal quotation marks omitted; alterations added).

Defendant argues, as a general matter, that none of the witnesses at trial had "clean hands" and that the co-conspirators testified inconsistently with each other at trial. Courts, however, must "defer to the jury's resolution of witness credibility and, where there is conflicting testimony, to its selection between competing inferences" *United States v. Tocco*, 135 F.3d 116, 123 (2d Cir. 1998).

A. Conspiracy - 18 U.S.C. § 371

Defendant argues that he is entitled to a judgment of acquittal on his conspiracy conviction. The general federal conspiracy statute, 18 U.S.C. § 371, prohibits "two or more persons [from] conspir[ing] either to commit any offense against the United States, or to defraud the United States or any agency thereof in any manner or for any purpose, [provided] one or more of such persons do any act to effect the object of the conspiracy." 18 U.S.C. § 371. In this case, the underlying federal offense is the submission of false HUD-1 settlement statements to mortgage lenders for the purpose of influencing banks insured by the Federal Deposit Insurance Corporation ("FDIC") to fund loans. *See* 18 U.S.C. § 1014.

"To sustain a conspiracy conviction, the government must present some evidence from

which it can reasonably be inferred that the person charged with conspiracy knew of the existence of the scheme alleged in the indictment and knowingly joined and participated in it." *United States v. Rodriguez*, 392 F.3d 539, 545 (2d Cir. 2004) (internal quotations omitted). A conspiracy "conviction cannot be sustained unless the Government establishes beyond a reasonable doubt that the defendant had the specific intent to violate the substantive statute[s]." *United States v. Gaviria*, 740 F.2d 174, 183 (2d Cir. 1984) (internal quotation marks omitted). "To convict a defendant as a member of a conspiracy, the government must prove that the defendant agreed on the essential nature of the plan, and that there was a conspiracy to commit a particular offense and not merely a vague agreement to do something wrong". *United States v. Lorenzo*, 534 F.3d 153, 159 (2d Cir. 2008) (internal citations, quotation marks and alteration omitted).

1. Knowing Participation in the Conspiracy

Here, it is undisputed that the government sufficiently proved the existence of a conspiracy to submit false statements to mortgage lenders in order to deceive them about the disbursements of mortgage proceeds. Disonell, Kupic and Sutliff, and later O'Connell and Crowley and others associated with them, initiated and carried out a scheme to defraud mortgage lenders by submitting false HUD-1 settlement statements that concealed the actual (lower) sales price of the property and how the mortgage proceeds were disbursed and falsely stated that the buyer made

a down payment. Nor does defendant contest that he and his law firm participated in the conspiracy; the disputed issue is whether he did so knowingly. To be guilty of conspiracy, "there must be some evidence from which it can reasonably be inferred that the person charged with conspiracy knew of the existence of the scheme alleged in the indictment and knowingly joined and participated in it." *United States v. Nusraty*, 867 F.2d 759, 763 (2d Cir. 1989) (internal quotation marks omitted). Once a conspiracy is shown to exist, the evidence sufficient to link another defendant to it need not be overwhelming. *Id.* at 762. The Second Circuit has cautioned, however, that:

> suspicious circumstances . . . are not enough to sustain a conviction for conspiracy, and mere association with those implicated in an unlawful undertaking is not enough to prove knowing involvement; likewise, a defendant's mere presence at the scene of a criminal act or association with conspirators does not constitute intentional participation in the conspiracy, even if the defendant has knowledge of the conspiracy.

United States v. Lorenzo, 534 F.3d 153, 159-60 (2d Cir. 2008) (internal citations quotation marks and alteration omitted).

Viewing the evidence in the light most favorable to the government, the Court concludes there was sufficient evidence that defendant knew of the existence of the scheme to make false statements to mortgage lenders and that he "knowingly joined and participated in it."

Nusraty, 867 F.2d at 763. A rational jury could have found from the evidence at trial that defendant knew the HUD-1 settlement statements that his law firm returned to mortgage lenders misrepresented the sales price of the property, falsely stated how mortgage proceeds were disbursed and falsely stated that the buyers brought down payments to closing. Hinds's testimony that she "confirmed" with defendant that it was "okay to cut checks" from the mortgage proceeds even though "the checks that we cut didn't necessarily match" the HUD-1s she returned to the lender indicated that defendant knew that the settlement statements his firm was returning to the lenders he represented contained false statements. Disonell's testimony that on at least one occasion, prior to closing, he gave defendant a list of names and amounts and asked him to issue checks, based on the list, from the mortgage proceeds in his escrow account indicated that defendant knew that the aim of the scheme was for individuals other than the buyer or seller to obtain mortgage proceeds. Defendant acknowledged having this meeting with Disonell to Agent Hensle and told Agent Hensle that Disonell and Kupic gave him verbal and written instructions to disburse the mortgage proceeds "not to the seller but to third parties" and that he never informed the lender of these disbursements. Indeed, defendant testified that he was aware that checks were being issued from his escrow account "that did not match the HUD-1". Thus, the jury had evidence from which it could find that defendant knew that in order for the scheme

to work, his office had to return to the lenders he represented, HUD-1 settlement statements that omitted the disbursements made to third parties. *See United States v. Desimone*, 119 F.3d 217, 223 (2d Cir.1997) (A "conspiratorial agreement itself may be established by proof of a tacit understanding among the participants, rather than by proof of an explicit agreement.").

The evidence of defendant's involvement in the 735 Burden Avenue and 4 Kaatskill Way closings provided the jury with a basis for finding that defendant participated in the conspiracy. Defendant's firm handled at least 44 transactions for PB Enterprises, including the closing for 735 Burden Avenue. The evidence showed that defendant signed two HUD-1 settlement statements for this property. The first HUD-1 showed the true sales price. The second HUD-1 showed the inflated sales price, falsely stated that the buyer made a cash down payment and falsely stated how the mortgage proceeds were disbursed. Sutliff testified that defendant attended the closing on 4 Kaatskill Way, a property she was buying. The documentary evidence showed that defendant signed two HUD-1s for that closing. The first showed the true sales price. The second, which was returned to BNC mortgage, showed the inflated sales price and falsely stated that Sutliff made a cash down payment on the property. Defendant's attendance of the 4 Kaatskill Way closing and signatures on the HUD-1s for that closing, and the 735 Burden Avenue closing, provided the jury with adequate evidence from

which it could find that defendant knew that the statements on the HUD-1s his office returned to the lenders contained inflated sales prices, falsely stated that the buyers made cash down payments and falsely reported how the mortgage proceeds were disbursed at closing. Defendant's personal involvement in these closings also provided the jury with sufficient evidence that he knowingly participated in the conspiracy.

It is uncontroverted that defendant's paralegal secretaries prepared the paperwork for and conducted most of the closings for Team Title and later PB Enterprises and that while defendant's firm conducted at least 64 closings, they constituted a small percentage of defendant's business. The evidence also showed, however, that: defendant was the sole attorney at the firm; that he discussed disbursing mortgage proceeds to individuals other than the buyer and seller with Disonell; that he instructed Hinds that it was permissible to disburse mortgage proceeds in a manner contrary to the disbursements reported on the HUD-1 they returned to the lender; that he told Disonell that he would do "double HUD" closings; and that he was involved in at least two double HUD closings as evidenced by his signature on the false HUD-1 settlement statements for 4 Kaatskill Way and 735 Burden Avenue. Thus, there was more than sufficient evidence from which the jury could find beyond a reasonable doubt that defendant knowingly participated in a conspiracy to submit false statements. *See United States v. Henry*, 325 F.3d

93, 105 (2d Cir. 2003) (finding "[t]he mere fact that Panek participated with Henry in the suspicious transactions at issue suggests an agreement."); *United States v. Rojas*, 617 F.3d 669, 674 (2d Cir. 2010) (in the context of a conspiracy conviction, deference to the jury's findings is especially important ... because a conspiracy by its very nature is a secretive operation, and it is a rare case where all aspects of a conspiracy can be laid bare in court." (alternation in original and quotation marks omitted)).

Defendant next argues that he is entitled to a judgment of acquittal because he received only his customary fee, $400-$500 per closing, and the closings that involved Team Title and PB Enterprises comprised a small percentage of his business. In light of the evidence outlined above of defendant's knowledge of and participation in the conspiracy, the government was not required to prove that he had a financial stake in the conspiracy. *Henry*, 325 F.3d at 105 ("[E]vidence of a financial stake in the venture is not essential to show that the defendant intended to facilitate the unlawful objective of the conspiracy." (quoting *United States v. Isabel*, 945 F.2d 1193, 1203 (1st Cir. 1991)).

Defendant argues that the government's "theory of the case requires one to assume" that the checks the buyers brought to the closing as evidence of their down payments were genuine and that the checks were introduced at trial as genuine. Defendant asserts that the checks were

fake and that this undermines the government's proof regarding whether buyers brought down payments. The evidence at trial showed that defendant and his co-conspirators would falsely state on the HUD-1s that the buyers made down payments and make copies of the down payment checks to submit to the lenders as proof but then return the checks to the buyers, uncashed. Thus, it is inconsequential whether the checks were genuine or fake because it is undisputed that the checks were not used in the transactions at issue. Accordingly, defendant's argument is without merit.

Defendant argues that the government failed to adduce evidence that any of the banks identified in the overt acts were federally insured. The four overt acts alleged in the indictment involved Washington Mutual Bank, FA, Fremont Investment & Loan, and CitiMortgage, Inc. Even assuming the government's proof failed with respect to Washington Mutual and CitiMortgage, Inc., there was ample evidence from which the jury could have found Fremont was federally insured. One of the overt acts in the indictment involved Fremont and alleged that:

> On or about March 30, 2005, defendant . . . submitted, and caused a coconspirator to submit to Fremont, a HUD-1 statement in connection with an $88,000 mortgage relating to 147 Fifth Avenue, Troy, New York, which HUD-1 misrepresented the amount the buyer would provide at the closing and misrepresented the manner in

which the disbursements of the loan proceeds would be made.

Irma Valdez, senior investigation research specialist at Fremont, testified that Fremont's depository accounts were insured by the FDIC during the relevant time period. The government also introduced into evidence a certificate of proof of insured status from Thomas E. Nixon, counsel for the FDIC stating that Fremont Investment & Loan, Brea, California and its "domestic branches", were federally insured and retained its insured status "from September 24, 1984, through and including December 31, 2005." Thus, there was evidence that Fremont was federally insured at the time the overt act occurred.

Defendant argues that his office did not deal with the Brea, California office, but a Fremont "wholesale loan processing office" located in Elmsford, New York, which did not operate within the meaning of the phrase "domestic branch office". Although there is an address for a Fremont office in Elmsford, New York in the documents introduced at trial concerning the 147 Fifth Avenue transaction, those documents also identify the Fremont office in Brea, California in connection with this property. Additionally, Valdez testified that Fremont was federally insured, offered mortgages, funded a mortgage for 147 Fifth Avenue and used defendant as the closing agent for the 147 Fifth Avenue closing. Valdez further testified that had Fremont known that the statements on the HUD-1s defendant's office returned to it after closing were false with

respect to the funds the buyer brought to closing and the disbursement of the mortgage proceeds, it would have defunded the loan. Thus, viewing the evidence in the light most favorable to the government, the Court finds there was sufficient evidence from which the jury could find that defendant conspired to make a false statement to influence the action of a federally insured financial institution on a loan.

B. Bank Fraud - 18 U.S.C. § 1344

The jury convicted defendant of Counts 7 and 19 for bank fraud in connection with his actions as BNC Mortgage's agent for the closings on 735 Burden Avenue and 4 Kaatskill Way. BNC Mortgage is an uninsured, wholly owned, subsidiary of Lehman Brothers, a federally insured institution. Defendant argues that he is entitled to a judgment of acquittal because the government failed to establish that BNC Mortgage was a federally insured financial institution.

Section 1344 states that:

> whoever knowingly executes, or attempts to execute, a scheme or artifice– (1) ***to defraud a financial institution***; or (2) ***to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution***, by means of false or fraudulent pretenses, representations, or promises; shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. § 1344. The term "financial institution" means, inter alia, "an insured depository institution (as defined in section 3(c)(2) of the Federal Deposit Insurance Act)" 18 U.S.C. § 20(1). "The well stablished elements of the crime of bank fraud are that the defendant (1) engaged in a course of conduct designed to deceive a federally chartered or insured financial institution into releasing property; and (2) possessed an intent to victimize the institution by exposing it to actual or potential loss." *United States v. Barrett*, 178 F.3d 643, 647-48 (2d Cir. 1999).

In this case, BNC's closing instructions required defendant to ensure that the buyers made cash down payments and to report all disbursements of the mortgage proceeds on the HUD-1 settlement statements. The evidence showed that defendant, however, not only closed the loans on 735 Burden Avenue and 4 Kaatskill Way without receiving down payments from the buyers but that defendant falsely reported on the settlement statements that the buyers had made the down payments. In addition, defendant disbursed $33,172.03 from the mortgage proceeds for 735 Burden Avenue to the buyer, the majority of which ended up in the pockets of O'Connell and Crowley, without recording the disbursement on the settlement statement. This evidence was more than sufficient to allow the jury to find that defendant engaged in a scheme to defraud.

Further, given defendant's representations on the settlement statements that the buyers made

down payments, when they had not, and his failure to disclose the actual, lower sales price of the property, the jury was entitled to infer that defendant placed BNC, and its parent company, Lehman Brothers at risk for harm. The evidence showed that defendant was hired by BNC to be its agent and to disburse the mortgage funds in accordance with its instructions and on its behalf. Defendant instead allowed the loans to close and disbursed the mortgage proceeds for properties in which the buyers held no financial stake and that were worth much less than the inflated sales price he was reporting, and were therefore inadequate as collateral.

Defendant asserts that the government failed to prove that BNC Mortgage was federally insured. The government's theory at trial, however, was that Lehman Brothers, which was federally insured, was the victim of bank fraud because it was Lehman Brothers' money that BNC used to fund the mortgages and that Lehman Brothers suffered when there was a loss on the loan. The proof required to establish the federally "insured depository institution" element when the wholly owned, but uninsured, subsidiary of an insured financial institution is the victim of bank fraud, or a false statement, has not been addressed directly by the Second Circuit. In *United States v. Bouyea*, 152 F.3d 192 (2d Cir. 1998), the Second Circuit addressed the issue in the context of the wire fraud statute and whether a five-year or ten-year statute of limitations applied. See id. at 195 ("Normally, conviction under the federal wire

fraud statute does not require proof of an effect on a financial institution. . . . . However, "if the offense affects a financial institution," then a ten-year statute of limitations applies.) (quoting 18 U.S.C. § 3293(2)).

In *Bouyea*, the defendant argued that the evidence did not support the jury's conclusion that his wire fraud scheme, in violation of 18 U.S.C. § 1343, "affected a financial institution" because the defrauded institution, the wholly owned subsidiary of a financial institution, was not a "financial institution" within the meaning of the statute. *Id.* Citing the Third Circuit's finding in *United States v. Pelullo*, 964 F.2d 193, 215-16 (3d Cir. 1992), that § 3293(2) "broadly applies to any act of wire fraud that affects a financial institution", the Second Circuit rejected the defendant's argument that the defrauding of a financial institution's subsidiary "is insufficient as a matter of law to meet the 'affect[ing] a financial institution' requirement of § 3293(2)". *Id.* The Second Circuit found that the evidence that the subsidiary "borrowed the money for its transaction with Bouyea from its parent, Centerbank, and that when [the subsidiary] suffered a $150,000 loss as a result of Bouyea's fraudulent scheme, Centerbank was affected by this loss" was "sufficient to allow [the jury] to conclude that, by defrauding a wholly-owned subsidiary of Centerbank, Bouyea did "affect[ ]" Centerbank, a financial institution, for purposes of § 3293(2). *Id.*

The statutes at issue in *Bouyea*, required proof that the fraud "affected a financial institution". The bank fraud statute, in contrast, requires proof of a scheme to defraud a financial institution or to obtain funds "owned by, or under the custody or control of, a financial institution".[21] 18 U.S.C. § 1344. As the D.C. Circuit has explained, "[t]here is little precedent" governing the issue of whether evidence that an uninsured subsidiary of a federally insured parent bank suffered a loss as the result of bank fraud is sufficient to allow a jury to find a scheme to defraud a federally insured financial institution. *United States v. Hall*, 613 F.3d 249, 252 (D.C.Cir. 2010), *see also United States v. Edelkind*, 467 F.3d 791, 797-98

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[21] In *United States v. Mavashev*, No.08-CR-902, 2009 WL 4746301 (E.D.N.Y. Dec. 7, 2009), in which the defendant was charged with conspiracy, bank fraud, and wire fraud, in violation of 18 U.S.C. §§ 1344, 1343, 1349, and 3551, the court applied Bouyea. In a pretrial motion, Mavashev argued that the wholly owned subsidiaries (mortgage lenders), which were not federally insured and from which he obtained mortgages were, not "financial institutions" within the meaning of 18 U.S.C. § 20. *Id.* The court denied the defendant's motion to dismiss the indictment, holding that the government's allegations that the "defendant has defrauded several federally-insured banks via their wholly-owned subsidiaries" were sufficient. *Id.* at *4. The court instructed the government that: "Applying *Bouyea*, in order to convict defendant for these actions, the government must present evidence that the fraud 'affected' the parent financial institutions." *Id.*

(1st Cir. 2006) ("[n]either the statute nor the case law fully instructs just how tight a factual nexus is required to allow a jury to decide that a scheme, formally aimed at one (uninsured) company, operates in substance to defraud another (insured) entity with whom the defendant has not dealt directly.").[22]

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[22] A number of other Circuits have also addressed bank fraud when it involves the uninsured subsidiary of a federally insured parent bank. *See, e.g., United States v. Irvin*, 682 F.3d 1254, 1272-73 (10th Cir. 2012) (holding that because the government charged the defendant with submitting a false loan application to the subsidiary "to obtain proceeds from [the parent bank] ", and the evidence showed that the loan proceeds disbursed by the subsidiary "upon its decision to fund [the] mortgage indisputably came from the credit line extended to it by [the parent bank]" and the subsidiary would not draw on its line of credit until its underwriters decided to fund a particular loan, the jury had a sufficient basis on which to conclude that "until such time, the funds comprising the line of credit were owned by, and in the custody and control of, [the parent bank]."); *United States v. Bennett*, 621 F.3d 1131, 1139 (9th Cir. 2010) (vacating three counts of bank fraud because the "government introduced no evidence regarding the relationship between BOA and [it's subsidiary] Equicredit, and the record contains nothing from which the jury could discern the nature, amount, or even existence of any control exercised by BOA."); *United States v. Bianucci*, 416 F.3d 651 (7th Cir. 2005).

In *United States v. Hall*, the defendant, who was involved in a property "flipping" scheme,[23] sent false appraisals and made false statements in settlement documents to lenders that were the uninsured, wholly owned, subsidiaries of the federally insured parent banks. *Hall*, 613 F.3d at 251. Reviewing the sufficiency of the evidence, the D.C. Circuit found that since GRL was wholly owned by federally insured Guaranty Bank, a loss to GRL would constitute a loss to Guaranty

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[23] This scheme was similar to the repair rebate and double HUD schemes used in this case: [A] co-conspirator . . . would buy homes in disrepair. Hall would then find straw buyers to repurchase the homes . . . . Before the homes were resold to the straw buyers, however, [another] co-conspirator . . . would appraise the homes in disrepair as if they had been renovated. These higher (false) appraisals were then sent to GRL and another mortgage company, National City Mortgage ("NCM"). These lending institutions would then provide mortgage funding, facilitated by co-conspirators [who were] underwriters at GRL and later NCM. The funds were sent to coconspirator Vicki Robinson, the settlement agent for the property sales . . . Robinson would give a portion of the funds to Hall, who would then convert a portion of those funds into cashier's checks in the amount that the straw buyer was supposed to bring to settlement as a downpayment. At settlement Hall would receive the loan proceeds, identified on the property settlement documents as reimbursement for "rehab construction," most of which was never done. Instead, Hall took the money as income for himself. *Hall*, 613 F.3d at 251.

Bank." *Hall*, 613 F.3d at 252. The court also found that a loss to "NCM, described at trial only as an operating subsidiary of federally insured National City Bank of Indiana" would constitute a loss to National City Bank if Indiana because "its status as an operating subsidiary implies at least a majority or controlling interest held by National Bank of Indiana." *Id.*

In *Edelkind*, the defendant was convicted of bank fraud for refinancing a property repeatedly by making false representations and submitting false documents to uninsured subsidiary lenders, in violation of §1344. 467 F.3d at 793. The defendant argued that since the wholly owned subsidiaries were not federally insured and the evidence failed to show that the federally insured parent bank was defrauded, he was entitled to a judgment of acquittal. *Id.* at 797.

The First Circuit found that the bank fraud statute applied, explaining that "where the federally insured institution takes part in an integrated transaction and is thereby injured by the defendant, who intended to defraud another party to the transaction." *Id.* at 797-98. The First Circuit held that although section 1344 "says that the scheme to defraud a protected financial institution must be 'knowingly' executed", "the government does not have to show that the defendant knew which particular bank might be injured or that it was federally insured." *Id.* at 797. In *Edelkind*, the uninsured subsidiary "did no more than 'table fund' the loan, that is, it agreed to make the loan only if another lender

[Lehman Brothers] first agreed to purchase the loan thereafter." *Id.* There, the evidence adduced at trial showed that:

> Lehman Brothers' forms and guidelines were used by Fairmont and Aurora in table funding the loan, that a Lehman Brothers official (not just its subsidiary Aurora) signed off on the loan before Fairmont made it, and that Fairmont transferred the loan to Lehman Brothers-not to Aurora-about a month after the closing between Edelkind and Fairmont. Thus the loan-although formally made by Fairmont-was from the outset part of an integrated transaction, the first step of which was dependent on approval by Lehman Brothers, and the pre-planned second step of which was a transfer of the mortgage to Lehman Brothers itself.

467 F.3d at 798. The First Circuit concluded that "[g]iven these predicates-Edelkind's intent to defraud, the integrated transaction, and the financial injury to which Lehman Brothers was exposed-the jury was entitled to find that Edelkind defrauded Lehman Brothers, a federally insured bank." *Id.*[24]

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[24] The First Circuit also upheld a the bank fraud conviction in *United States v. Walsh*, 75 F.3d 1 (1st Cir. 1996). In *Walsh*, the defendant obtained mortgages by submitting false documents to Dime-MA, the uninsured wholly owned subsidiary of Dime-NY, which was federally insured, and was convicted of bank fraud, in violation of 18 U.S.C. § 1344. *Walsh*, 75 F.3d at 3. The defendant argued that "the

Kelly Monahan, the Chief Executive Officer of BNC Mortgage and a vice president of Lehman Brothers Bank, testified at trial. Monahan explained that Lehman Brothers owned BNC Mortgage and that he "was a dual employee so I was a vice president of the bank because we had to sign documents as BNC Mortgage and then other documents as Lehman Brothers Bank." Monahan stated in that 2000, he led "part of the management team to buy out the publicly traded company [BNC Mortgage] so we'd go private again, and . . . then I partnered with Lehman

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evidence failed to show that the victim was a federally insured financial institution." *Id.* at 9. The First Circuit held that "a defendant can violate section 1344 by submitting the dishonest loan application to an entity which is not itself a federally insured institution." *Id.* The evidence showed that the wholly owned subsidiary's directors and principal officers "were officers of the parent" and it was "subject to examination by the same federal bank examiners" as the parent "and reported its result on a consolidated basis." *Id.* Additionally, the parent "provided all the funds for the subsidiary's operating expenses and to fund mortgage closings." *Id.* The parent "determined what loan products should be offered and, on the closing of a loan by [the subsidiary], the mortgage was immediately assigned to [the parent] which serviced the loan." *Id.* The First Circuit concluded that on those facts, "for the purposes underlying section 1344, the mortgage fraud perpetrated against Dime-MA was effectively a fraud against Dime-NY." *Id.*

Brothers as my financial partner so we bought out the public." Monahan testified that he became BNC Mortgage's CEO and ran the company until 2006.

Monahan stated that BNC offered mortgages during the time period relevant to this case. Monahan explained that since BNC did not have the capital to fund the "approximately a billion dollars a month" it was originating in loans, it obtained the funds through an "unlimited warehouse line of credit" from Lehman Brothers. Monahan stated that as a result, when BNC funded loans, "we were using their funds."

Monahan testified that once BNC funded the loans, Lehman Brothers "purchased many of them." Monahan stated that if there was a loss on a loan, "three different parties" could have the loss. Monahan explained that BNC Mortgage could have the loss "because if the borrowers don't make the payments we have to buy the loans back." Monahan further stated that it: "[c]ould also be Lehman Brothers because of one or two things. If they're holding them on the books and the loans are worthless, then they'll take the loss, but it could also be another - - if they securitize the loans, it also could be the security holder."

From Monahan's testimony, viewed in the light most favorable to the government, the jury could find that: BNC Mortgage was a wholly owned subsidiary of Lehman Brothers, a federally insured financial institution; BNC's CEO was also an officer of Lehman Brothers; BNC funded the

loans for 735 Burden Avenue (approximately $76,500) and 4 Kaatskill Way (approximately $226,000) with money it drew from its Lehman Brothers' credit line, and a loss on a loan issued by BNC could also be a loss for Lehman Brothers. Given this evidence - defendant's intent to defraud, the integrated transaction involving funds from Lehman Brother's and the financial injury to which Lehman Brothers was exposed as a result of its ownership of BNC and its provision of money to fund the loan - the jury had a basis for finding that defendant defrauded Lehman Brothers, a federally insured financial institution, in violation of § 1344. *See Hall*, 613 F.3d at 252 (finding the evidence sufficient to prove bank fraud in violation of § 1344 because "GRL being wholly owned by federally insured Guaranty Bank, a loss to GRL would constitute a loss to Guaranty Bank.").

Defendant argues that even assuming the evidence regarding the relationship between BNC and Lehman Brothers was sufficient, his bank records showed that the funds for these transactions came from "Deutcshe Bank, a financial institution whose relationship to BNC or Lehman was never proven." The jury heard this evidence, however, and was entitled to reject it. Therefore, the Court concludes that the evidence was sufficient to support defendant's convictions for defrauding federally insured financial institutions.

C. False Statement - 18 U.S.C. § 1014

1. Statement to a Federally Insured Financial Institution

Defendant argues that the evidence at trial was insufficient to support his conviction for making a false statement on the 735 Burden Avenue HUD-1 settlement statement because BNC Mortgage was not federally insured. "Section 1014 criminalizes 'knowingly making any false statement or report ... for the purpose of influencing in any way the action' of a Federal Deposit Insurance Corporation (FDIC) insured bank 'upon any application, advance, ... commitment, or loan.'" *United States v. Wells*, 519 U.S. 482, 490 (1997) (quoting 18 U.S.C. § 1014). "The elements to be established under 18 U.S.C. § 1014 are (1) that the lending institution's deposits were federally insured; (2) that the defendant made false statements to the institution; (3) that the defendant knew the statements made were false; and (4) that the statements were made for the purpose of influencing the institution to make a loan or advance." *United States v. Chacko*, 169 F.3d 140, 147 (2d Cir. 1999). *United States v. White*, 882 F.2d 250 (7th Cir. 1989).

It is undisputed that BNC Mortgage is not federally insured. The government's theory, both in the indictment and at trial, however, was that defendant made false statements to BNC Mortgage for "for the purpose of influencing BNC Mortgage and its parent corporation Lehman, an institution whose deposits were insured by the

Federal Deposit Insurance Corporations". *Cf. United States v. White*, 882 F.2d 250, 254 (7th Cir. 1989) (vacating the defendant's conviction for making a false statement in violation of § 1014 where the government "staked its all on persuading the district court and us" that the uninsured leasing corporation, which was the wholly owned subsidiary of an FDIC-insured bank, was a bank, explaining "that if White had intended by making false statements to the leasing corporation to influence the bank as well, the fact that the statements were not made to the bank would not prevent his conviction; the language of the statute is clear on this point" and that "the intent to influence the bank" would not "have to be the primary motivation for the making of the statements").

In *United States v. Krown*, the Second Circuit held that § 1014 applied even though the false statement was made to a third party and not directly to a bank:

> The statute is not limited by its terms to direct dealings with banks. It covers the making of false statements "for the purpose of influencing in any way" the action of an FDIC insured bank upon certain types of transactions. Thus, the statute is broad enough to apply to fraudulent dealings with third persons where it could also be said that there was the purpose to influence a bank upon one of the transactions named in the statute.
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> 675 F.2d 46, 50 (2d Cir. 1982).

In this case, there was evidence from which the jury could find that defendant made false statements in order to influence both BNC and Lehman Brothers in connection with the loan on 735 Burden Avenue. Defendant could not access or disburse the mortgage proceeds, which BNC had obtained from Lehman Brothers and wired to his escrow account, until he had ensured all BNC's closing requirements had been satisfied and had completed and signed the HUD-1. Defendant falsely stated on the 735 Burden Avenue HUD-1 settlement statements that the buyer made a down payment at closing and falsely reported the disbursements he made from the mortgage proceeds. Monahan testified that if BNC had known that the buyer did not make the down payment or that a "$33,000" disbursement had been made to the buyer, which ultimately ended up with O'Connell and Crowley, it would not have funded the loan in the first place. Monahan further stated that had BNC learned of these false statements, it could have unwound or defunded the loan, the proceeds of which came from Lehman Brothers. The jury therefore had a basis for finding that defendant made the false statements with the intent to influence BNC's and Lehman Brothers's actions with respect to the loan on 735 Burden Avenue, including the actions of funding the loan in the first place with Lehman Brothers' money and unwinding or defunding of the loan. *See United States v. Zahavi*, No. 12 Crim. 288 (JPO), 2012 WL 5288743, at *5 (S.D.N.Y. Oct. 26, 2012) ("Indeed, a broad interpretation of 'action' most harmoniously

accords with the statutory purpose. Defendants have not explained, and cannot explain, why it would be unreasonable for a statute designed to protect the credit system to cover statements intended to influence bank 'action' on defaulted loans, including such actions as foreclosure, liquidation, sale, and release." (internal citation omitted) (citing *United States v. Whitman*, 665 F.2d 313, 319 (10th Cir. 1981) ("We note that the purpose of §1014 was to cover all undertakings which might subject the FDIC insured bank to risk of loss and to protect lending institutions from deceptive practices." (internal citations and quotation marks omitted))). Thus, the evidence was sufficient for the jury to find that defendant made the false statements to BNC Mortgage for the purpose of influencing the actions of BNC and Lehman Brothers with respect to the loan on 735 Burden Avenue.

2. Knowledge that Lender was Federally Insured

Defendant argues that there is no evidence that he knew that the lender he was making statements to was Lehman Brothers. "Section 1014's proscription of knowing misrepresentation reach[es] a defendant's knowledge of the statement's presentation to banks generally[,] as distinguished from a particular bank." *See United States v. Bellucci*, 995 F.2d 157, 159 (9th Cir.1993) (per curiam) (internal quotations omitted) (quoting *United States v. Lentz*, 524 F.2d 69, 71 (5th Cir. 1975)).

Defendant was an experienced real estate attorney, who, as he testified, acted as the "bank's attorney" for numerous transactions over many years. This is sufficient to create an inference from which the jury could infer that defendant knew his statements would influence a bank. *See United States v. Sabatino*, 485 F.2d 540, 545 (2d Cir. 1973) ("There was testimony, however, that the salesman showed the form, which was headed 'Bankers Trust Company - Buyer's Credit Statement' to appellant who affixed his signature. We think that is enough to create an inference, which the jury could accept, that appellant knew he was making an application to the bank.")

3. HUD-1 as Basis for False Statement Conviction

Defendant asserts that as a matter of law, a statement on a HUD-1 cannot serve as the basis for a false statement conviction under §1014 because the warning on the HUD-1s used in this case refer to 18 U.S.C. §§ 1001 and 1010, which also criminalize false statements. Defendant argues that "if the Government actually intended for a HUD-1 settlement statement to be considered a 'false statement' under 18 U.S.C. § 1014, then the government would have added a reference to 18 U.S.C. § 1014 into the 'Warning' language" on the HUD-1."

Defendant's argument has no merit. Section 1014, "by its terms covers 'any false statement.' Common sense indicates that 'any statement' means both written and oral statements." *United States v. Sackett*, 598 F.2d 739, 741 (2d Cir.1979).

Defendant admitted at trial that he "was aware of checks being written that did not match the HUD-1". BNC required defendant as its closing agent to ensure that Haskins brought a cash down payment to closing before he closed the loan and disbursed the mortgage proceeds. The HUD-1 settlement statement defendant signed for the 735 Burden Ave closing falsely stated that the buyer, Haskins, brought a $17,177.97 cash down payment to closing and failed to report that $33,172.03 in mortgage proceeds had been disbursed to Haskins at closing. Defendant's office returned this HUD-1 settlement statement to BNC. Defendant made a written false statement on a form and returned it to BNC for the purpose of influencing BNC and Lehman Brothers with respect to the mortgage loan. Based on these facts, the Court finds that this statement falls within the term "any false statement" and that it is immaterial whether the statement was on a HUD-1 that contained warnings about other statutes or an otherwise blank piece of paper.

B. Motion for a New Trial

Defendant further argues that the interest of justice requires the Court to vacate the judgment and grant a new trial. *See* Fed.R.Crim.P. 33(a). The Court has "broader discretion to grant a new trial pursuant to Rule 33 than to grant a motion for a judgment of acquittal pursuant to Fed.R.Crim.P. 29, where the truth of the prosecution's evidence must be assumed[.]" *United States v. Sanchez*, 969 F.2d 1409, 1414 (2d Cir. 1992) (citations omitted). Such discretion should,

however, be exercised sparingly. *Id.* The *Sanchez* court states:

> It is only where exceptional circumstances can be demonstrated that the trial judge may intrude upon the jury function of credibility assessment. Where testimony is patently incredible or defies physical realities, it may be rejected by the court, despite the jury's evaluation. But the trial judge's rejection of all or part of the testimony of a witness or witnesses does not automatically entitle a defendant to a new trial. The test is whether it would be a manifest injustice to let the guilty verdict stand. *Id.* (citations, quotation marks, and footnote omitted).

1. False Trial Testimony by Kevin O'Connell

Defendant moves for a new trial on the basis that one of the government's witnesses, Kevin O'Connell, testified falsely at trial. Dkt. No. 57. This assertion is based on a post trial interview between O'Connell and two special agents from the IRS. According to the Memorandum of Interview dated February 28, 2013:

> O'Connell said that he had 6 different Assistant United States Attorneys that he worked with starting with Tom Capezza and ending up with Michael Olmsted over those 6 years. O'Connell then stated that he lied in the Michael Bouchard trial and that he never met Michael Bouchard.

O'Connell said that he met with Assistant United States Attorney, Michael Olmsted and Special Agent Thomas Fattorusso and told them several times he never met Michael Bouchard. O'Connell stated that Michael Olmsted told him "If you do not tell us you met with Michael Bouchard we can't help you". O'Connell told Michael Olmsted that he wanted to speak with his attorney privately. O'Connell then spoke with his attorney, Lee Greenstein, and told him that he (O'Connell) never met with Michael Bouchard. O'Connell said that his attorney told him that he (O'Connell) had to decide what to do. O'Connell explained that he felt Michael Olmsted threatened him and as a result O'Connell lied while testifying that he met Michael Bouchard when in fact he did not.

O'Connell stated that it was like the movies, he had to swear to tell the truth but then lied that he had a meeting with Michael Bouchard when he actually had never met Michael Bouchard. O'Connell said that he lied because he felt that Michael Olmsted threatened him that if he did not lie he would not get a reduced sentence. Also, that in the past he had provided information on others to Special Agent Fattorusso but that he only seemed to be interested in the Bouchard [sic].

Paragraph numbers omitted.

After receiving a copy of this memorandum, defendant supplemented his motion for a new trial and requested a hearing on this issue. The government responded as follows:

> By way of background, o[n] February 28, 2013, the government interviewed one of the trial witnesses in connection with an investigation unrelated to the Bouchard matter. The witness expressed his displeasure with the sentence imposed upon him and said that he had testified falsely at Bouchard's trial by saying he had met with Bouchard to discuss the fraud when he had not done so. The interviewing agents wrote a memorandum reciting what the witness said, and on March 8, 2013, the government provided defense counsel with the memorandum. The government attempted to interview the witness a second time, but was advised by his attorney that he had not testified falsely, that he had not told the agents he had testified falsely, and that he was unavailable for further interviews.
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> The memorandum provided to defense counsel noted that the witness stated that he lied when he testified that he met with Michael Bouchard, because, in fact he did not meet with Michael Bouchard. Dkt. No. 58, pp.26-27.

The government went on to cite portions of the witness's trial testimony and argued that his testimony is not inconsistent with the statement

he made to the government after being sentenced. Still, the government agreed that a hearing would be "appropriate." *Id.* at p.27.

In an Order entered on May 21, 2013, Dkt. No. 66, the Court granted the parties' request for a hearing. Michael Olmsted, one of the Assistant United States Attorneys who prosecuted this case, testified. Defendant called no witnesses. Mr. Olmsted testified that he met with O'Connell a number of times prior to trial and that O'Connell's attorney was present during all of these meetings. Mr. Olmsted testified that he told O'Connell at least four different times that: "If you are going to talk to me at all, tell the truth. It is better for you to be silent than to lie to me, because your cooperation in this case depends upon telling the truth, and that's it." Regarding the discussions they had about whether O'Connell met with defendant, Mr. Olmsted testified as follows:

> Q Did you ever, again, this is from. . . did you ever threaten Kevin O'Connell in a manner that would result in him believing that he needed to testify that he met Michael Bouchard when in fact he did not?
> A No, we were emphatic on this. There was a -- I'll give you a little bit of background. At one point, we were asking him about his, you know, did you meet with Michael Bouchard, how is it that you had 63 closings with this guy in which they were all worked out a certain way, and after initially saying I don't remember having a meeting, he said, look, I can't remember when I had it or where I had

it, but we had that meeting. And so we tried to follow up on that saying, all right, when was this, and he said, I know you want me to be able to say when it was, and I remember saying, all right, time out. I remember doing this (indicating). Time out.
Q Let the record reflect that the witness is forming a T with his hands much like an NFL official does calling a timeout.
A And I said, we don't want you to say anything other than what you remember. So if you remember when it was, testify when it was. If you remember where it was, testify where it was. And if you can't remember when or where it was, then say so.

On cross examination, Mr. Olmsted stated:

Q And is it a true statement that the reason that you had conversations during your meetings with Mr. O'Connell about whether or not he had ever met with Michael Bouchard personally is because there was indication in some of the prior statements made by Mr. O'Connell that he had not met Michael Bouchard?
A I can answer that. Mr. O'Connell said in grand jury testimony something to the effect that he had not had conversations with Mr. Bouchard. I thought that he was and still think that he was remarkably imprecise in trying to distinguish between whether he met with Bouchard or whether he had conversations involving criminality with

Bouchard. And that I was confident that when he said on some occasions I met with Bouchard, he means he physically met with him and said something to him, for example, at a closing. There are other times when he said, I met with Bouchard or didn't meet with Bouchard where what he was trying to say is I did not have a conversation with him about this conspiracy. And he was vague through that and I thought frankly his grand jury testimony was imprecise on that point, which is why we asked him about it.

Q Mr. Olmsted, in the grand jury testimony of Kevin O'Connell, and I'll direct your attention to page 13, I know you don't have it in front of you but I'm going to read it to you, tell me if you're familiar with the following question and answer. "Question: Did you have any conversations with Michael Bouchard about the use of gift money or double HUD closings or any other techniques used to close properties? "Answer: No." You're familiar with that part of his testimony?

A Yes.

Q And you said, Mr. Bouchard, that -- excuse me, Mr. Olmsted, you said that you specifically recalled four conversations, what was discussed and where they took place, correct, as it relates --

A I remember talking to him about his obligation to tell the truth. I remember another meeting we had where we played him a tape where he had previously talked

> about manipulating the HUDs because we thought that might refresh his recollection that he had had – on his interaction with Bouchard. It did not refresh his recollection...

"A district court's discretion to determine if 'newly discovered evidence warrants a new trial is broad because its vantage point as to the determinative factor—whether newly discovered evidence would have influenced the jury—has been informed by the trial over which it presided.'" *United States v. Williams*, No. 12-765-cr, 2013 WL 1729754, at *1 (2d Cir. Apr. 13, 2013)(quoting *United States v. Stewart*, 433 F.3d 273, 296 (2d Cir. 2006)). "It is the defendant who bears the burden of showing that a new trial is called for." *United States v. Sasso*, 59 F.3d 341, 350 (2d Cir. 1995), "Where the allegation is that there is new evidence of perjury, 'a threshold inquiry is whether the evidence demonstrates that the witness in fact committed perjury,'" *Id.* (quoting *United States v. White*, 972 F.2d 16, 20 (1992)). Perjury is defined as "giv[ing] false testimony concerning a material matter with the willful intent to provide false testimony." *United States v. Dunigan*, 507 U.S. 87, 94 (1993). The Second Circuit has articulated the relevant standard as follows:

> Whether the introduction of perjured testimony requires a new trial depends on the materiality of the perjury to the jury's verdict and the extent to which the prosecution was aware of the perjury. With respect to this latter inquiry, there are two discrete standards of review that are

> utilized. Where the prosecution knew or should have known of the perjury, the conviction must be set aside " 'if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.' " *Perkins v. LeFevre*, 691 F.2d 616, 619 (2d Cir. 1982) (quoting *United States v. Agurs*, 427 U.S. 97, 103 (1976)); *see also Sanders v. Sullivan*, 863 F.2d 218, 225 (2d Cir. 1988) (question is whether the jury's verdict "might" be altered); *Annunziato v. Manson*, 566 F.2d 410, 414 (2d Cir. 1977). Indeed, if it is established that the government knowingly permitted the introduction of false testimony reversal is "virtually automatic." *United States v. Stofsky*, 527 F.2d 237, 243 (2d Cir.1975) (citing *Napue v. Illinois*, 360 U.S. 264, 269 (1959)).

United States v. Wallach, 935 F.2d 445, 456 (2d Cir. 1991).

Where, on the other hand:

> the government neither knew nor should have known of its witness's perjury at the time of trial, [the defendant] must make the following showing to win a new trial: (1) that the perjured testimony was material; and (2) but for the perjured testimony, the defendant would most likely not have been convicted.

United States v. Martinez, 26 Fed. Appx. 40, 42 (2d Cir. 2001).

At trial, O'Connell testified[25] that he and Crowley were introduced to defendant by Sutliff,

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[25] At trial, on direct examination, O'Connell testified, in relevant part:

Q Do you know Michael Bouchard?

A Yes.

Q How did you get to meet Michael Bouchard?

A He was a referral from somebody that I worked with in the past, Nickole Riley, she introduced us.

...

Q And how did you find a closing agent?

A Through just like a series of people that were already in the business that had experience with it through referrals.

Q And was one of those Michael Bouchard?

A Yes.

Q And how did you find him?

A He was introduced to us by Nickole Riley who was a mortgage broker that had worked with him in the past.

Q And did you describe to him what you wanted to do?

A Yes.

Q And what did you ask him, what did he tell you?

A That we wanted to basically buy the property, have two closings in one day where we were buying it from somebody at a lower price and then reselling it at a higher price.

Q And what did he say to you?

A That wouldn't be a problem.

Q And did you subsequently use him to do that?

A Yes.

Q Repeatedly?

A Yes.

Q How much business did you do -- I mean how many closings did you do in a month would you say?

A Probably five to six.
Q Over what period of time?
A Oh, like a four-year, three- or four-year period of time.

...

Q All right. So after you had met with Michael Bouchard, discussed the need to have HUDs at a high and a low price, you then had a series of closings?
A Yes.

...

Q How did the closing agent know to write that check as opposed to other checks?
A I think it was just the difference between what we bought the property for and what our sales contract was.
Q But is that what you had agreed would happen --
A Yes.
Q -- with Michael Bouchard when you first started using him?
A Yes.
Q On each, I mean, and you didn't have to renew that agreement each closing?
A No.

On cross examination, O'Connell testified, in relevant part:
Q You just said that the check that you would get at the end of the closing, that that's what you expected would happen, is that right?
A Yes.
Q And you said that was based upon a conversation you had with Michael Bouchard?
A Yes.
Q When did you have that conversation?
A I don't remember the exact date.
Q Well, where did you have that conversation?

A I don't know exactly where.
Q Because I've read some of your prior testimony, you've given prior testimony in connection with this case, correct?
A Yes.
Q More than once, correct?
A Yes.
Q You've indicated you never really had any real conversation with Michael Bouchard previously, isn't that right?
A That wasn't really my role in the company to deal with him, I was --
Q I understand that, so the point of the matter, sir, is you didn't have any conversations with him, isn't that right?
A Well, we had the closing so I must of.

...

Q As a matter of fact, sir, you can't even say that you yourself directly dealt with Michael Bouchard in connection with any of the closings, that you testified to here today, isn't that right?
A Not directly, no.

...

Q And you didn't talk to Michael Bouchard about the use of double HUDs, correct?
A No.
Q That conversation never happened between you and he, correct?
A Correct.

. . .

Q And by the way, when it came to utilizing Michael Bouchard as a lawyer, you know who Thomas Disonell is, correct?
A Yes.

that they told defendant they wanted to buy low and sell high and that defendant replied that "that wouldn't be a problem." On cross-examination, O'Connell could not recall where or when he met defendant or when or where he spoke with defendant but stated that "we had the closing so I must of". After trial, O'Connell told IRS agents that he lied at trial and that he never met defendant.

For purposes of deciding this motion, the court assumes without deciding that O'Connell testified falsely at trial,[26] when he stated that they (he and

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Q You never spoke to Thomas Disonell about using Michael Bouchard as a lawyer, correct?
A No.
Q And you know who Matthew Kupic is, correct?
A Yes.
Q And you never talked to Matthew Kupic about using Michael Bouchard as a lawyer, correct?
A No.

[26] O'Connell stated that he lied because Mr. Olmsted threatened to withhold a motion for a reduced sentence if he did not say he met defendant. According to O'Connell's attorney:

Like many de-briefings there were times that Mr. Olmsted [sic] explored a topic and it was apparent that my client's recollection was not 100% consistent with Mr. Olmsted's expectations. However, Mr. Olmsted always articulated that my client's first obligation was to tell the truth and he never wavered in that regard during any of our meetings.

Crowley) met defendant and discussed buying and selling properties.

At the second step, the Court finds that the government neither knew nor had reason to know that O'Connell was lying when he testified at trial that he had met defendant at some point. Mr. Olmsted credibly testified that he told O'Connell that "we don't want you to say anything other than what you remember" and that his

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I observed my client's testimony at Bouchard's trial. My sense was that his direct testimony was very straight forward and the cross-examination brief. My recollection is that he was impeached once with his grand jury testimony by Mr. Castillo, who otherwise limited his cross-examination to having my client acknowledge the limits of Bouchard's knowledge of parts of the conspiracy in which his client did not participate.

After the Bouchard trial I agreed to have case agents meet with my client at the Albany County Jail because it was unclear how long my client would be at that facility before being moved to the Bureau of Prisons. I agreed to that meeting without my presence. It was reported to me that the agents left that meeting with the impression that Mr. O'Connell claimed that he did not tell the truth at the Bouchard trial. My sense is that my client's issues were more with the cooperation process and the results of his case, rather than his own factual accuracy at trial. I am not comfortable revealing the substance of my conversations with my client, but I believe that the transcript of his testimony speaks for itself in terms of whether my client lied on the witness stand.

Dkt. No. 71.

cooperation in this case depended on "telling the truth, and that's it." O'Connell's statements to the government during debriefing sessions, in his grand jury testimony, and at trial were consistent in their vagueness and lack of detail about when and where he met defendant. Further, O'Connell, never testified at trial that he, individually, met with defendant to discuss the double HUD scheme or what they needed defendant to do, as the closing agent. Instead, O'Connell used "we" or "us" when testifying about meeting defendant, meaning he and Crowley. Mr. Olmsted attributed O'Connell's vagueness to a difficulty in distinguishing meeting defendant at a closing, which O'Connell stated "must" have happened given the number of closings at defendant's office, with a meeting in which they discussed the conspiracy with defendant, which O'Connell stated did not happen. Thus, the Court finds that the government neither knew nor had reason to know of O'Connell's perjury at the time of trial. Defendant has presented no facts indicating otherwise. The Court therefore applies the more lenient standard of review.

To obtain a new trial, defendant must show "that the perjured testimony was material; and [that] but for the perjured testimony, the defendant would most likely not have been convicted." *Martinez*, 26 Fed. Appx. at 42.

Although O'Connell's testimony covered much of the same ground as several other witnesses, including Crowley, Hinds and Edgerton, and the buyers PB Enterprises recruited, it was

nonetheless relevant probative testimony in support of the government's case-in-chief and defendant's involvement in the conspiracy. The Court therefore concludes the testimony was material.

"Where the government was unaware of a witness' perjury" and the "testimony was material" a new trial is warranted only if "'the court [is left] with a firm belief that but for the perjured testimony, the defendant would most likely not have been convicted.'" *Wallach*, 935 F.2d at 456 (quoting *Sanders v. Sullivan*, 863 F.2d 218, 226 (2d Cir. 1988) (alteration in *Wallach*)). "The test 'is whether there was a significant chance that this added item, developed by skilled counsel ... could have induced a reasonable doubt in the minds of enough of the jurors to avoid a conviction.'" *Wallach*, 935 F.2d at 456 (quoting *United States v. Seijo*, 514 F.2d 1357, 1364 (2d Cir.1975)).

Defendant asserts that there is no way to know "what conclusion that jury made relative to whether or not Kevin O'Connell had spoken with Michael Bouchard and had discussed with him the scam and that Michael Bouchard had agreed to it." At the evidentiary hearing, defense counsel stated that if he had been able to present evidence to the jury that O'Connell never met with defendant he could not say "what the effect would be, but I certainly can say that it would not have been without effect" and "perhaps the verdict would be different today." At trial, defense counsel effectively cross-examined O'Connell, who

conceded that he never had any discussions with defendant about the conspiracy in this case. The government made no attempt to rehabilitate O'Connell on redirect and made no mention of O'Connell's relationship with defendant during summations. Further, defense counsel argued in summation that "Kevin O'Connell doesn't really say he discussed it with [defendant], all the other bandits do." Defense counsel also stated to the jury:

> Now I'm going to talk to you about Kevin O'Connell, you know he's Crowley's partner, PB Enterprises, now the conversation, question that's being asked of him is how he came to know Michael Bouchard. Page 155 of his testimony,
> 'Question: And how did you find him?
> 'Answer: He was introduced to us by Nickole Riley who was a mortgage broker that had worked with him in the past.
> 'And you didn't talk to Michael Bouchard about the use of double HUDs, correct?
> 'Correct.
> 'That conversation never happened between you and he,' meaning Michael Bouchard, 'correct?
> 'Correct.

Having presided over this trial and having heard the testimony of all the witnesses and reviewed all the documentary evidence, the Court concludes that O'Connell's acknowledgment that he lied and never met defendant, even if it was "developed by skilled counsel" would not "have

induced a reasonable doubt in the minds of enough of the jurors to avoid a conviction." *Wallach*, 935 F.2d at 456 (internal quotation marks omitted). Even if O'Connell had testified that he and defendant never met, the Court finds, in light of the other evidence presented at trial, that there is little chance that this evidence would "have induced a reasonable doubt in the minds of enough of the jurors to avoid a conviction.'" *Wallach*, 935 F.2d at 456. As the Court discussed above, the evidence was more than sufficient for the jury to find defendant guilty of conspiracy. Accordingly, defendant's motion for a new trial based on O'Connell's false testimony is denied.

2. Jurors

a. Excusal of Juror 102

Defendant asserts that he is entitled to a new trial on the basis that the Court erred when it excused Juror 102 for cause during jury selection. In *United States v. Perez*, the Second Circuit discussed the due process implications of the right to an impartial jury:

> The Sixth Amendment to the Constitution guarantees a defendant the right to a speedy and public trial by an impartial jury. Because [o]ne touchstone of a fair trial is an impartial trier of fact, the right to an impartial jury also implicates due process rights.
>
> An impartial jury is one capable and willing to decide the case solely on the evidence before it, or one comprising people

> who will conscientiously apply the law and find the facts. Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula.
>
> Impaneling a jury requires a trial judge to assess carefully the demeanor and tone of prospective jurors to determine if there is any potential for prejudice. District courts, of necessity, have both broad discretion and a duty to ensure that the jury ultimately impaneled is unbiased. The determination of whether a juror can serve impartially will not be disturbed absent a clear abuse of discretion. In fact, we have stated that [t]here are few aspects of a jury trial where we would be less inclined to disturb a trial judge's exercise of discretion, absent clear abuse, than in ruling on challenges for cause in the empanelling of a jury.

United States v. Perez, 387 F.3d 201, 204-205 (2d Cir. 2004) (internal quotation marks and citations omitted).

During jury selection, after some, but not all, trial jurors had been selected, Juror 102, who had been selected as a juror, asked to speak to the Court, privately.[27] Juror 102 explained to the

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[27] The following is the transcript of the proceedings involving Juror 102:

THE CLERK: Court's in recess. You are jurors, you understand you're going to be jurors on this case, you people. You're there.

JUROR NO. 102: Could I talk to you for a second?

THE COURT: Me? With the lawyers with me.

(Jury Panel Excused, At Side Bar with Juror No. 102, 1:10 p.m.)

JUROR NO. 102: Because I know you asked this question of me when you were up there but it was really just a general to everybody where you asked it specifically of everybody, could you really sit in judgment of someone and I really, I really have -- the more I've been thinking about it, I really have a difficult time with that. I am a person who empathizes with people to a great degree and I think I'd have -- I think I'd have a great deal of difficulty with that. My other problem is just work because I really didn't think about this but I'm a secretary for three department heads, it's advisement time and a lot of the students who are prospective students are coming right now and there won't be anybody really for these weeks at a very crucial time for them, and --

THE COURT: It's kind of --

JUROR NO. 102: -- the more I sit here thinking about that, that's going to be a real hardship I think at work.

THE COURT: Well, so you're -- there's a couple things you're asking.

JUROR NO. 102: I've done -- couple things, the more I've been thinking about it, hearing it again and again. I think the thing that's really bothering me is the judgment thing. It's not a religious thing, it's just that I'm just thinking I'm going to have a real hard time sitting in judgment of someone.

my top one, so I know -- I know I'll have -- that will be probably my -- probably the most important thing that I'll be dealing with. Everybody else seems just so much more comfortable in the decision-making process.

THE COURT: Counsel? Any objection? To excusing her?

MR. CASTILLO: Can we have a conversation outside of her presence for a moment, Judge.

THE COURT: Sure. Why don't you go back over.

JUROR NO. 102: Should I sit over here?

(Juror No. 102 left Side Bar.)

MR. CASTILLO: I mean I honestly don't want to consent. I don't think that she said anything that makes it -- makes her unfit to serve. I think she's supposed to have a hard time, that's the way it's supposed to be. Nothing she says makes me fear she can't do the job.

THE COURT: I know. I think she's having a hard time wrestling with it, now having listened to more questioning, I don't see where as a matter of law, I mean she's already been accepted as a juror.

MR. OLMSTED: If you don't grant us the request we had, could we do – could you amend your view on back-strikes because if she'd given these answers in the earlier questioning, when we asked them, she certainly would have been somebody we would have stricken, and so if you would allow us to do a back-strike on her, I mean in the next round. We have two remaining strikes.

THE COURT: What's your position on that?

MR. CASTILLO: Well, I'm not going to agree to that. Sorry.

MR. OLMSTED: Well, then I believe -- I think her answers have consistently said she can't come to a verdict, that she will have a hard time and that the government is -- the people of the United States are entitled to someone who will make a decision.

MS. THOMSON: I think it's also important to consider her demeanor in this. I mean she was clearly distraught by it, you could see it on her face, you could see it the way she answered, her voice was shaking and this is something that is a heavy burden for her, and you know, I share Mike's view on the fact that if she comes forward and says that this is something that, you know, she can't do and struggles with, I think it's an appropriate strike for cause.
THE COURT: Well, you may have an exception. I'm not going to strike her, I don't think that she's established that she shouldn't serve. She's just worried about because she's very empathetic and things like that.
MR. OLMSTED: How about our request that we be able to use it as a back-strike given the fact that she has now come forward with new information that we didn't have when we made our strike?
THE COURT: I'll think about it, but I don't know. I don't know right now. I'll let you know.
MR. OLMSTED: Okay.
(Juror No. 102 returned to Side Bar.)
THE COURT: Ma'am, as is it stands right now, you're still on the jury, okay.
JUROR NO. 102: Okay.
THE COURT: I'll see you back here at 2.
(Luncheon recess, 1:17 p.m. to 2:09 p.m.)

(At Side Bar.)
THE COURT: Gaspar, I have rethought my position here and you may have an exception. I think the things that she said were so different from anything she said before, and it's kind of a reflection upon having heard the next group of witnesses -- or jurors, the way you're questioning people, it gets very personal, and I can see why she might have gone

Court and counsel for both parties that she was unsure whether she would be able to "sit in judgment of someone" as a person "who empathizes with people to a great deal" and wanted to alert the Court and the parties that she did not feel she had the ability to judge the case fairly. "Impaneling a jury requires a trial judge to assess carefully the demeanor and tone of prospective jurors to determine if there is any potential for prejudice. District courts, of necessity, have both broad discretion and a duty to ensure that the jury ultimately impaneled is unbiased." *Perez*, 387 F.3d at 204-205. Mindful of this duty, the Court carefully considered the juror's statements, her demeanor and the potential unfairness of impaneling a juror who doubted her ability to make a decision about another person. The Court was also mindful of defendant's objection to removing her as a juror, but having determined that Juror 102 could not serve impartially concluded that she should be removed for cause.

Defendant asserts the Court's decision to strike Juror 102 for cause was in error because when

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the way she did. I don't think it's fair to the government that she has that mind set now. So I'm going to excuse her.
MR. CASTILLO: Yes, sir.
THE COURT: Okay.
MR. OLMSTED: Thank you.
(Open Court, Jury Panel Present.)
THE COURT: [Juror No. 102], I'm going to excuse you based upon what you've told us. Okay. You may leave. Thank you.

asked, she said that she could follow the Court's instructions and make a decision based on those instructions. When defense counsel asked Juror 102 whether she could follow the Court's instructions, she did not respond affirmatively but continued to state that she was concerned she could not approach the case fairly: "Well, the one thing that bothered me was when you said some of the people who would be testifying would be people who have maybe been convicted of something, so I'd have a real hard time taking what they say at their word." Thus, the Court did not err when it, exercising its discretion to ensure the impanelment of an unbiased jury, excused Juror 102 for cause.

Further, defendant does not, and could not, claim that the jury ultimately impaneled was biased. Thus, even if the Court erred when it excused Juror 102 for cause, because defendant has failed to show prejudice, there is no basis on which to grant a judgment of acquittal or new trial. *See Perez*, 387 F.3d at 208 ("[s]ince appellant does not contest that the jury *ultimately impaneled* was fair and impartial, his allegation of error does not implicate his constitutional right to a fair trial.") (emphasis in original); *United States v. Towne*, 870 F.2d 880, 885 (2d. Cir. 1989) ("Since appellant has in no way established the partiality of the jury that ultimately convicted him, he may not successfully claim deprivation of his sixth amendment or due process rights"). Accordingly, defendant's motion is denied.

b. Replacement of Juror 8

Defendant argues that the Court erred when it replaced a sitting juror with an alternate during trial. On November 16, 2012, prior to beginning the fourth day of trial, Juror 8's husband contacted the Court to report that Juror 8 was sick and could not report that day. The Court advised counsel for both parties that Juror 8 was ill and proposed replacing her with an alternate juror. Defense counsel objected and suggested giving Juror 8 a few hours to recover. The Court responded that the courtroom deputy had already contacted Juror 8's husband to ask whether this was an option and had been told that Juror 8 would not be able to report at all that day. The Court therefore, over defendant's objection, replaced Juror 8 with an alternate juror and proceeded with trial.[28]

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[28] The following is the discussion between the Court and counsel about whether to replace Juror 8 with an alternate juror:

THE COURT: [W]e've got a juror that is not -- juror number 3, is it?

THE CLERK: No, 8.

THE COURT: Juror 8, who is [name redacted], her husband called, right?

THE CLERK: Correct.

THE COURT: He called early this morning to say that she's sick, too sick, she's got stomach problems and can't come today. So we said maybe I could adjourn until maybe noontime, said no, it's not going to work, so --

MR. OLMSTED: Can we counsel each other?

THE COURT: Sure.
MS. THOMSON: That's acceptable to the government.
THE COURT: Defense?
MR. CASTILLO: I'm sorry, Judge, I didn't know what the question was.
THE COURT: The husband of --
MR. CASTILLO: I heard that part, I just didn't hear what your question was.
THE COURT: Do you have any objection to putting alternate 1 in that seat?
MR. CASTILLO: I would at this time, yes, I would.
THE COURT: You would.
MR. CASTILLO: Yes, I would.
THE COURT: Okay. Do you have a suggestion of what we would do then?
MR. CASTILLO: Well, I think your suggestion was the best suggestion, was to give her a couple hours, but I don't know if that's feasible.
THE COURT: That -- my clerk spoke to them, called them back an hour and a half later and said, how is she feeling, possibly she could come in at noontime, and they said no.
THE CLERK: He seems to think she has the flu because he was sick for the last few weeks and she did not get the flu shot, that's what he said.
MS. THOMSON: Did I understand you to say, Judi, that the husband believes that the wife has the flu?
THE CLERK: Correct.
THE COURT: She ran a campground up in Oswego County, I believe.
MR. CASTILLO: I know.
THE COURT: Well, I don't know what choice I have, I've got alternate jurors for this reason, to, in the event that another juror can't serve. Her husband says she's got like flu

"[D]istrict courts have broad discretion to replace jurors at any time before the jury retires for deliberations." *United States v. Agramonte*, 980 F.2d 847, 850 (2d Cir. 1992) (per curiam). To remove a juror, a court need only have "reasonable cause" to believe that the juror is unable or disqualified to serve according to her oath. *United States v. Gambino*, 951 F.2d 498, 503 (2d Cir.1991). "All that is needed to satisfy a prudent exercise of discretion is to be certain the trial court had sufficient information to make an informed decision." *United States v. Reese*, 33 F.3d 166, 173 (2d Cir. 1994). Defendant asserts that the Court's decision to replace the sitting juror with an alternate juror was premature. The Court, however, had assessed the situation and learned that the juror would be unable to report for jury duty at any point that day. While the Court could have adjourned the trial until the juror recovered, it exercised its discretion and decided to replace the sick juror with an alternate and proceed with trial that day rather sending the jurors and alternate jurors home after they had reported to the courthouse and were prepared to serve. Accordingly, defendant's motion for a judgment of acquittal based on the Court's decision to replace a sitting juror with an alternate juror during trial is denied.

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symptoms and she's got diarrhea and she's throwing up, right? Judi?

IV. CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that defendant's motion for a judgment of acquittal and motion for a new trial (Dkt. Nos. 35 and 36) are **DENIED.**

IT IS SO ORDERED.

Date: February 10, 2014

/S/

Norman A. Mordue
Senior U.S. District Judge

APPENDIX H

STATUTORY PROVISIONS
(Pre-2009 Congressional Amendments)

18 U.S.C. §2. Principals.

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

8 U.S.C. §20. Financial institution defined

As used in this title, the term "financial institution" means—

(1) an insured depository institution (as defined in section 3(c)(2) of the Federal Deposit Insurance Act);

(2) a credit union with accounts insured by the National Credit Union Share Insurance Fund;

(3) a Federal home loan bank or a member, as defined in section 2 of the Federal Home Loan Bank Act (12 U.S.C. 1422), of the Federal home loan bank system;

(4) a System institution of the Farm Credit System, as defined in section 5.35(3) of the Farm Credit Act of 1971;

(5) a small business investment company, as defined in section 103 of the Small Business Investment Act of 1958 (15 U.S.C. 662);

(6) a depository institution holding company (as defined in section 3(w)(1) of the Federal Deposit Insurance Act;

(7) a Federal Reserve bank or a member bank of the Federal Reserve System;

(8) an organization operating under section 25 or section 25(a) 1 of the Federal Reserve Act; or

(9) a branch or agency of a foreign bank (as such terms are defined in paragraphs (1) and (3) of section 1(b) of the International Banking Act of 1978).

18 U.S.C. §1014. Loan and credit applications generally; renewals and discounts; crop insurance

Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of the Farm Credit Administration, Federal Crop Insurance Corporation or a company the Corporation reinsures, the Secretary of Agriculture acting through the Farmers Home Administration or successor agency, the Rural Development Administration or successor agency, any Farm Credit Bank, production credit association, agricultural credit association, bank for cooperatives, or any division, officer, or employee thereof, or of any regional agricultural credit corporation established pursuant to law, or a Federal land bank, a Federal land bank association, a Federal Reserve bank, a small business investment company, as defined in section 103 of the Small Business Investment Act of 1958 (15 U.S.C. 662), or the Small Business Administration in connection with any provision of that Act, a Federal credit union, an insured State-chartered credit union, any institution the accounts of which are insured by the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, any Federal home loan bank, the Federal Housing Finance Board, the Federal Deposit Insurance Corporation, the

Resolution Trust Corporation, the Farm Credit System Insurance Corporation, or the National Credit Union Administration Board, a branch or agency of a foreign bank (as such terms are defined in paragraphs (1) and (3) of section 1(b) of the International Banking Act of 1978), or an organization operating under section 25 or section 25(a) of the Federal Reserve Act, upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan, or any change or extension of any of the same, by renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therefor, shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both. The term "State-chartered credit union" includes a credit union chartered under the laws of a State of the United States, the District of Columbia, or any commonwealth, territory, or possession of the United States.

U.S. Const. amend V

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

U.S. Const. amend VI

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

APPENDIX J

RELEVANT EXCERPTS FROM PRINT-OUT OF PRE-INDICTMENT RESEARCH CONDUCTED BY MICHAEL G. BOUCHARD REGARDING LENDER, FREMONT INVESTMENT & LOAN **(Internet Source: FDIC Web-Site)**

FDIC: Fremont Investment & Loan Page 1 of 1

Key demographic information as of June 7, 2012

Fremont Investment & Loan
2727 East Imperial Highway
Brea, CA 92821

FDIC Certificate #: 25653

Date Established: 3/1/1937

Date of Deposit Insurance: 9/24/1984

Bank Charter Class: Federal Reserve Non-member

Primary Federal Regulator: Federal Deposit Insurance Corporation

http://www2.fdic.gov/idasp/confirmation_outside.asp?inCert1=25653 6/12/2012
