No. _____

In The

Supreme Court of the United States

PABLO CALDERON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

PABLO CALDERON
Pro Se
7 Old Parish Road
Darien, CT 06820
(203) 613-6748
sxallc@gmail.com

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QUESTION PRESENTED

The rights and obligations of parties in a letter of credit are subject to the statutory provisions of the Uniform Commercial Code Article 5. In particular, the conditions that allow a party to dishonor a letter of credit presentation is black letter law. By ignoring statutory law in this criminal case, the Second Circuit created a property right that is non-existent in civil fraud litigation.

The question presented is:

Can a party in a criminal fraud action have a property right that applicable statutory law denies in a civil action?

PARTIES TO THE PROCEEDING

Pablo Calderon is the petitioner here and was a defendant-appellant below.

The United States is the respondent here and was the appellee below.

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INTRODUCTION

The mail and wire fraud statutes are "limited in scope to the protection of property rights", *McNally v. United States*, 483 U. S. 350, 360 (1987). In most, if not all, of the criminal fraud case law of the past three decades the determination of a proposed property right has relied primarily on the application of common law principles. This case presents the unusual prosecutorial technique of dressing an issue of statutory law in common law clothing. So far, the tactic worked. The Second Circuit affirmed convictions below by creating a new property right replacing a black letter statutory obligation. The decision below sets an unacceptable precedent in violation of the Judiciary Act of 1789 and of basic principles of federalism, separation of powers and due process. Yet there is a simple remedy: order the court below to not ignore applicable statutes and instead apply them.

This prosecution arose out of Pablo Calderon's and co-defendant Brett Lillemoe's participation in the GSM-102 Program ("Program") of the United States Department of Agriculture ("USDA"). The Program's mission is to promote U.S. agricultural exports by providing credit guarantees on loans issued to foreign banks. The Defendants were not exporters of physical products, instead they participated in the Program as financial intermediaries for U.S. agricultural exporters that lack the expertise in banking and in the rules of a complex federal program. The Defendant's business model is neither illegal nor

at issue in this case.

Based on expected shipments, the Defendants obtained guarantees from the USDA. Foreign banks issued letters of credit ("LC") with the Defendants as beneficiaries and upon presentation of copy shipping documents, the Defendants transferred the foreign banks' obligations under the LCs to the U.S. confirming banks. The guarantees were assigned to the U.S. banks that issued guaranteed loans financing the foreign banks' LC obligations.

One of Calderon's convictions was for fraud on a U.S. bank by presenting changed copies of shipping documents under a LC (the "Cool Express" transaction)[1]. 18 U.S.C. § 1343. The Second Circuit ruled based on witness testimony that the changes exposed the U.S. confirming bank to the risk that the foreign issuing bank would repudiate its LC obligation or that the USDA would repudiate a claim on the guarantee. Further, it ruled based on witness testimony that the U.S. bank would have declined to go through with the Cool Express LC ("dishonored the presentation") had it known that documents were changed. In other words, the alleged misrepresentations were material. The USDA paid a claim for loss in the transaction of more than $6,000,000. The district court imposed the full amount as restitution for the USDA. On appeal, the restitution was reversed based on a finding that Calderon's misrepresentations were not a proximate cause of the USDA's loss.

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[1] Cool Express is the name of the vessel on which the product was shipped.

The Second Circuit, however, ignored a critical clause of the LC contract that limited the jurisdiction of any claim to either a court of the State of Colorado or the U.S. District Court for the District of Colorado, where LC contracts are subject to the Colorado Revised Statutes Title 4 Uniform Commercial Code Article 5 ("UCC"). The opinion lacks a single reference to the UCC. Under the Judiciary Act of 1789, the laws of the states are superseded only by the Constitution and treaties of the United States or Acts of Congress. 28 U.S.C. §1652. The decision affirming the Cool Express conviction creates an absurd Second Circuit precedent tantamount to abrogating part of 28 U.S.C. § 1652 or to denying the existence of the UCC.

Given the undisputed facts of this case, the findings in the Second Circuit opinion, the UCC text and case law, there are sufficient merits such that disregard of the UCC infringes on Calderon's due process rights.

A LC contract is a payment mechanism for an underlying commercial transaction by which payment is made upon the presentation of prescribed documents. The obligation to honor the presentation is plainly stated in the statute: the confirmer or issuer shall honor a presentation that is complying "on its face" with the terms and conditions of the LC. UCC § 4-5-108. The exception to this rule is codified in UCC § 4-5-109: to dishonor a facially complying presentation, the LC issuer or confirmer carries the burden of showing "material fraud", i.e. there must be fraud in the underlying transaction as per universal

statutory interpretation.[2] The decision below relies on a holding clearly at odds with the statute: it holds that a presentation containing documents that were changed in order to facially comply with the terms and conditions of the LC, are actually non-complying and the confirmer and issuer have the right to dishonor the presentation, free from the burden of showing underlying fraud. The Second Circuit affirmed the Cool Express conviction despite reversing the restitution which is inconsistent with fraud in the underlying transaction.

LC contracts are ubiquitous in domestic and international trade and are covered by standardized statutes in the 50 states. The Cool Express decision conflicts with statutory obligations markets have relied on for decades. Yet the overarching reason to grant review of the Cool Express decision is to preserve the requirement of the Judiciary Act of 1789 that federal courts shall base decisions on state law when it applies.

OPINIONS BELOW

The district court's opinion denying acquittal or a new trial is reported at *United States v. Lillemoe*, 242 F. Supp. 3d 109 (D. Conn. 2017). The Second Circuit's opinion is reported at *United States v. Calderon, et al.*, 944 F.3d 72 and reprinted at App.1-54.

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[2] Section 5-109 of the Colorado UCC has equivalents in the Uniform Commercial Code of the other 49 states.

JURISDICTION

The Second Circuit issued its opinion on December 3, 2019 and denied a timely petition for rehearing *en banc* on March 10, 2020. On March 19, 2020, this Court issued an order extending the period to file petitions for certiorari from 90 to 150 days, making the deadline for this petition August 7, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

- 18 U.S.C. § 1343
- 28 U.S.C. § 1652
- Colo. Rev. Stat. Ann. § 4-5-107
- Colo. Rev. Stat. Ann. § 4-5-108
- Colo. Rev. Stat. Ann. § 4-5-109

STATEMENT OF THE CASE

A. Factual Background

Calderon was convicted of mail fraud and conspiracy as a result of his participation in the GSM-102 Program. The Program — which is administered by the USDA — is designed to encourage U.S. agricultural exports to developing countries by providing credit guarantees to U.S. banks that finance foreign banks in connection to the export transactions. The seller in such an export transaction enjoys immediate payment and the domestic bank's credit exposure to the foreign bank is covered by the Program guarantee. App.10.

In a transaction covered by the Program, the link between the export sale

of physical goods and the loan to the foreign bank is established by a LC contract, a payment mechanism in the sale of the goods. In a LC, the foreign bank (the "LC issuer") assumes the foreign importer/buyer's obligation to pay the exporter/seller (the "LC beneficiary") subject to the presentation of documents related to the sale. The role of the domestic bank in the overall export transaction is two-fold. First, the U.S. bank is the "LC confirming bank" (or "LC confirmer") and as such it is a party to the LC contract. The LC confirmer assumes the LC issuer's obligation to pay the LC beneficiary upfront on receipt of the beneficiary's documents (the confirmer "honors the presentation"). When the confirmer pays the beneficiary, the confirmer acquires the right to be reimbursed upon forwarding the presentation to the issuer (the issuer "honors the presentation").

Second, having acquired the right to reimbursement, the U.S. bank finances the foreign bank's obligation. The U.S. bank lends the obligation amount to the foreign bank that pays back the loan, in time and with interest. But the U.S. bank is only exposed to a minimal portion of the credit risk on the loan, a Program guarantee covers 98% of the risk of default. Before the issuance of the LC, the U.S. exporter/seller applies for the Program guarantee with the USDA. Based on specific and qualifying characteristics of the shipment sold but not-yet delivered, the Program guarantee is issued to the benefit of the seller/exporter. When the U.S. bank honors the seller/exporter's LC

presentation, the Program guarantee is assigned to the U.S. bank and applied to the loan, covering default risk. If the foreign bank defaults on its loan obligation, the U.S. bank makes a loss claim on the guarantee and the USDA reimburses 98% of the loss.

The GSM-102 Program is technically complex, but the ultimate effect is straightforward: the credit guarantees enhance the economic value of the export-linked loans and that value in turn creates an incentive to purchase U.S. agricultural products, making them more accessible to foreign buyers. The undesired effect of the Program design, however, is to limit direct access to only few U.S. exporters that have the capability of "lining up the sun, the moon and the stars", necessary to arrange Program-backed transactions. App.12. To meet the demand for Program benefits of smaller exporters, which otherwise would not have access to those benefits, some participants act as financial intermediaries in "structured trade transactions". Calderon and Lillemoe were not exporters of physical goods; they exclusively arranged structured transactions in the Program as intermediaries. App.11.

In a structured transaction, the financial intermediary contracts with a physical exporter and acquires the exclusive right to use the physical exporter's shipment to obtain a Program guarantee — a shipment related to a sale that qualifies for the Program and that would allow the physical exporter to obtain a Program guarantee if the exporter participated directly. In exchange for that

right and the delivery of the copy shipment documents required by the related LC, the financial intermediary pays the physical exporter a fee. In this arrangement the intermediary "rents the trade flow". App.11. The intermediary generates the fee by monetizing the value of the Program guarantee that it obtains from the USDA based on the export sale.

The court below found that "[p]articipating in the GSM-102 program as a financial intermediary is not itself illegal." App.12. The nature of Calderon's business model was not at issue in his convictions. Calderon was convicted of one count of wire fraud and one count of conspiracy to commit wire and bank fraud for presenting allegedly falsified bills of lading ("BL") to the U.S. confirming banks. This Petition requests the review of the substantive wire fraud conviction, which was based on the Cool Express transaction.

The only alleged basis of fraud in the Cool Express transaction was that the exporter sent Lillemoe copies of BLs stamped "copy non-negotiable" and that Lillemoe "whited out" the stamps and placed "original" stamps instead. Calderon was convicted of fraud on CoBank of Denver, Colorado, the confirming bank of the LC, for presenting the changed copy BLs. The alleged purpose of changing the stamps was "in order to make them appear to be compliant with the terms of the governing letters of credit." App.29.

The Government does not dispute that State of Colorado law applies to the Cool Express LC. By incorporation of the "Terms and Procedures for Letter of

Credit Refinancing" in the LC (JA 1852), the jurisdiction of any claims related to the LC is limited to the courts of the State of Colorado and the U.S. District Court for the District of Colorado. App.63.

In 2010, the LC issuer defaulted on the Cool Express loan of over $6,000,000. CoBank filed a claim for loss and the USDA reimbursed 98% of the full loan amount. App.13.

B. Indictment and Trial

On February 20, 2015, a grand jury returned a twenty-three count indictment against Calderon. It charged Calderon with one count of conspiracy to commit wire fraud and bank fraud, nineteen counts of wire fraud, 18 U.S.C. § 1343, one count of bank fraud, one count of money laundering and one count of making a false statement. The Indictment alleged, in part, that Lillemoe and Calderon conspired to commit bank fraud and wire fraud by materially altering shipping documents. App.14.

At trial, the Government submitted evidence that Lillemoe whited out "copy non-negotiable" stamps and added "original" stamps on the Cool Express copy BLs and that Calderon presented the changed copies to CoBank. App.15. Witness Holly Womack, a CoBank representative, and a witness from another confirming bank testified that they would not have honored Calderon's presentations had they known that copy BL stamps had been changed from "copy non-negotiable" to "original". App.16. Further, Womack testified that the

BL modifications exposed the confirming bank to the risk of non-reimbursement by the foreign LC issuer. App.30.

The conspiracy charge was based on several transactions, one of which was the Cool Express. App.41. In two of the other transactions underlying the conspiracy charge, the Government introduced evidence that Lillemoe changed the "onboard date" of three copy BLs from October 5, 2008, to October 6, 2008. The Government argued that those shipments did not qualify for the Program guarantees that Lillemoe obtained. Witness Jonathan Doster, a USDA official, testified to that effect. App.17-18. Notably, Doster was not asked, nor did he testify that any of the shipments with changed stamps on the copy BLs did not qualify for the guarantees, including the Cool Express. Doster also testified that according to a Program regulation, 7 C.F.R. § 1493.120 (e)[3], the U.S. confirming banks were holders in due course of Program guarantees. *See* JA610 ("Q. So even if a shipment never existed, if the bank took the documents in good-faith and the documents complied on their face, the USDA is not going to come back to them later and say, tough luck, we're not paying? A. Our regulations state we would pay it."). It was undisputed during the proceedings in this case that the U.S. confirming banks dealt in good faith.

On November 9, 2016, the jury returned a verdict of guilty for Calderon on

[3] In the Program regulations currently in effect, the corresponding clause is 7 C.F.R. § 1493.180(e).

the conspiracy count and on one wire fraud count based on the Cool Express. Calderon was acquitted of the other twenty-one counts of wire fraud, bank fraud, money laundering and false statement. After the verdict, the court denied Calderon's motion for acquittal or a new trial. *United States v. Lillemoe*, 242 F. Supp. 3d 109 (D. Conn. 2017). The court sentenced him to five months' imprisonment and $63,509.97 in forfeiture. App.19,46. Post judgment, the district court ordered Calderon to pay $18,501,353 in restitution to the USDA, jointly and severally with Lillemoe, under the Mandatory Victims Restitution Act, 18 U.S.C. § 3663A. App.20. Of the full restitution amount to the USDA, $6,053,647 was attributed to the Cool Express and the remainder to other transactions related to the conspiracy charge. The district court granted Calderon bail pending appeal.

C. The Decision Below

On appeal Calderon argued that there was no underlying fraud in transactions where only copy BL stamps had been changed and there was no dispute that the shipments qualified for the guarantees. In those transactions the U.S. confirming banks could not dishonor facially complying presentations as a matter of law. UCC § 5-109. App.94. He also argued that by the same clause of the statute, the foreign issuing bank could not repudiate its obligation to reimburse the U.S. confirming banks. App.81. The Second Circuit affirmed Calderon's Cool Express conviction based on witness testimony and its own

interpretation of the contractual language. The opinion did not address Calderon's arguments of statutory law. Indeed, the court did not cite the statute at all.

The Second Circuit held that a LC presentation that was changed by the beneficiary and that otherwise would not strictly comply on its face with the conditions of the LC, is not "complying" and consequently the confirming and issuing banks have the right to dishonor such a presentation for non-compliance. App.25. As a result, the changes exposed the U.S. banks to the risk of non-reimbursement by the foreign bank. App.30. Further, the court ruled that the changes that were the basis of the convictions, were *per se* fraudulent. App.25. The court ignored the UCC requirement that the party that dishonors a facially complying presentation make a showing of "material fraud" or "fraud in the underlying transaction". The court explicitly found that changed BL onboard dates exposed the U.S. banks to the risk that the USDA would decline to pay loss claims. App.32. The court was silent on the risk that the USDA repudiate a loss claim for changed stamps, as in the Cool Express.

The opinion briefly explains LC contracts, relying in part on civil case law. App.6-10. However, all the cases cited in the opinion involved disputes on the facial compliance of presentations or on the notice required to dishonor facially non-complying presentations. The Court did not address the case law relating to allegations of fraud that Calderon cited in his reply brief. App.76-79. Indeed,

the Court did not address any precedent on the fraud-in-the-transaction exception.

Finally, the Court reversed the restitution in its entirety because Calderon did not proximately cause the USDA's losses. App.45-54. The Court held that the economic risks to the U.S. banks due to Calderon's misrepresentations did not materialize, namely the risks that the issuer repudiate reimbursement or the USDA not pay a loss claim. The risk that did materialize was the default of the foreign bank. Calderon did not the affect either the USDA's or the confirming bank's decision to assume credit exposure to the foreign bank because the credit decisions were made before Calderon's misrepresentations. App.51.

The Second Circuit denied Calderon's petition for rehearing or rehearing *en banc* on March 10, 2020. App.55.

REASONS FOR GRANTING CERTIORARI

This case resembles most other criminal property fraud litigation since *McNally* where the central question is the extent of property rights. The review sought here is of a conviction under the criminal wire fraud statute 18 U.S.C. § 1343. However, property being by nature a *civil* right, the question to be decided is essentially one of civil law. The thesis of this petition is that the limiting principles of property rights in the criminal fraud context and in civil litigation are indistinguishable. If this Court generally agrees with the thesis, this case

presents a good vehicle to explicitly state the principle. If the Court does not agree with the thesis, it must accept the creation of a new area of law, criminal property law, distinct from civil property law. The decision below is a concrete step in that direction. It creates a property right that civil statutory law explicitly denies. The decision below affords LC confirming and issuing banks the right to dishonor a facially complying LC presentation in circumstances where both banks have the obligation to honor according to applicable civil statutory law.

Here the limiting principle in civil law is stated in the Rules of Decision Act, part of the Judiciary Act of 1789, currently codified in 28 U.S.C. § 1652:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

The applicable state law is the UCC. The decision below, in so much as it creates a property right, establishes federal common law that supersedes state statutory law, contrary to the consistent interpretation of Rules of Decision Act since inception.[4]

The Cool Express wire fraud conviction is based on a finding of fraud specifically in the LC contract, App.12, and both the materiality and contemplated harm elements of the charge are based on the Second Circuit's

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[4] Since *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938) state common law supersedes federal common law, when it applies.

right to dishonor a facially complying LC presentation. The court relied on testimony by CoBank officer Holly Womack that CoBank would have exercised the right to dishonor if it had known that the stamps were changed. App.26. The right to dishonor was also a basis of the contemplated harm element of the charge. Again, the court relied on testimony by Womack that the LC issuer could have exercised its right to dishonor the presentation and refuse to reimburse CoBank. App.30. If the confirming and issuing banks did not have the Second Circuit right to dishonor and they actually had the UCC obligation to honor, multiple elements of the charge fail as a matter of law and the Cool Express charge must be reversed.

The reason for granting review of the Cool Express conviction, however, does not directly concern the ultimate ramifications of the UCC in this case. The reason is the Second Circuit's refusal to consider the UCC at all. The court deliberately set aside and ignored the UCC which Calderon's reply brief addressed in detail and created a federal common law property right contrary to the UCC statute and contrary to the Judiciary Act of 1789. App.56.

A. The Statutory Obligation to Honor a LC Presentation

This section and the following one show that while CoBank and the LC issuing bank had the right to dishonor Calderon's Cool Express presentation according to the Second Circuit, they had the obligation to honor according to UCC.

In addition to being subject to the UCC, the vast majority of LCs incorporate the standardized language of the Uniform Customs & Practice for Documentary Credits ("UCP 600"), as does the Cool Express LC. JA1851. SA78-128. Under UCP 600 rules, both the confirming and issuing banks must examine the documents of the LC presentation and determine " whether or not the documents *appear on their face* to constitute a complying presentation" (emphasis added). UCP 600 art. 14.a. SA105. "When an issuing bank determines that a presentation is complying, it must honour." UCP 600 art. 15a. "When a confirming bank determines that a presentation is complying, it must honour" UCP 600 art. 15b. SA106. The contractual obligation to honor documents that "appear on their face" to constitute a complying presentation, is mirrored by the plain language of UCC and though the contractual language contemplates no exception to this obligation, the statute does have an exception.

> Except as otherwise provided in section 4-5-109, an issuer shall honor a presentation that, as determined by the standard practice referred to in subsection (e) of this section, *appears on its face* strictly to comply with the terms and conditions of the letter of credit.

(Emphasis added). UCC § 4-5-108. App.57. By UCC § 4-5-107 the confirming bank has the same obligations as the issuer. App.57. The exception in UCC § 4-5-109 is commonly called the fraud-in-the-transaction exception or defense[5]:

> (a) If a presentation is made that appears on its face strictly to comply with the terms and conditions of the letter of credit, but a required document is

[5] The expression "fraud in the transaction" comes from the language of UCC § 4-5-114(2) in the revision of UCC preceding the current revision adopted by Colorado in 1996 (bill number SB 132).

> forged or materially fraudulent, or honor of the presentation would facilitate a material fraud by the beneficiary on the issuer or applicant:
>
> (1) The issuer shall honor the presentation, if honor is demanded by [...] (ii) a confirmer who has honored its confirmation in good faith [...]; and
>
> (2) The issuer, acting in good faith, may honor or dishonor the presentation in any other case.

App.58. The statute does not define the term "material" fraud; the meaning is to be found in the official comments of the section and in the extensive case law. Courts have some degree of discretion in deciding "materiality". For example, if the sale invoice is for 1,000 barrels of salad oil, and only 998 barrels are delivered,

> the beneficiary's act, though possibly fraudulent, is not materially so and would not justify an injunction. Conversely, the knowing submission of those invoices upon delivery of only five barrels would be materially fraudulent. *The courts must examine the underlying transaction* when there is an allegation of material fraud, for only by examining that transaction can one determine whether a document is fraudulent or the beneficiary has committed fraud and, if so, whether the fraud was material.
>
> Material fraud by the beneficiary occurs only when the beneficiary has no colorable right to expect honor and where there is no basis in fact to support such a right to honor.

(Emphasis added). Official Comment to § 4-5-109, 1. App.58-59. The case law preceding and following the adoption of the current UCC revision uniformly affirms the meaning of the comment above.

> Fundamentally, "fraud in the transaction," as referred to in section 4-5-114(2), must stem from conduct by the beneficiary of the letter of credit as against the customer of the bank. [...] It must be of such an egregious nature as to vitiate the entire underlying transaction so that the legitimate purposes of the independence of the bank's obligation would no longer be served. *Intraworld Industries, Inc. v. Girard Trust Co.*,[461 Pa. 343, 336

A.2d 316 (1975)]; *New York Life Insurance Co. v. Hartford National Bank & Trust Co.*, 173 Conn. 492, 378 A.2d 562 (1977); *Sztejn v. Henry Schroder Banking Corp.*,[177 Misc. 719, 31 N.Y.S.2d 631 (Sup. Ct. 1941)];

Colo. Nat'l Bank v. Bd. of Cty. Comm, 634 P.2d 32, 39 (Colo. 1981).

> Thus, courts have stated that the "fraud in the transaction" exception is available only where the beneficiary's conduct has "so vitiated the entire transaction that the legitimate purposes of the independence of the issuer's obligation would no longer be served." *Roman Ceramics Corp. v. Peoples National Bank*, 714 F.2d 1207, 1212 n. 12, 1215 (3d Cir.1983) (quoting *Intraworld Industries, Inc. v. Girard Trust Bank*, 461 Pa. at 359, 336 A.2d at 324–25 (1975)).

Itek Corp. v. First National Bank of Boston, 730 F.2d 19, 25 (1st Cir.1984), an opinion by then Judge Breyer.

> The [fraud in the transaction] exception, as we also explained in *Itek*, 730 F.2d at 24–25, concerns "fraud" so serious as to make it obviously pointless and unjust to permit the beneficiary to obtain the money. Where the circumstances "plainly" show that the underlying contract forbids the beneficiary to call a letter of credit, *Itek*, 730 F.2d at 24; where they show that the contract deprives the beneficiary of even a "colorable" right to do so, *id.* at 25; where the contract and circumstances reveal that the beneficiary's demand for payment has "absolutely no basis in fact," *id.*

Ground Air Transfer v. Westates Airlines, 899 F.2d 1269, 1272–73 (1st Cir. 1990), another opinion by then Judge Breyer.

> The [fraud in the transaction] doctrine, however, authorizes dishonor only where "a drawdown would amount to an outright fraudulent practice by the beneficiary." [*Recon/Optical, Inc. v. Government of Israel*, 816 F.2d 854, 858 (2d Cir.1987)] (internal quotation marks omitted). For example, if a draft is accompanied by documents evidencing shipment of goods under a contract of sale, the doctrine permits dishonor not where a legitimate dispute exists concerning whether the goods conform to the underlying contract, but only where the goods are so obviously defective that the representation of shipment is plainly false. See, e.g., *United Bank Ltd. v. Cambridge Sporting Goods Corp.*, 41 N.Y.2d 254, 256, 392 N.Y.S.2d 265, 360 N.E.2d 943 (1976)

3Com Corp. v. Banco do Brasil, S.A., 171 Fd.3d 739, 747 (2d Cir. 1999).

> [T]he fraud exception "is limited to situations in which the wrongdoing of the beneficiary has permeated the entire transaction", [*Banque Worms, New York Branch v. Banque Commerciale Privee*, 679 F. Supp. 1173, 1182 (S.D.N.Y. 1988) *affd.* 849 F.2d 787 (2d Cir. 1988)].

BasicNet S.p.A. v. CFP Services Ltd., 127 A.D.3d 157, 171, 4 N.Y.S.3d 27 (N.Y. App. Div. 2015). The fraud-in-transaction doctrine is so well established that many memoranda and opinions that rely on § 4-5-109 or its equivalent in other states are no longer reported, often citing cases above. *In re Tabernash Meadows, LLC*, No. 03-24392 SBB, Adversary No. 03-1899 HRT, 2005 WL 375660 (Bankr. D. Colo. Feb. 15, 2005); *ACE Am. Ins. Co. v. Bank of the Ozarks*, No. 11-cv-3146(PPG), 2014 WL 4953566 (S.D.N.Y. Sept. 30, 2014); *Ada-Es v. Big Rivers Elec. Corp.*, No: 4:18-CV-00016-JHM (W.D. Ky. June 9, 2020).

B. The Second Circuit Decision Conflicts With the Plain Language and the Intent of UCC

The Second Circuit's opinion echoes the civil law obligation to honor "compliant", or synonymously "conforming", presentations. "The letter of credit itself constitutes an 'irrevocable promise to pay the []beneficiary when the latter presents certain documents ... that conform with the terms of the credit.' *Alaska Textile Co. v. Chase Manhattan Bank, N.A.*, 982 F.2d 813, 815 (2d Cir. 1992)." App.6-7. The opinion also echoes the right to dishonor a presentation that does not "strictly" comply.

> Indeed, under the law of the majority of jurisdictions (including this one) if the documents provided by the seller to the confirming bank did not

> "strictly" comply with the requirements of the letter of credit, the issuing bank is entitled to refuse to honor the letter of credit, and the confirming bank is therefore unable to recover the money "assigned" to it by the seller. *See Voest-Alpine Int'l Corp. v. Chase Manhattan Bank, N.A.*, 707 F.2d 680, 683–85 (2d Cir. 1983); *see also* [*Mago International v. LHB AG*], 833 F.3d at 272 (noting that the "absolute duty" to honor the letter of credit "does not arise unless the terms of the letter have been complied with strictly" (internal quotation marks and citation omitted)). "This rule [of strict compliance] finds justification in the bank's role in the transaction being ministerial, and to require it to determine the substantiality of discrepancies would be inconsistent with its function." *Alaska Textile*, 982 F.2d at 816. If the documents were nonconforming but honored, an issuing bank could sue a confirming bank for "wrongful honor." *See, e.g., Bank of Cochin, Ltd. v. Mfrs. Hanover Tr. Co.*, 808 F.2d 209 (2d Cir. 1986)

App. 9.

> [A] confirming bank must determine if the presentation is compliant with the terms of a letter of credit, and it can reject non-compliant documents. This Circuit has emphasized in the civil context that documents' compliance with the terms of a relevant letter of credit should generally be analyzed under a standard of "strict compliance," a standard followed by a majority of courts. *See Mago Int'l*, 833 F.3d at 272.

App.30-31.

The opinion did not define the expressions "strictly complying", "compliant" or "conforming" in the context of the obligation to honor a LC presentation but it did articulate a condition that makes a presentation "non-compliant": a presentation that is compliant on its face but was changed by the beneficiary and otherwise would not be compliant on its face, is non-compliant. The opinion deduced that a confirming or issuing bank has the right to dishonor such a presentation, relying on the general principle that the "absolute duty [to honor] does not arise unless the terms of the letter have been complied with strictly." *Mago* 833 F.3d at 272. App.9.

The court clearly articulated how this principle applies to the transactions of this case. "[T]he Defendants falsified documents in order to make them appear to be compliant with the terms of the governing letters of credit." App.29. "[T]he banks could have and would have rejected the bills of lading had they not been changed or had the banks known of the specific changes at issue". App.26. "[T]he banks could have and would have rejected nonconforming documents such as those at issue here." App.28.

In formulating this new class of "non-compliant" presentations the court did not adduce a single apposite authority. The dispute in *Banco Espanol de Credito v. State St. Bank & Tr. Co.*, 385 F.2d 230 (1st Cir. 1967), App.5, and in *Mago* was whether the documents were facially compliant. The dispute in *Alaska Textile Co.* was whether the issuer fulfilled the notice requirements for dishonoring a facially non-compliant presentation. The dispute in *Voest-Alpine Int'l Corp.* was whether the strict compliance of a facially non-compliant presentation had been waived. The dispute in *Bank of Cochin* was whether the presentation was facially compliant and, if not, whether the notice for dishonoring was timely. In this case, the parties agree that the presentations were facially compliant.

According to both the Second Circuit's new LC law and the UCC, confirming and issuing banks have the obligation to honor a presentation of facially complying documents (a presentation that "appears on its face strictly

to comply with the terms and conditions of the letter of credit". UCC § 4-5-108(a).) However, the exception to the rule, namely the specific conditions where the obligation to honor a facially complying presentation is replaced by the right to dishonor it, differ radically under the two laws. Under UCC § 4-5-109, the obligation to honor is extinguished only on a showing of "material fraud" which requires an examination of the underlying transaction. The Second Circuit ignores the plain language of UCC and does away with the required examination of the underlying transaction; an examination of documents suffices to extinguish the obligation. If the beneficiary changed a document in order to make it facially complying, the confirming and issuing banks are no longer obligated to honor, even without a showing of fraud in the underlying transaction.

The Cool Express LC is an example where the court found that the confirming and issuing banks had the right to dishonor a facially complying presentation. Calderon was convicted on the Cool Express charge because his misrepresentations deprived the banks of exercising their right to dishonor. Yet, the opinion not only lacks an examination and a finding of fraud in the transaction underlying the Cool Express LC, it lacks any *allegation* of fraud in the underlying transaction.[6] To wit, there is no allegation that the exports of the

[6] The opinion examines the underlying transactions only where BL onboard dates were changed. Those transactions relate to the conspiracy charge, *not* the Cool Express charge. App.16-18.

Cool Express transaction did not qualify for the Program guarantee obtained nor is there any allegation of fraud or impropriety in the "rental" contract with the physical exporter of the Cool Express shipment. There is no allegation of fraud on the USDA in applying or obtaining the Cool Express guarantee. There is no allegation that the copy BLs stamped "copy non-negotiable" that Lillemoe received from the exporter were fraudulent or forged, indeed, there is no dispute that the copy BLs Lillemoe received were true and correct. There is no allegation of any discrepancy between the characteristics of the shipment reported on the guarantee application, those represented by the copy BLs in Calderon's presentations, and those of the actual shipments. Under the Second Circuit's new LC law, had the shipper delivered copy BLs stamped "original" but otherwise identical to the ones he actually delivered, and had Calderon presented those versions, there would be no fraud on CoBank.

But the implications of the Cool Express decision go beyond those above. According to the court's decision, there *was no fraud* in the underlying transaction . The reversal of the restitution in the Cool Express transaction amounts to such a finding. The USDA lost more than $6,000,000 in the Cool Express transaction and the decision to pay the claim was made *after* Calderon presented the changed BLs to CoBank. Indeed, the USDA's decision to pay CoBank's claim *relied* on the changed documents. If Calderon's alleged misrepresentations constituted fraud on the USDA, Calderon's presentation to

CoBank was the proximate cause of the USDA's loss.[7] Inevitably, two conclusions must be drawn from the reversal of the Cool Express restitution. Calderon did not commit fraud on the USDA and there was no fraud in the transaction underlying the Cool Express LC.

C. The Second Circuit Disregarded the Rules of Decision Act

Calderon's wire fraud conviction was affirmed for allegedly falsifying the Cool Express BLs before presenting them to CoBank in order to make the documents facially compliant with the terms of the LC. Specifically, the Second Circuit found that Calderon's misrepresentations deprived CoBank of its right to dishonor the presentation and that the LC issuing bank's right to dishonor the presentation exposed CoBank to the severe economic harm of not being reimbursed for paying Calderon. In contrast, according to the State of Colorado UCC statute that applies the determination of civil rights here, neither CoBank nor the LC issuing bank had the right to dishonor Calderon's presentation. They had the obligation to honor it.

The determination of a civil right is subject to the same rules of decision in criminal actions as it is in civil actions. In this case the Second Circuit deliberately set aside and ignored the UCC that Calderon explained in his reply

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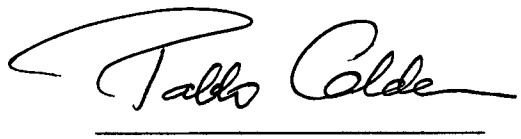
[7] As described *supra*, the court found that the changed BLs were not the proximate cause of the USDA's decision to assume credit exposure to the foreign bank. The opinion is silent on the effect of Calderon's changes on the decision to pay the loss claim.

brief. The court disregarded the Rules of Decision Act and created federal common law contrary to applicable state statutory law.

CONCLUSION

This Court should grant the petition.

Respectfully submitted,



Pablo Calderon

Pablo Calderon
PRO SE
7 Old Parish Rd
Darien, CT 06820
(203) 613-6748
sxallc@gmail.com

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