UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 24-3040

Darrell Smith

Petitioner - Appellant

v.

United States of America

Respondent - Appellee

Appeal from U.S. District Court for the Northern District of Iowa - Eastern
(6:20-cv-02105-LTS)

JUDGMENT

Before BENTON, ERICKSON, and KOBES, Circuit Judges.

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The appeal is dismissed.

The motion to supplement is denied.

November 19, 2024

Order Entered at the Direction of the Court:
Acting Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Maureen W. Gornik

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
EASTERN DIVISION

DARRELL SMITH, Movant, vs. UNITED STATES OF AMERICA, Respondent.	No. C20-2105-LTS (Crim. No. CR17-2030-LRR) **ORDER** **(Filed Under Seal)**

This matter is before me on Darrell Smith's amended motion (Doc. 17) to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255. He also has filed a brief (Doc. 20). Smith's prior attorneys have filed court-directed responses (Docs. 26, 27, 34, 37) and the Government has filed a resistance (Doc. 42) to Smith's § 2255 motion. Smith has filed a reply (Doc. 47) along with appendices to the reply (Doc. 48, 52, 62). Also before me is Smith's motion (Doc. 53) for leave to conduct discovery to supplement his reply brief and appendices, along with the Government's resistance (Doc. 58).

I. BACKGROUND

On May 22, 2017, Smith was charged with one count of wire fraud and one count of aggravated identity theft related to client investment accounts. Crim. Doc. 2. He pleaded guilty under a plea agreement on July 25, 2017, to wire fraud in violation of 18 U.S.C. § 1343 (Count 1) and aggravated identity theft in violation of 18 U.S.C. § 1028A(a)(1) (Count 2). Crim Docs. 15, 16.

The Eighth Circuit Court of Appeals summarized the events as follows:

> For many years, Smith worked as a broker and an investment advisor at several investment firms. In 2008, Smith and his partner formed an Iowa-based investment partnership—named Energae, LP ("Energae")—to invest

> in various biofuel companies. Energae bought a 49 percent interest in an ethanol production plant called Permeate Refining, LLC ("Permeate"), which was owned by Randy Less.
>
> * * *
>
> In 2013, a client for Smith's former employer, Multi-Financial Services Corporation, filed a complaint against Smith, alleging that Smith had purchased investments without the client's authorization. An investigation revealed that Smith had intentionally devised and executed a scheme to defraud several of his investment clients beginning in 2010 and continuing through at least April 2013. He stole money from his investment clients' accounts and transferred the stolen funds to Energae. Energae, in turn, used the stolen funds to pay expenses related to Permeate's operations and to invest in other entities.
>
> At various times, Smith used pre-signed, blank authorization forms or forged his clients' signatures in order to effectuate the unauthorized transfer of funds. He also diverted funds from his investment clients' accounts using checks. He often used wire and mail transfer to send and deposit the stolen funds into Energae's accounts. During the course of Smith's fraudulent scheme, he stole over $2.4 million from 10 investment clients.
>
> In May 2017, the government charged Smith with wire fraud. Shortly thereafter, he pleaded guilty to the charge pursuant to a plea agreement.

United States v. Smith, 944 F.3d 1013, 1014-15 (8th Cir. 2010).[1]

The presentence investigation report (PSR) set Smith's base offense level at 7 for Count 1 and applied a 16-level enhancement because the loss exceeded $1,500,000, a 2-level enhancement because the offense involved ten or more victims, a 2-level enhancement because the offense involved sophisticated means, a 4-level enhancement because the offense involved a violation of securities law and Smith was a broker or investment advisor and a 2-level enhancement for obstruction of justice. Crim. Doc. 37 at 24-26. Smith's total offense level of 33, combined with his criminal history category

[1] As noted in prior orders, CR17-2030-LTS is one of three federal prosecutions involving Smith. *See* Doc. 12 (citing CR16-2002-LTS and CR20-2007-LTS).

of II, resulted in an advisory Guidelines range of 151 months to 188 months' imprisonment for Count 1. *Id.* at 40.

On October 5, 2018, the court sentenced Smith to 151 months' imprisonment on Count 1 and 24 months' imprisonment on Count 2, to be served consecutively, followed by three years of supervised release.[2] Crim. Doc. 96. The court also ordered Smith to pay a $200 special assessment and $1,056,909.68 in restitution. Crim. Docs. 95, 96. The court found that the PSR properly assigned Smith two points for obstruction of justice under USSG § 3C1.1. Crim. Doc. 117 at 3-5. The court also found that the PSR properly assigned him two criminal history points for a prior conviction in a payroll tax-related case in this court (CR16-2002-LTS). *Id.* at 8-9. In making that finding, the court determined that the conduct leading to the payroll tax-related conviction was not relevant conduct as to the wire fraud case. *Id.* The court stated:

> it's an entirely different scheme. The scheme in this case was a fraud perpetrated by taking money from private clients of the defendants without their permission, when he purported to be their trusted investment advisor. In the tax scheme, he and his accomplice deducted employee payroll taxes and the like and did not pay them over to the IRS, nor account for them.

Id.

Smith appealed, arguing that the court's relevant conduct finding was erroneous. *Smith,* 944 F.3d at 1015. The Eighth Circuit affirmed on December 16, 2019, rejecting Smith's "attempt to connect his prior tax-related conviction to his instant offense" and holding it was not error to assess the two criminal history points. *Id.* at 1016-17. The court noted that the convictions share the same time period but do not share the same victims, scheme, or indictment. *Id.* at 1016. The court stated that "the district court's ruling is consistent with our holdings in cases where the conduct underlying the prior

[2] The sentencing judge stated that normally she would impose a mid-range sentence of 167 months for Count 1, given the amount of loss, but she moved to the bottom of the range because Smith pleaded guilty and avoided the expense of trial. Crim. Doc. 117 at 56.

sentence and offense of conviction shared some temporal and geographical proximity but additional facts showed that the two convictions were separate and distinct." *Id.* Smith did not seek a writ of certiorari.

Smith filed his initial pro se § 2255 motion (Doc. 1) on December 23, 2020. In a September 1, 2022 order, I noted that Smith submitted a 374-page brief and stated that "it is difficult to discern how many distinct claims Smith actually is asserting in his extremely lengthy, convoluted and unclear § 2255 motion." Doc. 12 at 7. I stated that "Smith raises numerous arguments that are not based on the ineffective assistance of counsel and do not reference prior counsel's action or inaction." *Id.* I found that Smith procedurally defaulted the claims set out in Points F, G, H, I, J, K and L of his motion by failing to pursue them at an earlier stage of litigation. *Id.* I concluded that the appointment of counsel was warranted and gave counsel sixty days to "file an amended motion setting forth, in an organized and concise manner, the distinct and non-frivolous claims of ineffective assistance of counsel Smith alleged in his initial motion." *Id.* at 8. Counsel filed an amended § 2255 motion (Doc. 17) setting forth twelve claims and a brief (Doc. 20) in support of that amended motion.

On August 25, 2023, I entered an order (Doc. 21) pursuant to Rule 4 of the Rules Governing 28 U.S.C. § 2255 Cases in which I denied four of Smith's claims but allowed eight claims to proceed and directed responses from his prior counsel and the Government. I directed the Government to both respond to the merits of the claims and present arguments as to whether certain claims were procedurally defaulted. Affidavits were then filed by the following prior attorneys for Smith: F. Montgomery Brown (Doc. 26), Michael K. Lahammer (Doc. 27), Michael A. Battle (Doc. 34) and James Nelsen (Doc. 37). On January 10, 2024, the Government filed a resistance (Doc. 42) to Smith's amended § 2255 motion.

Smith filed a reply (Doc. 47) on March 13, 2024, along with an appendix (Doc. 48).[3] Because Smith's reply alluded to additional documents he would like to obtain, I granted him 14 days to clarify whether he was seeking discovery and, if so, directed him to file a motion for discovery that complies with Rule 6(b). Doc. 49. On March 22, 2024, Smith filed a motion (Doc. 50) for leave to file a supplement to his appendix under seal, which I granted (Doc. 51). Smith then filed a sealed supplement (Doc. 52) to his appendix that consists solely of an 11-page document authored by Smith with additional pro se arguments about his claims.

On April 3, 2024, Smith filed a motion (Doc. 53) for leave to conduct discovery to supplement his reply brief and appendices.[4] The Government filed a resistance (Doc. 58) to that motion. Smith then filed a motion (Doc. 59) for leave to file under seal a document to further supplement his appendix, which I granted (Doc. 61). Smith filed a notice of filing a sealed supplement (Doc. 62) to his appendix that consisted of an 11-page document authored by Smith that lists phone calls he believes he had with his prior attorneys, describes his characterization of the substance of the phone calls, and argues about counsel's performance.

The matter is now fully submitted. I find that neither oral argument nor an evidentiary hearing are necessary.

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[3] The appendix notes that "Smith has provided counsel with a significant amount of information to assist in the preparation of the reply to the Government's response and counsel has included a representative portion of it in this appendix." Doc. 48-1 at 1. That appendix includes portions of the information, plea agreement and initial § 2255 motion, as well as 10 pages of pro se argument about various claims.

[4] Smith filed a pro se motion (Doc. 54) for leave to amend his counsel's motion (Doc. 53) for leave to conduct discovery and supplement his reply brief and appendices. Because Smith is represented by counsel, I denied his motion and stated that all motions, other than motions concerning the appointment of counsel, must be filed through counsel. Doc. 55.

II. MOTION FOR LEAVE TO CONDUCT DISCOVERY

As noted, Smith's reply brief (Doc. 47) alluded to documents he would like to obtain to support his case, including letters from counsel regarding their representation of him and a transcript of the arraignment and plea hearing. A March 20, 2024, order (Doc. 49) noted that the hearing transcript is already available as CR17-2030 at Doc. 113 and that an evidentiary hearing is not required in order for a party to seek document discovery under Rule 6 of the Rules Governing § 2255 Proceedings. After I granted Smith 14 days to clarify whether he is seeking discovery, he filed a motion (Doc. 53) for leave to conduct discovery that requests additional discovery related to Claims 4, 11 and 12, including document requests and interrogatories.

"A habeas petitioner, unlike the usual civil litigant in federal court, is not entitled to discovery as a matter of ordinary course." *Bracy v. Gramley*, 520 U.S. 899, 904 (1997). Rather, the Rules Governing § 2255 Proceedings afford the court discretion when deciding whether to permit discovery. Specifically, Rule 6(a) provides that "[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." Rule 6(b) makes clear that a party requesting discovery must provide reasons for the request. When determining whether "good cause" exists, the court must identify the "essential elements" of the claim that is asserted, *Bracy*, 520 U.S. at 904, and then evaluate whether the "specific allegations before the court show reason to believe that [the movant] may, if the facts are fully developed, be able to demonstrate that he is . . . entitled to relief," *id.* at 908-09. *See also Newton v. Kemna*, 354 F.3d 776, 783 (8th Cir. 2004)

Smith has the burden to establish good cause, and his supporting factual allegations must be specific in order to warrant discovery. *See, e.g., Smith v. United States*, 618 F.2d 507, 509 (8th Cir. 1980) (per curiam) (good cause for discovery not shown where movant failed to state what he hoped to find in records or how they would help him prosecute his section 2255 motion); *Honken v. United States*, No. CR01-3047-LRR, 2011

WL 4527572, at *1 (N.D. Iowa Sept. 28, 2011). "Mere speculation that some exculpatory material may have been withheld is unlikely to establish good cause for a discovery request on collateral review." *Blanks v. United States*, No. 4:22-CV-1257 RLW, 2023 WL 3633373, at *2 (E.D. Mo. May 24, 2023), *aff'd,* No. 23-2910, 2023 WL 9782293 (8th Cir. Nov. 2, 2023), *cert. denied,* No. 23-7213, 2024 WL 2116494 (U.S. May 13, 2024) (quoting *Strickler v. Greene*, 527 U.S. 263, 286 (1999)). "Rule 6 of the Rules Governing Section 2255 Proceedings does not authorize a 'fishing expedition.'" *Honken*, 2011 WL 4527572, at *1 (*citing Rich v. Calderon,* 187 F.3d 1064, 1067 (9th Cir. 1999)).

I will address Smith's discovery requests related to Claims 4, 11 and 12 within the analysis of each claim below. Smith also requests leave to supplement the appendices he has already submitted in support of his reply brief to include a transcript of the guilty plea in the underlying criminal case[5] and the Eighth Circuit Jury Instructions for Wire Fraud. That request is denied, as the court already has access to both documents and will take judicial notice of them as necessary.

III. LEGAL STANDARDS

A. Section 2255 Standards

A prisoner in custody under sentence of a federal court may move the sentencing court to vacate, set aside or correct a sentence. *See* 28 U.S.C. § 2255(a). To obtain relief, a federal prisoner must establish:

> [T]hat 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 [that the judgment or sentence] is otherwise subject to collateral attack.

[5] CR17-2030-LTS, Doc. 113.

Id.; *see also* Rule 1 of the Rules Governing § 2255 Proceedings (specifying scope of § 2255). If any of the four grounds are established, the court is required to "vacate and set the judgment aside and [to] 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).

When enacting § 2255, Congress "intended to afford federal prisoners a remedy identical in scope to federal habeas corpus." *Sun Bear v. United States*, 644 F.3d 700, 704 (8th Cir. 2011) (en banc) (citation omitted). Section 2255 does not provide a remedy for "all claimed errors in conviction and sentencing." *Id.* (citation omitted). Rather:

> Relief under [§ 2255] is reserved for transgressions of constitutional rights and for a narrow range of injuries that could not have been raised on direct appeal and, if uncorrected, would result in a complete miscarriage of justice.

United States v. Apfel, 97 F.3d 1074, 1076 (8th Cir. 1996) (citation omitted); *see also Sun Bear*, 644 F.3d at 704 ("[T]he permissible scope of a § 2255 collateral attack . . . is severely limited[.]"). A collateral challenge under § 2255 is not interchangeable or substitutable for a direct appeal. *See United States v. Frady*, 456 U.S. 152, 165 (1982) ("[W]e have long and consistently affirmed that a collateral challenge may not do service for an appeal."). Consequently, "an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment." *Id.* (citation omitted).

"Evidentiary hearings on [§ 2255] motions are preferred, and the general rule is that a hearing is necessary prior to the motion's disposition if a factual dispute exists." *Thomas v. United States*, 737 F.3d 1202, 1206 (8th Cir. 2013). "The district court is not permitted to make a credibility determination on the affidavits alone." *Id.* at 1206; *see also United States v. Sellner*, 773 F.3d 927, 930 (8th Cir. 2014) ("[The] district court abused its discretion when it credited the attorney's affidavit over the petitioner's without first holding an evidentiary hearing."). However, no hearing is required "where the claim is inadequate on its face or if the record affirmatively refutes the factual assertions

upon which it is based." *See New v. United States*, 652 F.3d 949, 954 (8th Cir. 2011) (citation omitted).

B. Ineffective Assistance of Counsel Standards

To establish a claim for ineffective assistance of counsel, a movant must prove that his attorney's representation "was 'deficient' and that the 'deficient performance prejudiced the defense.'" *Walking Eagle v. United States*, 742 F.3d 1079, 1082 (8th Cir. 2014) (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). "Deficient" performance is performance that falls "below an objective standard of reasonableness," *Lafler v. Cooper*, 566 U.S. 158, 163 (2012) (citation omitted), that is, conduct that fails to conform to the degree of skill, care and diligence of a reasonably competent attorney. *Strickland*, 466 U.S. at 687. Matters of trial strategy are generally entrusted to the professional discretion of counsel and they are "virtually unchallengeable" in § 2255 proceedings. *Loefer v. United States*, 604 F.3d 1028, 1030 (8th Cir. 2010). Counsel is not constitutionally ineffective because of the failure to raise a "relatively sophisticated" and "counter-intuitive argument." *Donnell v. United States*, 765 F.3d 817, 821 (8th Cir. 2014). However, "[s]trategy resulting from lack of diligence in preparation and investigation is not protected by the presumption in favor of counsel." *Holder v. United States*, 721 F.3d 979, 994 (8th Cir. 2013) (citation omitted).

To establish "prejudice," a movant must "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Lafler*, 566 U.S. at 163 (citation omitted). "Reasonable probability" means "a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. That requires a "substantial," not just "conceivable," likelihood of a different result. *Harrington v. Richter*, 562 U.S. 86, 112 (2011). Ultimately, a showing of "prejudice" requires counsel's errors to be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 104 (citation omitted).

Because a movant must show both deficient performance and prejudicial effect, a court reviewing ineffective assistance claims need only address one prong if either fails. *See Williams v. United States*, 452 F.3d 1009, 1014 (8th Cir. 2006). Additionally, each individual claim of ineffective assistance "must rise or fall on its own merits," meaning that courts should not take into account the "cumulative effect of trial counsel's errors in determining Strickland prejudice." *Middleton v. Roper*, 455 F.3d 838, 851 (8th Cir. 2006); *United States v. Brown*, 528 F.3d 1030, 1034 (8th Cir. 2008) ("[W]e have repeatedly rejected the cumulative error theory of post-conviction relief.").

IV. DISCUSSION

Smith's eight remaining claims are as follows: (1) counsel failed to advise him of a wire fraud defense (Claim 1); he is innocent of wire fraud (Claim 2); he is innocent of identity theft (Claim 3); counsel failed to secure an agreement to a single prosecution of payroll tax violation, wire fraud and identity theft (Claim 4); counsel failed to present mitigating evidence of efforts to reduce losses (Claim 6); counsel failed to properly contest a two-level increase in criminal history score for a payroll tax conviction (Claim 9); counsel failed to effectively argue the number of victims (Claim 11) and counsel failed to adequately contest the obstruction of justice enhancement (Claim 12).

As previously noted, four of Smith's prior attorneys submitted affidavits in response to the court's August 25, 2023, order. Battle represented Smith between May 2016 and April 2017.[6] Doc. 34 at 1. That time period includes Smith's plea and sentencing in the payroll tax case and Battle's affidavit thus speaks to Claim 4. *Id.* Lahammer represented Smith between April 20, 2017, and April 4, 2018, a time period that included Smith's guilty plea and preliminary objections to the draft PSR in the underlying case. Doc. 27 at 1. After Lahammer withdrew, F. Montgomery Brown and

[6] Battle's law firm, Barnes and Thornburg, began representing Smith on or about February 2016 and on May 4, 2016, Battle assumed responsibility as Smith's lead counsel. Doc. 34 at 1.

James Nelsen began representing Smith in April 2018 and assisted him during the sentencing phase of his wire fraud and identity theft case. Crim. Docs. 29, 31. As such, their affidavits primarily address Claims 6, 9, 11 and 12.[7]

A. Ineffective Assistance of Trial Counsel for Failure to Advise Him of Wire Fraud Defense (Claim 1)

Smith's amended § 2255 motion asserts that trial counsel was ineffective for failing to advise him that "mere silence or non-disclosure, in itself, with or without a fiduciary duty to disclose material information, is not cognizable under the mail and wire fraud statutes." Doc. 17 at 6; Doc. 20 at 3. Smith contends he would not have accepted a guilty plea had he understood his defense to the wire fraud charge. *Id.*

1. Procedural Bar

Smith argues that this claim relates to Point L in his initial pro se § 2255 motion because Point L "asserts, in part, that 'unauthorized investments' by a stockbroker have never been construed as wire fraud." Doc. 20 at 4. In Point L, Smith wrote:

> The defendant cannot find in the court records, or sentencing guideline, where 'wire fraud' is defined as 'unauthorized investments', especially since there was no intent to deceive or defraud Claimants, and the Claimants received a respectable return on their investment, as they requested. The defendant did not lie to Claimants, but freely admitted he was investing their money in the Companies, despite certain Claimant objections . . . . The defendant would request that the court offer advice, with legal justification, as to specific sections of the criminal code that defines unauthorized investments as 'wire fraud' when no intent to defraud was present.

[7] Brown filed an affidavit addressing Smith's claims, and Nelsen stated in his affidavit that "the legal conclusions and factual assertions made by Mr. Brown are accurate and undersigned counsel agrees with the statements of Mr. Brown as it relates to representation of Mr. Smith at the district court level." Doc. 37.

Doc. 1 at 7-8; Doc. 1-1 at 187-88. On the first page of his original pro se § 2255 motion, Smith stated that the following pages were broken down into points A through L and each of those points contained various ways his counsel was deficient.[8] Doc. 1-1. In my initial review order, I rejected Smith's assertion that that introductory sentence converted every argument in his lengthy motion into a claim for ineffective assistance of counsel, when the substance of those arguments in no way implicated counsel's performance. Doc. 21 at 4. I explained that Smith's initial motion differentiates arguments that counsel provided ineffective assistance from other arguments, such as contentions about alleged errors by the court. *Id.* The first sentence of Point A states that "[t]he defendant identifies about thirty failures by his legal counsel to properly defend him." Doc. 1 at 1. Indeed, under Point A, Smith lists approximately thirty-eight alleged errors of counsel, designated as paragraphs a through ll, all of which use language explicitly referring to defendant's counsel and that counsel's various failures. Doc. 1 at 41-58.

However, as I previously noted, in Point L, unlike Point A, Smith does not discuss counsel or any failings of his counsel. *See* Doc. 21 at 4-5. Rather, Point L directs its attention to the court and "requests that the court offer advice, with legal justification, as to specific sections of the criminal code that defines unauthorized investments as 'wire fraud' when no intent to defraud was present." Point L is clearly directed to challenging his conviction, not counsel's conduct or advice. Smith's reply brief reasserts his argument that the initial motion's introductory sentence renders all the claims in Points A through L to be ineffective assistance claims. Doc. 47 at 3. Again, I disagree.

Smith contends that Point A only addresses one alleged failure by counsel ("refusing to specifically identify the relevance between the payroll tax case and the wire fraud"), and thus the thirty failures of counsel referenced in Point A extends to all of

[8] In a paragraph before Points A through L, Smith stated: "The main purpose of this 2255 filing is to hopefully adjust the defendant's sentence to more accurately reflect information that is accurate. This request is broken down into the following categories regarding what the defendant's legal counsel failed to do on behalf of the defendant." Doc. 1 at 1.

Points A through L. Doc. 47 at 3. That argument is meritless. Even though some of Point A's assertions of ineffective assistance of counsel go to the relevancy between the two cases, numerous errors asserted under Point A have nothing to do with that argument. For example, several paragraphs under Point A address alleged errors by counsel in challenging the restitution amount or identity of victims. *See, e.g.*, Doc. 1 at 52-55. That has no bearing on the relevancy argument between the two cases. In sum, the initial § 2255 motion did not contain a claim that Smith's counsel was ineffective for failing to advise Smith that he had a defense to the wire fraud charge. Thus, to the extent Smith is now making this argument in the context of ineffective assistance of counsel, it must be considered as an amendment to his original § 2255 motion.

Amendments to § 2255 motions must generally be filed within the one-year limitations period, but untimely amendments are permitted if the claims relate back to the original timely motion. *Mandacina v. United States*, 328 F.3d 995, 999 (8th Cir. 2003). As such, Claim 1 can be added only if it relates back to the initial motion and I directed the parties to brief that issue. Doc. 21 at 5-6. Claims relate back if "the claim asserted in the original pleading and the claim asserted in the amended pleading arose out of the same conduct, transaction, or occurrence." *Mandacina*, 328 F.3d at 1000 (citing *United States v. Craycraft*, 167 F.3d 451, 457 (8th Cir. 1999)); see also FED. R. CIV. P. 15(c). To arise out of the same conduct, transaction or occurrence, the claims must be "tied to a common core of operative facts." *Humphrey v. United States*, No. C19-3023-LTS, 2021 WL 2750339, at *2–6 (N.D. Iowa July 1, 2021) (quoting *Mayle v. Felix*, 545 U.S. 644, 664 (2005)). Relation back requires claims to be similar in both "time and type," a requirement that is not satisfied when the facts merely arise out of the same prosecution or allege the same constitutional violation. *Mayle*, 545 U.S. at 660-61 (defendant's original and amended claims became actionable at the same stage of trial, but they did not arise from the same set of facts because they dealt with separate and distinct events and legal issues). "[R]elation back is ordinarily allowed when the new claim is based on the same facts as the original pleading and only changes the legal theory.' " *Id.* at 664

n.7. The facts alleged must be specific enough to put the opposing party on notice of the factual basis for the claim. *United States v. Hernandez,* 436 F.3d 851, 858 (8th Cir. 2006).

Humphrey noted that "several courts have denied untimely efforts to amend motions for habeas relief to add ineffective assistance of counsel claims when the original motions contained no such claims" while "[o]ther courts have permitted such amendments under certain circumstances." 2021 WL 2750339, at *4. As such, "there is no per se rule barring an ineffective assistance of counsel claim from relating back to an original motion that contained no such claim." *Id.* Rather, "[t]he question then becomes whether the claims share a common core of facts." *Id.* at *5. Even though ineffective assistance of counsel claims consider the circumstances of counsel's challenged conduct, they also "frequently address the merits of the underlying substantive issue." *Id.; see also, e.g., Jackson v. United States*, 956 F.3d 1001, 1008–09 (8th Cir. 2020) (evaluating whether the court erred in sentencing the defendant as a career offender when rejecting the defendant's related ineffective assistance of counsel claim). Evaluating the merits of an objection, for example, can inform both whether counsel's performance was deficient and whether the movant establishes prejudice. *Humphrey*, 2021 WL 2750339, at *5. Thus, *Humphrey* held that a "claim that counsel provided ineffective assistance by failing to investigate and object to his career offender status implicates the same underlying facts as does a claim that the court erred in classifying him as a career offender." *Id.; cf. Dodd*, 614 F.3d at 516-517 (finding no relation back where a new claim identified different insufficiencies in trial counsel's challenges to different evidence in different circumstances).

In addition to sharing a common core of facts, "the opposing party must have notice before I can find that [movant's] claims of ineffective assistance relate back to the claims he made in his initial motion." *Humphrey*, 2021 WL 2750339, at *6. "[O]verlapping factual bases for [movant's] original claims and his ineffective-assistance-of-counsel claims" can satisfy the notice requirement. *Id.; cf. Jackson v. United States*,

No. C19-2017-LTS, 2021 WL 3573041, at *15–16 (N.D. Iowa Aug. 12, 2021), *certificate of appealability denied,* No. 21-3123, 2022 WL 839393 (8th Cir. Jan. 26, 2022), *cert. denied,* 143 S. Ct. 186 (2022) ("The facts alleged in Jackson's original claim (that counsel was ineffective for failure to file a motion to suppress DNA evidence obtained through violation of Jackson's Fourth Amendment rights) are not sufficient to "put the opposition on notice" of Jackson's assertion that Johnston was ineffective for failing to file a motion in limine to exclude expert witness testimony regarding the DNA evidence."). "The final question is of judicial economy and prejudice to the Government." *Humphrey*, 2021 WL 2750339, at *6.

The Government asserts that Claim 1 of the amended motion does not relate back to a claim in the initial § 2255 motion because there is no common core of operative facts between Point L in the original motion and this ineffective assistance claim. Doc. 42 at 2. Smith, in turn, argues that the claim relates back to the initial motion. Doc. 47 at 5. However, rather than explain how there is a common core of operative facts, Smith simply argues that habeas petitions should be liberally construed. *Id.* at 5-6.

Here, I will assume that there is overlap in the operative facts and will reach the merits of Claim 1's allegation of ineffective assistance of counsel. Both Point L in the initial § 2255 and Claim 1 of the amended § 2255 motion require the court to consider the underlying argument that mere silence or nondisclosure cannot constitute wire fraud. (Point L words it as "unauthorized investments."). Claim 1 requires that consideration to assess whether counsel offered deficient performance and whether Smith was prejudiced. However, Claim 1 has an additional set of operative facts related to whether Smith would have opted to plead guilty had counsel advised him differently. Even so, I conclude there is a sufficient overlap in operative facts that Claim 1 relates back and that the Government had sufficient notice. In addition, because the Government had not yet filed a responsive pleading before Smith amended his motion to add the ineffective assistance of counsel claim, I find there is no prejudice. I will thus consider the merits of Claim 1.

2. Merits

Smith's amended § 2255 motion asserts that trial counsel was ineffective for failing to advise him that "mere silence or non-disclosure, in itself, with or without a fiduciary duty to disclose material information, is not cognizable under the mail and wire fraud statutes." Doc. 17 at 6; Doc. 20 at 3. In his affidavit, Lahammer states that "Smith misrepresents the cases cited as well as his duties as a financial advisor. Mr. Smith had fiduciary duties to his clients, and under the facts in his case, he had obligations under those duties, which he failed to meet as evidenced by the facts of this case. As such, there is no basis for his claims that counsel was ineffective in representing him and advising him to plead guilty." Doc. 27 at 2.

Brown, in turn, notes that Smith "brought up factual challenges to both facts admitted in the Information and facts contained in the Government's Offense Conduct Statement, Government Sentencing Exhibits and Victim Impact Statements that theoretically bore on Claims 1 and 2 in some way. Plaintiff did not, however, demand or actually request in person or on the phone that I file a motion to withdraw his plea." Doc. 26 at 3-4. Brown notes that, even if he raised the issues in Claims 1 or 2 in his letters, Brown deemed them frivolous. Brown states that, "[a]s a licensed financial advisor, [Smith] did have legal and fiduciary duties of disclosures to his clients and responsibilities to advise clients of suitability of investments and investment risks." *Id.* at 4. He further states that "[t]he factual underpinnings of this case in the Information, Offense Conduct Statement, government discovery and Plaintiff's own laptop data support a claim of a scheme to defraud his investors out of monies and concomitant false statements and omissions of material facts by Plaintiff to his investors globally and individually." *Id.* at 4-5.

The Government argues that Smith has not shown either counsel's deficient performance or prejudice, as required by *Strickland*. Doc. 42 at 2. The Government asserts that Lahammer was not deficient in advising Smith to plead guilty after a thorough review of the evidence in light of Smith's fiduciary relationship with the victims. *Id.* at

3. As to prejudice, the Government argues that Smith "has not shown a reasonable probability that he would have exercised his right to a trial but for counsel's purported ineffectiveness, which is the strict manner in which *Strickland* applies here." *Id.* The Government contends that Smith's claim ignores the part of the plea agreement in which he specifically admitted that he had devised and executed a scheme to defraud his investment clients. *Id.* at 3-4.

Smith's reply brief reasserts the argument that mere silence is insufficient and argues that the court commits plain error if it accepts a plea that does not set forth all of the elements of wire fraud. Doc. 47 at 7. Smith asserts that intent to deceive is an element of the offense but that the "[t]he written guilty plea does not include the word 'deceive' or the words 'intent to deceive'" except in an irrelevant paragraph. *Id.* at 9. In response to the Government's argument that he has not shown that he would not have pleaded guilty had counsel properly advised him, Smith asserts he is actually innocent of wire fraud and "the Government does not explain what benefit there would have been for him to plead to wire fraud if he were actually innocent of that offense, nor is there any actual reason for him to do so." *Id.* at 10. Smith asserts that "he was prejudiced by the advice he was given, which allowed him to plead guilty to wire fraud without being advised or otherwise alerted to the fact that intent to deceive was an element of the offense." *Id.*

a. Whether Counsel's Performance Was Deficient

The wire-fraud statute, 18 U.S.C. § 1343, in relevant part, states:

> [w]hoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years.

The elements of wire fraud are: (1) a scheme to defraud; (2) intent to defraud and (3) the use of a wire in furtherance of the fraudulent scheme. *United States v. Burns*, 990 F.3d 622, 627 (8th Cir. 2021). In *United States v. Steffen,* 687 F.3d 1104 (8th Cir. 2012), the court noted that the term "scheme to defraud" is not capable of precise definition but explained that the Eighth Circuit has "previously characterized a scheme to defraud as a 'departure from fundamental honesty, moral uprightness, or fair play and candid dealing in the general life of the community.'" *Id.* at 1113. A "scheme to defraud" does not require affirmative misrepresentations, but simple nondisclosure of a material fact generally cannot give rise to an action for fraud unless the defendant had an independent duty to disclose the information. *Id.* at 1113-16.

The court distinguishes concealment from nondisclosure. *Id.* at 1114. Fraud "has not been limited to those situations where there is an affirmative misrepresentation or the violation of some independent-prescribed legal duty. . . . Rather, even in the absence of a fiduciary, statutory or other independent legal duty to disclose material information, common-law fraud includes acts taken to conceal, create a false impression, mislead, or otherwise deceive in other to prevent the other party from acquiring material information." *Id.* Thus, the Eighth Circuit has distinguished passive concealment (mere nondisclosure or silence) from active concealment, "which involves the requisite intent to mislead by creating a false impression or representation." *Id.* at 1115.

At the outset, this is not a case of passive non-disclosure or mere silence. This case involved active concealment and misrepresentations. Indeed, in the plea agreement Smith admitted to taking actions and making misrepresentations. For example:

> Beginning no later than 2010, and continuing through at least April 2013, within the Northern District of Iowa, defendant *voluntarily and intentionally devised, executed, and attempted to execute a scheme and artifice to defraud his investment clients*, and to obtain the moneys, funds, assets, and other property of his investment clients, *by means of false or fraudulent pretenses, representations, and promises* ("the scheme to defraud"). In particular, defendant *caused funds to be withdrawn* from his investment clients'

> accounts without their authorization and by *forging* his clients' signatures and *using the funds to pay expenses* related to the operation of Permeate and to *invest in other entities without his clients' knowledge or authorization.*

Crim. Doc. 11 at 7, ¶ 16.G (emphasis added); *see also id.* at ¶ 16.K ("Defendant forged B.B.'s signature on a MetLife Variable Annuity Form and also used his social security number without B.B.'s permission."). Thus, this is not a case in which Smith simply failed to inform his clients of a fact. *See, e.g., Steffen*, 687 F.3d at 1116 (finding no scheme to defraud when government conceded there were no misrepresentations and the defendant "made no false representation, submitted no misleading or falsified documents, and took no affirmative steps to conceal that he had sold the collateral."; "[t]hroughout the indictment, the only alleged 'act' to conceal was Steffens' silence about the sale to the Bank"). Rather, Smith admitted that he "caused funds to be withdrawn," "forg[ed] his clients' signatures," "us[ed] the funds to pay [Permeate's] expenses . . . without his clients' knowledge or authorization" and did so "by means of false or fraudulent pretenses, representations, and promises." *Id.* Forging his client's signatures, as admitted in the plea agreement, is hardly mere silence. Rather, it comprises a false representation and deceptive act.

During the change of plea hearing on July 25, 2018, Smith agreed that he had gone through the stipulation of facts section carefully to make sure it was true and correct and agreed that the stipulation of facts provided a factual basis for his guilt of the crimes charged in the information. Crim Doc. 113 at 26-28. Smith cannot establish that prior counsel provided deficient performance by failing to advise him of the defense that mere silence or nondisclosure cannot constitute wire fraud because that defense, quite obviously, did not apply to his case. *See Dyer v. United States,* 23 F.3d 1424, 1426 (8th Cir. 1994) (holding that a claim of ineffective assistance of counsel must fail where the Court rejects as meritless the claim movant asserts counsel should have pursued); *Larson v. United States*, 905 F.2d 218, 219 (8th Cir. 1990).

Second, Smith inaccurately states the law. Counsel was not ineffective for failing to advance an inaccurate statement of the law concerning a "scheme to defraud." Smith's amended motion asserts that trial counsel was ineffective for failing to advise him that "mere silence or non-disclosure, in itself, with or without a fiduciary duty to disclose material information, is not cognizable under the mail and wire fraud statutes." Doc. 17 at 6; Doc. 20 at 3. That is not a correct statement of the law. Smith relies on *Goellner v. Butler*, 836 F.2d 426, 431 (8th Cir. 1988), but that case addresses "fraudulent concealment" under Minnesota law. Under federal law, nondisclosure can give rise to wire fraud when the defendant has a fiduciary duty. *Steffen* indicates that "nondisclosure in the face of an independent legal duty to disclosure [e.g., a fiduciary duty] may support a criminal fraud prosecution. 687 F.3d at 1116.

Unlike the facts in *Steffen*, in which the defendant had no duty independent of the contract, here there was a fiduciary relationship. As Smith's prior counsel points out, Smith had a fiduciary relationship as an investment advisor such that even if his actions were limited to nondisclosure, mere nondisclosure was not a defense. Thus, his counsel could not have been ineffective in failing to inform him of that non-existent defense to wire fraud. *See, e.g., McGraw v. Wachovia Sec., L.L.C.*, 756 F. Supp. 2d 1053, 1085 (N.D. Iowa 2010) (Under Iowa law "a fiduciary duty exists between a financial advisor and a customer or other individual if the individual entrusts the broker/advisor to select and manage his or her investments.").

In his reply brief, Smith argues that counsel was deficient because intent to deceive is an element of wire fraud and the plea agreement did not include an admission of intent to deceive. Doc. 47 at 8. The plea agreement specifies that Smith "voluntarily and *intentionally* devised, executed, and attempted to execute a scheme and artifice to defraud his investment clients, and to obtain the moneys, funds, assets, and other property of his investment clients." Crim. Doc. 11 at 7, ¶ 16.G (emphasis added). The factual allegations in that paragraph of the plea agreement support that Smith had an intent to deceive and were adequate to support a conviction. *See United States v. Welker*, 75 F.4th

820, 823 (8th Cir. 2023), *cert. denied,* 144 S. Ct. 867 (2024) ("The indictment included allegations about Welker's intentional concealment of material information from and misrepresentations to R.W., supporting that he had the 'intent to defraud' her."). The "intent to defraud" required for federal wire fraud can be satisfied by a showing that the defendant acted with intention or with reckless disregard to the interests of the plaintiff. *See United States v. DeRosier,* 501 F.3d 888, 898 (8th Cir. 2007); *see also Diamonds Plus, Inc. v. Kolber,* 960 F.2d 765, 768 (8th Cir. 1992) ("Intent to defraud need not be evinced by the defendant's avowed intent to bilk members of the public; it can also be demonstrated when the defendant recklessly disregards whether his representations are true."). "Fraudulent intent need not be proved directly and can be inferred from the facts and circumstances surrounding a defendant's actions." *United States v. Flynn*, 196 F.3d 927, 929 (8th Cir. 1999); *see also United States v. Schumacher*, 238 F.3d 978, 980 (8th Cir. 2001).

Here, evidence of intent to defraud is stipulated to in the plea agreement, including the forging of clients' signatures and the diverting of their funds to pay the expenses of Energae. *See, e.g., United States v. Louper-Morris,* 672 F.3d 539, 556 (8th Cir. 2012) (holding that the record was replete of evidence of an intent to defraud when defendant, among other things, forged signatures of power-of-attorney forms). Counsel did not fall below a standard of reasonableness in failing to contend that the plea agreement did not support a conviction for wire fraud when it accurately set out the elements and Smith agreed he violated those elements. In the context of a claim of ineffective assistance of counsel, the Eighth Circuit has long recognized that counsel's refusal to advance a meritless argument cannot constitute ineffective assistance. *See, e.g., Rodriguez v. United States*, 17 F.3d 225, 226 (8th Cir. 1994); *accord Thai v. Mapes*, 412 F.3d 970, 978 (8th Cir. 2005) ("In our view, [the petitioner's] claim fails because [the petitioner] cannot show that his counsel performed deficiently by failing to raise a meritless argument."). The argument that Smith contends his counsel should have raised is plainly without merit. Counsel did not perform deficiently by failing to raise it.

b. Whether Smith Was Prejudiced

Even if Smith could demonstrate deficient performance, he fails to establish that any alleged deficient performance prejudiced him. To satisfy the prejudice prong, "the convicted defendant must demonstrate that 'there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.' " *Matthews v. United States*, 114 F.3d 112, 114 (8th Cir. 1997) (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985); *United States v. Prior*, 107 F.3d 654, 661 (8th Cir. 1997)). *See also Tran v. Lockhart*, 849 F.2d 1064, 1067 (8th Cir. 1988) (a petitioner must provide the court "with the type of specific facts which would allow ... an intelligent assessment of the likelihood that [a petitioner] would not have ple[ ]d guilty.").

Smith simply alleges he would not have pleaded guilty, yet he points to no objective evidence to support that conclusory assertion. *See Caldwell v. United States*, No. 4:15-CR-00043-BP-1, 2019 WL 11664880, at *8 (W.D. Mo. June 24, 2019) ("Movant has provided no argument other than conclusory allegations to overcome the 'formidable barrier' of his representations during plea taking to show his guilty plea was not made knowingly or voluntarily."). "[D]ispositions by guilty plea are accorded a great measure of finality" and "[s]olemn declarations in open court carry a strong presumption of verity." *Blackledge v. Allison*, 431 U.S. 63, 71, 74 (1977). Therefore, "[t]he subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible." *Id.* at 74. Here, Smith presents no credible, non-conclusory evidence that he would not have pleaded guilty but for Lahammer's failure to advise him of a potential defense.[9] He therefore fails to establish prejudice under *Strickland*. Claim 1 is denied.

[9] In addition, Smith contends that a different attorney, Conrad Lysiak, advised him prior to September 2016 that "unauthorized investments" are not wire fraud. *See* Doc. 62-1 at 6. Thus, Smith was aware of this (incorrect) proposition before he was indicted in CR17-2030-LTS.

B. Actual Innocence of Wire Fraud (Claim 2)

Smith contends that he is actually innocent of the wire fraud charge because there was "no 'active concealment' of 'material' information in his case." Doc. 17 at 6. Smith contends that because an essential element of the wire fraud charge cannot be proved, "[h]is guilty plea and conviction results in the denial of due process under the United States Constitution and a 'miscarriage of justice.'" Id. at 7. Although Smith avers that an essential element of the wire fraud charge cannot be proved, that essential element changes throughout his filings. Smith's counsel recasts the claim in the reply brief as alleging that "he is innocent of wire fraud because he did not have intent to deceive." Doc. 47 at 12.

Like Claim 1, Smith contends that this claim relates to Point L of the initial § 2255 motion. Smith contends that Point L encompassed both an ineffective assistance of counsel claim and an actual innocence claim. Despite the obvious incongruity, I will assume Claim 1 is sufficiently found in his initial motion and is timely.

Even though timely, Smith procedurally defaulted the claim set out in Point L by failing to pursue it at an earlier stage of litigation. *See* Doc. 21 at 6. Claims are procedurally defaulted if they could have been brought at an earlier stage of litigation and were not. Specifically, § 2255 relief "is not available to correct errors which could have been raised at trial or on direct appeal." *Ramey v. United States*, 8 F.3d 1313, 1314 (8th Cir. 1993) (per curiam). It is well-settled that in order to obtain collateral review on a procedurally defaulted claim, a habeas petitioner must show either that there was (1) cause for his procedural default and actual prejudice, or (2) that he is actually innocent of the crime for which he was convicted. *Jennings v. United States,* 696 F.3d 759, 764 (8th Cir. 2012) (citing *Bousley v. United States,* 523 U.S. 614, 622 (1998)).

To establish a valid claim of actual innocence, a movant must show factual innocence, not merely legal insufficiency. *Dejan v. United States,* 208 F.3d 682, 686 (8th Cir. 2000). Thus, Smith must demonstrate, in light of all the evidence, that "it is more likely than not that no reasonable juror would have convicted him." *Id.; Bousley,*

523 U.S. at 623. Actual innocence claims require a movant to "support his allegations of constitutional error with new reliable evidence – whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence – that was not presented at trial." *Weeks v. Bowersox*, 119 F.3d 1342, 1351 (8th Cir. 1997) (quoting *Schlup*, 513 U.S. at 324). "This is a strict standard; generally, a petitioner cannot show actual innocence where the evidence is sufficient to support a [ ] conviction." *McNeal v. United States*, 249 F.3d 747, 749–50 (8th Cir. 2001). "Because such evidence is obviously unavailable in the vast majority of cases, claim of actual innocence are rarely successful." *Weeks*, 119 F.3d at 1351.

In his amended § 2255 motion, Smith asserts his actual innocence of wire fraud because he did not engage in any false representation. Smith relies on *Steffen* to assert that "[t]he legal basis for this claim is that mere silence or non-disclosure, in itself, with or without a fiduciary duty to disclose material information, is not cognizable under the mail and wire fraud statutes." Doc. 20 at 7. Smith argues that "[i]t does not appear that the plea agreement identified a duty to disclose material information that Mr. Smith violated, thereby demonstrating the basis for his challenge to the wire fraud conviction."[10] *Id.* at 8.

As discussed in the previous section, Smith has failed to demonstrate that he is factually innocent of wire fraud, either from lack of intent to deceive or from lack of a misrepresentation. Rather, the factual allegations in the plea agreement are sufficient to support his conviction for wire fraud. Smith has not shown that it is more likely than not that no reasonable juror would have convicted him. Because Smith has not demonstrated factual innocence, Claim 2 is denied.

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[10] Smith seeks to supplement the appendices to his reply brief with a transcript of the guilty plea and the Eighth Circuit Jury Instructions for wire fraud. Doc. 53 at 5. That is unnecessary. The transcript of the guilty plea is already a part of the docket in his underlying criminal case. Crim. Doc. 113. Additionally, I take judicial notice of the publicly available Eighth Circuit Jury Instructions.

C. Actual Innocence of Identity Theft (Claim 3)

In Claim 3 of the amended motion, Smith asserts "that he is also actually innocent of the identity theft offense because he is actually innocent of the underlying offense (mail fraud) upon which the identity theft offense is predicated." Doc. 17 at 7; Doc. 20 at 9. Smith contends that "if the wire fraud offense were set aside, that would seemingly require that both offenses be set aside because a challenge to the wire fraud conviction is an indirect challenge to the identity theft conviction." Doc. 20 at 9.

Smith pleaded guilty to aggravated identity theft in violation of 18 U.S.C. § 1028A(a)(1), which applies when a defendant, "during and in relation to any [predicate offense], knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person." The predicate offenses include, among many others, wire fraud. 18 U.S.C. § 1028A(c)(4). Section 1028A(a)(1) carries a mandatory minimum sentence of two years in prison "in addition to the punishment" for the predicate offense.

Smith argues that, "[a]lthough it was not framed as such, Mr. Smith did allude to his actual innocence of identity theft in his pro se motion in the context of reciting how counsel was ineffective." Doc. 20 at 9. Specifically, Smith relies on an argument under Point A in the initial § 2255 motion that counsel erred by refusing "to object to the inclusion of 'identify theft' relative to charges leveled against the defendant." Doc. 1 at 58. Smith asserted that "[t]he defendant was licensed to handle Claimants' identities reference their investment preferences. This license included the defendant's approval to manage Claimants' investments on a discretionary basis." *Id.* I allowed this claim to proceed past initial review and directed the Government to address both procedural default and its merits.

The Government contends that Claim 3 is procedurally defaulted and "application of the relation-back doctrine . . . would be highly strained." Doc. 42 at 6. The Government argues that "the relationship-back doctrine may not be extended to cover any argument that 'seemingly' might be made or an 'indirect challenge to a claim that is

made." *Id.* The Government also asserts that Smith incorrectly suggests that a wire fraud conviction is essential to an identity theft conviction. *Id.* at 6-7.

Smith's reply brief argues that the original motion's statement that "Defendant's Legal Counsel Refused to Object to the Inclusion of 'Identity Theft' Relative to Charges Leveled Against the Defendant" is "just another way of expressing that Mr. Smith claims he is innocent of identity theft." Doc. 47 at 13. Turning to the merits, the reply argues that "dicta in *Dubin* [*v. United States*, 599 U.S. 110 (2023)] supports his claim that he is actually innocent of aggravated identify theft" because the clients provided their identifying information to him when he became their broker. *Id.* at 14.

The statement Smith relies on – that counsel refused to object to the inclusion of an identity theft charge –is too general and vague to put the Government on notice of the factual basis for the claim. "New claims must arise out of the 'same set of facts' as the original claims, and '[t]he facts alleged must be specific enough to put the opposing party on notice of the factual basis for the claim.'" *Taylor v. United States*, 792 F.3d 865, 869 (8th Cir. 2015) (quoting *Dodd*, 614 F.3d at 515). In the original claim, Smith asserted that he was licensed to handle the clients' identities and thus had approval to manage their investments "on a discretionary basis." Doc. 1 at 58.

To the extent Claim 3 contends that Smith is actually innocent of identity theft because he is innocent of the underlying wire fraud, Claim 3 does not relate back because the relevant set of facts are not the same. The initial claim centered on what authority his license conveyed on him to make investments. That contrasts with Claim 3's evaluation of whether he satisfied the elements of wire fraud. However, to the extent that Claim 3 is arguing that he is actually innocent of identity theft because he was entitled to use his clients' identities, as asserted in his reply brief, then the claim relates back to his initial motion.

Regardless, Claim 3 is meritless. Smith pleaded guilty to identify theft and the plea agreement's recitation of facts support his guilt of that offense. He admitted in the plea agreement to forging the client's signatures and using their Social Security Numbers

to affect the unauthorized transfer of their funds without authorization. Smith may regret that choice and attempt to argue that he did not intend to deceive his clients (Doc. 47 at 15), but any contention that he is factually innocent of the offense is wrong. The factual stipulations in the plea agreement are sufficient to support a conviction. Consistent with the plea agreement, the record is replete with testimony and victim statements asserting that Smith used clients' identities to effectuate unauthorized transfers, including a client who testified that he specifically instructed Smith not to conduct a particular transfer but later found out that Smith did so anyway. *See, e.g.*, Crim. Doc. 37-2; Crim. Doc 116 at 143, 144.

Dubin does not support Smith's claim. In that case, the Supreme Court held that "[a] defendant 'uses' another person's means of identification 'in relation to' a predicate offense when this use is at the crux of what makes the conduct criminal. To be clear, being at the crux of the criminality requires more than a causal relationship. . . . Instead, with fraud or deceit crimes like the one in this case, the means of identification specifically must be used in a manner that is fraudulent or deceptive. Such fraud or deceit going to identity can often be succinctly summarized as going to 'who' is involved." *Dubin*, 599 U.S. at 131–32. The Court concluded that Dubin's overbilling to Medicaid, which was based on a misrepresentation about the qualifications of an employee who provided a medical service to a client, did not fall within the statute. *Id.* at 132 ("petitioner's use of the patient's name was not at the crux of what made the underlying overbilling fraudulent. The crux of the healthcare fraud was a misrepresentation about the qualifications of petitioner's employee. The patient's name was an ancillary feature of the billing method employed."). The actions to which Smith pleaded guilty are distinguishable because the fraud directly involved the persons whose identities were used. The forged signatures and use of Social Security numbers – the means of identification – were a "key mover in the criminality." *Id.* at 123. This is not a simple matter of overbilling that the Court distinguished, such as when an attorney rounds up the amount of time spent on a task.

When describing identity theft, *Dubin* includes the example "steal[ing] personal information about and belonging to another person, such as a bank account number or driver's license number, and use[ing] the information to deceive others." *Dubin*, 599 U.S. at 122. Smith attempts to use that dictionary definition of "identity theft" to argue his actions are not "identity theft." He argues the record does not show he stole information about his client's names; rather his clients voluntarily gave him their information. Doc. 47 at 15.

Despite the cited example, *Dubin* does not require that the defendant "steal" the information to be guilty of identity theft. Indeed, it is absurd to suggest that Smith was free to use his clients' identifying information for whatever purpose he chose once they provided it to him. By Smith's argument, any individual who obtains another's identifying information by legitimate means cannot be guilty of identity theft. Nothing in *Dubin* supports that position. Rather, as noted above, the "use" of the information is what makes it criminal (or not). *Dubin*, 599 U.S. at 123. Smith's argument has no merit and Claim 3 is denied.[11]

D. Ineffective Assistance of Trial Counsel for Failure to Secure Agreement to Single Prosecution (Claim 4)

In his amended § 2255 motion, Smith argues that counsel provided ineffective assistance by failing to secure an agreement with the Government to combine the prosecution for the payroll tax offense in CR16-2002-LTS with the wire fraud offense in CR17-2030-LTS. Doc. 17 at 7. Smith asserts that the Government originally agreed to a single prosecution but, "through no fault of his own, his attorney failed to consummate the agreement and as a result the two offenses were prosecuted separately." *Id.*; Doc.

[11] Smith requests an evidentiary hearing on this claim (Doc. 47 at 15), but no hearing is required "where the claim is inadequate on its face or if the record affirmatively refutes the factual assertions upon which it is based." *See New v. United States*, 652 F.3d 949, 954 (8th Cir. 2011) (citation omitted).

20 at 10. Smith received sentences to be served consecutively and he was assigned two criminal history points for the prior payroll tax-related conviction. Smith asserts that "[t]he basis for the claim would have to be developed through discovery of emails and other communications between his attorney(s) and the Government." *Id.*

I found this claim to be timely because Smith's initial § 2255 motion argued the cases were wrongly separated. Doc. 21 at 7. Smith asserted that his counsel misrepresented the Government's intentions regarding additional indictments, stating that counsel "failed to properly inform the defendant about all the government's actions in desiring to charge the defendants with a second crime, wire fraud. In fact, the defendant's legal counsel provably lied to the defendant regarding this matter." Doc. 1 at 48. Smith also alleged:

> The tax and the wire case should have been treated as a single case as was communicated by the government to the defendant and to which the defendant agreed. However, because the defendant refused to pay his counsel $200,000 more in legal fees to handle the wire case, beyond the $720,000 that he had already charged in the tax case, his counsel lied to the defendant saying the government was likely "dropping the wire fraud case due to lack of evidence." The defendant refused to pay his counsel the additional $200,000 until he cleaned up the legal fees regarding the $720,000 – his counsel was charging $900 an hour versus the agreed rate of $720 per hour. The cases were purposefully, and wrongly, separated. Battle deceived the court telling the court "the defendant would take his chances" (Battle told this lie to attorney Lahammer) reference not being charged with wire fraud.

Id. at 42. Smith asserted that Lahammer stated he would obtain copies of recorded phone calls between Smith and Battle, but he did not. *Id.*

Battle, who represented Smith during the plea negotiations for his payroll tax case, responds that he made efforts to reach a plea resolution with the Government. He attaches a June 2, 2016, email from the Assistant United States Attorney that describes three "paths forward." *See* Docs. 34, 34-2 at 1-2. In Option 1, Smith resolved only the payroll tax case, pleading guilty to the count with the highest tax loss with the remaining counts

dismissed. The email notes that the likely sentencing range would be 24 to 30 months and "we would reserve the right to later seek an indictment from the grand jury on the pending financial investigation, and Mr. Smith should expect that we certainly would do so." Doc. 34-2 at 1. Option 2 resolved both the pending indictment related to payroll taxes and the pending investigation:

> This would be substantially similar to the prior offer from AUSA Williams to Mr. Rosenberg in 2014. We would require a plea to one tax count, as described above, one count of Aggravated ID Theft, and one count of Mail or Wire Fraud. I would be amenable to litigating the loss amount at sentencing, but understand the government's position is that at least a 16 level enhancement (under the new table) would be appropriate.

Id. Option 3 entailed multiple trials, noting the Government's concern that Smith continued to engage in felony crimes while on pretrial release and the likelihood the Government would seek at least one ten-year mandatory consecutive enhancement. *Id.*

Battle states that he, along with his co-counsel Leasa Anderson, met with Smith and presented the three options to him. Doc. 34 at 2. "During this meeting, Ms. Anderson and I spent an extended period of time with Petitioner explaining all three options in detail and answered any questions or concerns that Petitioner may have had." *Id.* at 3. Battle further states that they explained the Sentencing Guidelines and how they would apply in each scenario. *Id.* He states that they explained to Smith that, if he were to accept Option One, then "the government reserved the right and would continue their investigation regarding Identity Theft and Wire or Mail Fraud, and that the government may seek a wholly separate indictment if the investigation lead to such." *Id.*

Smith "advised that he would accept Option One and would enter a plea to the tax violation as it presented the lowest exposure to time towards possible incarceration." *Id.* Battle states that "they "advised [Smith] that we could not promise that the government would not seek a separate indictment, in response, [Smith] confirmed he understood and reiterated an intent to accept Option One." *Id.* With respect to the combined plea in Option 2, Battle stated that "the proposal provided that if accepted the government would

seek a 16 level enhancement which would significantly raise Petitioner's sentencing exposure. This was all discussed and explained to Petitioner to which he indicated that he had no interest in accepting this Option." *Id.* Battle further states that the Government did not offer to combine prosecutions for just two offenses (payroll tax violation and wire fraud). *Id.* Rather, he notes that the email demonstrates the offer was for a plea of all three offenses (payroll tax violation, wire fraud and identity theft). *Id.*

Battle responds to Smith's billing rate accusations by attaching both the engagement letter (Doc. 34-1 at 1-2) and a September 23, 2016, letter (Doc. 34-1 at 3). The September 23, 2016, letter requests that Smith remit payment at his earliest convenience and states that "[e]nclosed is a copy of our engagement letter which you signed, reflecting our hourly rate of $735.00 as opposed to $915. Also enclosed is a chart reflecting expenses and charges on your account since the engagement." Doc. 34-1 at 3.

Lahammer notes that at the time he was retained on April 20, 2017, Smith had already pleaded guilty and had been sentenced in the payroll tax case. Doc. 27 at 1. Brown was not involved in the plea negotiations, but he notes that Smith "never asked me formally to seek withdraw[al] of his plea in the fraud and identity theft counts." Doc. 26 at 5. He also notes that he has a "distinct recollection that AUSA Vavricek told me that [Smith] did not want to resolve both cases at the same time." *Id.*

The Government argues that Smith has not demonstrated either deficient performance or prejudice. Doc. 42 at 7. The Government argues that Smith's "allegations against counsel are frivolous and belied by the record." *Id.* The Government asserts the email provided by Battle demonstrates that Smith was given the option of a global plea agreement but declined that option. *Id.* at 8. The Government also points to the plea agreement Smith signed in the payroll tax case, which provided that the Government may pursue additional charges against him that include wire fraud and aggravated identity theft. *Id.* (citing CR16-2002, Doc. 102 at 2 ("This waiver of the

right to file additional charges does not include, for example, any mail- or wire-fraud, USDA-fraud, money laundering, or aggravated-identity-theft charges.")).

The Government argues Smith cannot demonstrate prejudice because "it is not the case that counsel's alleged failings resulted in convictions that he would not otherwise receive." Doc. 42 at 8. The Government further notes that he would have still received consecutive sentences under a global plea agreement and "the only possible difference in the sentencing process would have concerned the interplay between the payroll tax conviction and the wire fraud conviction under the guidelines rules for criminal history points and grouping" but application of the guidelines is not cognizable in § 2255 proceedings. *Id.* at 8-9 (citing *Sun Bear v. United States*, 644 F.3d 700 (8th Cir. 2011) (en banc).)

Smith replies that "it is possible for a prisoner to raise a Guidelines issue in a collateral attack so long as he can demonstrate that the failure to raise it on direct appeal resulted from the ineffective assistance of counsel." Doc. 47 at 15-16. Smith argues that a single prosecution would have reduced his criminal history category to 1 and rendered him eligible for the retroactive application of a zero-point offense level reduction. Doc. 53 at 6. Smith also argues that "no written documentation or corroboration was submitted" in connection with Battle's assertion that the Government offered Smith a global plea agreement but Smith rejected it. Doc. 47 at 17. Smith argues that he disputed whether the global plea agreement was offered and rejected, pointing to Point A of his original pro se § 2255 motion. *Id.* Smith also seeks leave to conduct discovery on this claim, stating that "allowing discovery seeking correspondence from defense counsel to Mr. Smith is central to establishing this claim." *See* Doc. 53 at 6; *see also* Doc. 47 at 17.

1. Whether Counsel Provided Deficient Representation

As an initial matter, I agree with Smith that *Sun Bear* does not preclude consideration of Smith's ineffective assistance of counsel claim.[12] *See United States v. Proudfoot*, No. CR 14-192 ADM/LIB, 2016 WL 3034155, at *2 (D. Minn. May 27, 2016) (stating that even though "[t]he Government correctly asserts 'that ordinary questions of guideline interpretation falling short of the miscarriage of justice standard do not present a proper section 2255 claim.' . . . [i]neffective assistance of counsel claims in federal criminal cases, comparatively, are properly asserted on collateral review . . . . [and] [t]herefore, Proudfoot's 2255 Motion will be reviewed as an ineffective assistance of counsel claim for trial court counsel's failure to challenge Proudfoot's career-offender designation."); *United States v. Daily*, No. CRIM. 03-381 1 JRT, 2011 WL 3920260, at *1 n.1 (D. Minn. Sept. 7, 2011), *aff'd,* 703 F.3d 451 (8th Cir. 2013) ("*Sun Bear,* which addressed the applicability of the "miscarriage of justice" standard to a habeas petitioner's attempt to re-litigate the matter of an alleged error in guidelines interpretation already raised on direct appeal, does not disrupt the principle that counsel's failures with regard to a guideline calculation can support § 2255 relief on the ground of ineffective assistance of counsel.").

Smith's amended motion makes the conclusory allegation that his counsel failed to consummate an agreement to combine the prosecutions for the payroll tax and wire fraud offenses. Yet Smith offers no evidence that he requested counsel pursue that option or that he would have accepted it. Naked and conclusory allegations in Smith's initial motion, such as "the defendant's legal counsel provably lied to the defendant regarding this matter," are insufficient. The unrebutted factual record indicates instead that Smith rejected the option whereby he would plead guilty to all three offenses.

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[12] The Government does not argue, so I will not consider, the extent to which my order in C18-2083-LTS forecloses this claim. That case addressed Smith's § 2255 motion arising out of CR16-2002-LTS. I found that motion, which contained substantially similar arguments, to be untimely. C18-2083-LTS, Doc. 9.

The only plea-related document submitted as a part of this record is the June 2, 2016, email from Assistant United States Attorney Tim Vavricek to Battle. That email notes that in 2014 the Government offered Smith a cooperation plea agreement substantially similar to Option 2's "Global Option," but Smith's prior attorney, Rosenberg, responded that Smith was "non-responsive" to the offer. Doc. 34-2 at 1. That email indicated that the three options described were a preliminary offer but that the Government was interested in negotiating a just resolution. *Id.* Battle's affidavit indicates that he met with Smith and presented the three options raised by the Government in 2016 but that Smith opted to only plead guilty to the payroll tax offense.

Smith does not explicitly deny that Anderson and Battle met with him and explained the three options presented by the Government. Smith filed an 11-page pro se affidavit (Doc. 62) as a second supplement to his appendix. Yet Smith does not offer his version of the meetings that occurred with Battle and Anderson. He does not address whether counsel provided him with the Government's three options, nor whether he rejected Option 2. Rather, he ignores Battle's recitation of those events. Smith asserts in his reply brief that his pro se initial motion disputes whether a global plea offer was offered and rejected (Doc. 47 at 17), but his initial motion does not actually deny that he rejected a global plea offer (Doc. 1 at 2), focusing instead on linking the improper separation to billing disputes.

In addition, Smith does not assert that Battle provided inaccurate information about his sentencing exposure. Even assuming Battle advised him to proceed with separate prosecutions, Smith cannot prove that his counsel's performance was deficient. A court's scrutiny of counsel's performance is "highly deferential," does not "second-guess strategic decisions or exploit the benefits of hindsight," and presumes that counsel's conduct "falls within the wide range of reasonable professional assistance." *Osborne v. Purkett,* 411 F.3d 911, 918 (8th Cir. 2005). Here, Battle's conduct in advising Smith, in view of the Government's email regarding Smith's three options, falls within the wide strategic discretion given counsel.

Smith makes the conclusory allegation that Battle failed to properly inform him about the Government's desire to charge him with wire fraud, but the plea agreement in the payroll tax case specifically reserved the right to charge him with both wire fraud and aggravated identity theft. *See* CR16-2002, Doc. 102 at 2. Smith agreed at his change of plea hearing in the payroll tax case that no one had made any promises to him to get him to plead guilty other than what was in the payroll tax plea agreement. *See* CR16-2002, Doc. 200 at 19. In other words, the Government did not promise to refrain from bringing wire fraud and aggravated identity theft charges and Smith was made aware of that in the plea agreement.

Smith makes other unsupported allegations that are contradicted by the record. For example, he states that Battle deceived the court by stating Smith would take his chances on the wire fraud offense, but the transcripts for the change of plea and sentencing proceedings demonstrate that the investigation of Smith for wire fraud or identity theft offenses and potential charges for those offenses never were discussed at those proceedings. CR16-2002-LTS-KEM, Docs. 140, 200. Nor did Battle state Smith would take his chances regarding further prosecutions. *Id.* Finally, Smith's allegation that Battle separated the cases because of a fee dispute is completely unsupported and contradicted by the record. Battle's letters indicate Smith was billed the agreed upon rate and Battle continued to represent Smith for almost an entire year after Smith pleaded guilty to the payroll tax violation. Smith has not established deficient performance with regard to the plea negotiations.

Smith submitted two appendices (Docs. 48, 52) to his reply brief and I then granted him leave to file yet another supplement (Doc. 62) to his appendix. That supplement comprises of an 11-page document authored by Smith that lists phone calls he believes occurred between him and his attorneys, attempts to "paraphrase" those conversations and argues about counsel's performance. The allegations in that document are irrelevant to Claim 4. Smith describes each of the 13 calls as occurring months after he had already pleaded guilty in the payroll tax case in June 2016. Therefore, they are not relevant to

what Battle informed Smith about a potential combined plea agreement addressing the payroll tax, wire fraud and identity theft offenses before he agreed to and signed the payroll tax plea agreement.[13] Nor are they relevant to any negotiations that occurred with the Government. To the extent any billing dispute transpired between Battle and Smith in the fall of 2016, such a dispute is irrelevant to Smith's guilty plea to the payroll tax offense, rather than in combination with wire fraud or identity theft, in June 2016.

2. Whether Smith Was Prejudiced

To demonstrate prejudice at the plea-bargaining stage, Smith must demonstrate a substantial likelihood that "(1) he would have accepted the offer to plead pursuant to the earlier proposed terms, (2) neither the prosecution nor the trial court would have prevented the offer from being accepted, and (3) the plea terms would have been less severe than under the judgment and sentence that were actually imposed." *Allen v. United States*, 854 F.3d 428, 432 (8th Cir. 2017). To establish prejudice, a movant "must show that, but for his counsel's advice, he would have accepted the plea." *Engelen v. United States,* 68 F.3d 238, 241 (8th Cir. 1995). Movants who consistently maintain their innocence fail to do so. "A defendant who maintains his innocence at all the stages of his criminal prosecution and shows no indication that he would be willing to admit his guilt undermines his later § 2255 claim that he would have pleaded guilty if only he had received better advice from his lawyer." *Sanders v. United States,* 341 F.3d 720, 723 (8th Cir. 2003); *see also Chesney v. United States,* 367 F.3d 1055, 1059–60 (8th Cir. 2004) (movant who alleged counsel failed to communicate plea offer could not show prejudice because he adamantly denied guilt under oath at trial and he could not establish he would have accepted plea agreement); *Sanders,* 341 F.3d at 722–23 (denial

[13] Smith's second supplement (Doc. 62) to his appendix argues in detail about whether Battle included requested objections to the PSR for the payroll tax case (CR16-2002) but such allegations are irrelevant to Claim 4 and any ineffective assistance in the underlying wire fraud and identity theft case (CR17-2030).

of § 2255 motion without hearing upheld when counsel provided inaccurate estimate of sentencing exposure but at all stages of criminal prosecution, prisoner showed no indication he was willing to admit guilt).

With respect to an evidentiary hearing, "[a] § 2255 motion may be dismissed without a hearing if (1) the criminal defendant's allegations, accepted as true, would not entitle him or her to relief; or (2) the allegations cannot be accepted as true because they are contradicted by the record, are inherently incredible, or are conclusions rather than statements of fact." *Hyles v. United States,* 754 F.3d 530, 534 (8th Cir. 2014). To avoid dismissal and "command an evidentiary hearing, the movant must present some credible, non-conclusory evidence that he would have pled guilty had he been properly advised." *Engelen,* 68 F.3d at 241 (affirming dismissal without a hearing when movant maintained his innocence at trial and "made no direct assertion that he would have pled guilty if his counsel had provided him with additional information concerning the risks of trial.").

Here, Smith presents no credible, non-conclusory evidence that he would have pleaded guilty under a combined plea agreement but for Battle's advice. *See Hyles*, 754 F.3d at 535 ("Nothing in the record indicates she wanted to accept the plea offer and would have acknowledged her guilt even if properly advised about the risks of trial."). The record is barren of any evidence that Smith would have accepted any global plea agreement offered to him. *See Moses v. United States,* 175 F.3d 1025, 1025 (8th Cir. 1999) (unpublished) ("Moses offers only his own self-serving statements made in his pro se § 2255 motion and brief that he would have accepted the plea agreement. . . . Moses's conclusory statements alone are not the sort of objective evidence required to establish a reasonable probability that he would have accepted the plea agreement absent his counsel's allegedly deficient performance."). While Smith has submitted dozens of pages he has drafted through multiple appendices to his reply brief, he never actually states that he would have accepted a global plea agreement as described in Option 2. To the

contrary, he instead continues to argue that he was not in fact guilty of the payroll tax offenses and the wire fraud and identity theft offenses. Claim 4 is denied.

3. Discovery Request

For Claim 4, Smith requests "correspondence from counsel [who represented Smith in the payroll tax case] to Smith." Doc. 53 at 6. He also seeks documents from the prosecution relating to a single prosecution and responses from defense counsel. *Id.* at 10. Smith requests leave to submit an interrogatory to the Government asking whether the Government has correspondence from Smith's counsel in the payroll tax case regarding an agreement for a single prosecution. Smith does not set forth what he expects these documents to show. Smith does not provide the court reason to believe that, if the discovery were granted, he would be able to demonstrate he is entitled to habeas relief. *See Moore v. Stange*, No. 1:21-CV-114, 2022 WL 1658811, at *3 (E.D. Mo. May 25, 2022) ("Petitioner does not meet his burden of demonstrating the requested discovery is material because his assertions are mere speculation and are insufficient to give the Court reason to believe that discovery would show he may be able to demonstrate he is entitled to relief."). Because Smith has failed to establish good cause, his request for discovery for Claim 4 is denied.

E. Ineffective Assistance of Trial Counsel for Failure to Present Evidence of Efforts to Reduce Loss (Claim 6)

Smith contends his counsel was ineffective for failing to "effectively present mitigating evidence of his efforts to save the investments of all investors who incurred financial losses." Doc. 17 at 9. He contends this claim is found in Points D and F of the initial motion, as well as in paragraphs o through w of Point A. Doc. 20 at 13 (citing Doc. 1 at 3, 4, 51). Smith argued, for example, that his efforts included:

> (1) making certain that all Claimants and company shareholders received a return on their "investment, (2) saving certain Companies from financial

> failure, (3) cooperating with the federal government in demonstrating the cash and other financial values received by Claimants, (4) cooperating with the federal government by presenting information which would allow certain of the Companies to continue in business, (5) offering the federal government information which implicated others in wrong doing, and (5)[sic] trying to right the wrongs created by the defendant and others by restoring value to Claimants.

Doc. 1 at 51. Smith argues that evidence of his efforts could have formed the basis for a downward variance. Doc. 20 at 13. The arguments underlying Claim 6 were in Smith's initial § 2255 motion and Claim 6 is thus timely.

Brown, who represented Smith during his sentencing hearing, responds that "[t]he fact that [Smith] supposedly did not resist claims for monies from his insurance carrier for some of the victims was not, in my view, a meaningful effort to reduce the loss at any material time in the scheme." Doc. 26 at 6. Brown further states that "[t]o the extent that [Smith] claims that each victim got a 'respectable return' on their monies, my opinion is that such claim is plainly false then and now.'" *Id.* at 7. Brown states that he "stand[s] by what was presented at sentencing and in Defendant's Sentencing Memorandum and Motion for Variance as my attempts to effectively address and present mitigating factors at sentencing." *Id.* at 6-7.

Brown states that Smith prepared extensive sentencing exhibits containing data of which Brown is uncertain, noting that "I have no idea if the data in his information and spreadsheets and summaries was even remotely accurate, much less all true."[14] *Id.* at 6. Brown states that only Smith could authenticate these exhibits by testifying at sentencing,

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[14] Brown notes that Smith "was a voluminous writer of materials to the undersigned" and he attached to his affidavit a 260-page letter Smith sent to the Government on July 29, 2019, that primarily addresses restitution in the wire fraud case. Doc. 26-3. Brown describes that as Smith's "manifesto of sorts about the case" and states that he did not send that letter to the Government because he "felt it was 'obstructive' at minimum and probably a false statement in whole or part to the government." Doc. 26 at 2. He further states that the document comprises basically what Smith "wanted to present and testify about at sentencing that in my view may have certainly caused a new indictment for some federal crime much less a[n] even high[er] sentence for the instant offense." *Id.*

and Brown advised Smith not to testify at sentencing because of his concerns that Smith likely would face another indictment if he chose to testify. *Id.* at 6, 8.

The Government argues that Smith has demonstrated neither deficient performance nor prejudice. The Government asserts that counsel's strategic decisions are virtually unchallengeable, and that Smith has not presented any evidence that his victims received a respectable return on investment. Doc. 42 at 10. The Government notes that "[d]espite Attorney Brown's stated intention and best efforts to focus on other mitigating evidence, Movant nonetheless presented the sentencing court with reams of handwritten filings . . . including multiple exhibits relating to Movant's self-described 'Restitution and Value Assignments.'" *Id.* The Government argues that "[t]here is no indication in the record that the sentencing court would have varied downward upon consideration of the factors at 18 U.S.C. § 3553(a) if Attorney Brown had chosen to focus on pursuing Movant's baseless theory of mitigation." *Id.* Smith's reply brief argues that "funds earmarked for paying counsel were seized by the Government, and as a result, the funds necessary for counsel to take the time to adequately prepare for and present arguments and evidence that could have supported a lesser sentence were not available." Doc. 47 at 17-18.

With regard to Claim 6, Smith has demonstrated neither deficient performance nor prejudice. Brown and Nelsen's performance did not fall below the objective standard of reasonableness in making strategic decisions to focus on other mitigating evidence. Brown filed a sentencing memorandum and motion for variance that advocated a 60-month sentence based on numerous arguments, including number of victims, failure to obstruct justice, acceptance of responsibility, the sentences should run concurrently and a downward variance was justified because of "unwarranted sentencing disparities based solely upon amount of loss even in the absence of intent to cause loss." Crim. Doc. 64 at 11-12. Attached to Smith's sentencing memorandum were 33 exhibits totaling over 1300 pages that Brown states were submitted at Smith's request. *See* Crim. Doc. 64 at 13; Crim. Docs. 64-1 through 64-25; Crim. Docs. 65-1 through 65-6; Crim. Doc. 90. Smith may have wished to flood the court with every possible sentencing argument and

document that he could muster, but there is no indication that Brown's decisions in selecting sentencing arguments to focus on were unreasonable.[15]

A court's scrutiny of counsel's performance is "highly deferential," does not "second-guess strategic decisions or exploit the benefits of hindsight," and presumes that counsel's conduct "falls within the wide range of reasonable professional assistance." *Osborne v. Purkett,* 411 F.3d 911, 918 (8th Cir. 2005). Here, Brown's choice and handling of sentencing arguments were valid strategic decisions. Reasonable professional judgment supported the decision not to base an argument on loss exhibits created by Smith and the related decision not to call Smith to testify to authenticate and explain the basis for his exhibits. The dockets in Smith's various cases validate Brown's belief that Smith's writings tend to obstruct rather than enlighten. If Smith's documents were presented in full at sentencing, the result could have been a longer sentence. Smith has not shown deficient performance.[16]

Nor has Smith shown prejudice. The discussion during the sentencing hearing makes it clear that there is no reasonable probability the sentencing judge would have imposed a lower sentence based on Smith's purported efforts to reduce loss. In rejecting a different motion for a downward variance, the sentencing judge noted that the crime of taking money from investors without their permission occurred regardless of whether the

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[15] Smith makes allegations about the impropriety of Brown and Nelsen's requests for withdrawal as his counsel related to payment demands and a related inadequate preparation for and presentation of arguments for sentencing. *See, e.g.,* Doc. 20 at 10-11. Brown responds that "[t]o the extent I told him 'no' about certain things or did or did not do as he asked, it had nothing to do with non-payment of fees. I point out that Plaintiff effectively 'wrote' the objections to the PSR that I submitted. He and I discussed ad nauseum how federal sentencing worked, the issues to be decided and the problems associated with his sentencing exhibits." Doc. 26 at 3.

[16] Smith's reply brief requests an evidentiary hearing for Smith to "develop the facts upon which he relied to create the loss-offset table" he authored in the appendix. Doc. 47 at 18, Doc. 48-1 at 23. Such an explanation is not material to whether there was constitutionally inadequate representation or prejudice from counsel not seeking a motion for downward variance based on efforts to avoid loss.

investors ultimately ended up in a better or worse financial position. Crim. Doc. 117 at 17. For example, the judge stated that "it doesn't really matter, does it, whether the companies were successful or not? I mean, it does from a restitution standpoint. If he had taken money that didn't belong to him and the companies were wildly successful, then we wouldn't have a restitution issue, but we'd still have a crime." *Id.*

During Smith's allocution, he asserted that his intent was not to hurt the investors but rather to "bless them and enrich their lives." *Id.* at 25. Smith's long allocution purported to provide information of what each victim "actually lost and what they actually made." *Id.* at 25-51. As he delved into the details of some of his efforts and what occurred with Permeate and another company Greenbelt, the judge stated to Smith that "I appreciate that all of this details what you've done in your work, but the issue is not whether these were legitimate companies or the like. The issue is, you stole money from people that trusted you, and that's what I'd like to hear about." *Id.* at 42. Smith stated that "I didn't mean for them to lose money. I gave away all my Greenbelt shares to restore their values. I made huge mistakes. I believed what I was doing was for the poor and to better society and to better them." *Id.* at 48.

While rejecting Smith's motion for a downward variance, the judge stated:

> Mr. Brown has made his arguments that the loss table in the advisory guidelines essentially would result in an excessive sentence and also that the Court should take into account that defendant did not intend the actual losses to occur to the individuals that he was advising on investments. I find no basis to vary from the advisory guidelines.

Crim. Doc. 117 at 52. The sentencing judge further stated that "he is not before the Court because the business failed or went down in value. He's here because he stole, and he stole money from people that trusted him very much and were willing to put their money with him in investments." *Id.* at 53.

The judge stated that "there are many aggravating factors in this case that made the sentence what it is. And they are factors that defendant brought on himself." *Id.* In discussing those aggravating factors, the judge noted that "Smith used other people's

money that he took without permission, used it as if it were his own, to fulfill his own dreams about these companies. He did the same thing over and over again to the ten victims that we've talked about over many, many years." *Id.* at 54. Finding the victim impact letters and victim testimony compelling, the judge noted that Smith picked on people unsophisticated in the technology at issue, some of whom were elderly, and tried to instill trust by invoking religion and using techniques that skilled con-men use when engaging with victims. *Id.* at 54-55. The judge found that "Smith is obstinate and, even while detained pending resolution of his case, he continued on this path and got some additional money out of a guy from Dubuque." *Id.* at 56-57.

The judge noted Smith's failure to accept responsibility and his belief that he is not guilty. *Id.* at 55-56. In issuing the sentence, the judge stated she would typically opt for 167 months for Count I but opted to reduce to 151 months only because his guilty plea saved the Government time and money. Any efforts to reduce loss would not have been material to the seriousness of the crime and thus the sentence imposed. There is no reasonable probability that the downward variance would have been granted or that his sentence would have been reduced.

Smith has failed to establish that Brown acted unreasonably or that there was a reasonable probability of a different outcome at sentencing had Brown based a motion for downward variance on Smith's purported efforts to reduce the losses of his victims. Claim 6 is denied.

F. Ineffective Assistance of Trial Counsel for Failure to Properly Challenge Two-Point Assessment for Payroll Tax Conviction in Criminal History Calculation (Claim 9)

"When calculating criminal history points, a sentencing court is to consider" a defendant's prior sentence, which is further "defined as conduct other than 'relevant conduct' under U.S.S.G. § 1B1.3." *United States v. Pinkin*, 675 F.3d 1088, 1090 (8th Cir. 2012). At sentencing, the court overruled Smith's objection and found that the

payroll tax scheme was an entirely different scheme and thus not relevant conduct. Crim. Doc. 117 at 8-9. The Eighth Circuit affirmed, holding that because the convictions "do not share the same victims, scheme, or indictment" and "the record reflects no nexus between the former and latter convictions" they were "distinct offenses" and it was not error to assess the two criminal history points. *Smith,* 944 F.3d at 1015.

Smith argues that his counsel's challenge of the two-point assessment for the prior payroll tax conviction was ineffective. Doc. 17 at 10. Smith states that his attorney challenged the two-level increase but "alleges that the argument failed because counsel did not present evidence to fully explain and justify the claim in district court." *Id.* Smith asserts that his "[c]ounsel was ineffective for failing to present the necessary evidence in district court and because it was not presented in district court, it could not be raised on appeal." *Id.* He contends he asserted this claim under Point A in his initial § 2255 motion. Doc. 20 at 16 (citing Doc. 1 at 1, 58-91, 100-145). I previously found this claim of ineffective assistance was included in the initial motion. Doc. 21 at 12.

Brown responds that he made the objection and raised it on direct appeal and that he is "not aware of any other 'evidence' that I could have mustered to even remotely buttress the objections made and rejected by the district court and Eighth Circuit." Doc. 26 at 7. The Government argues Smith has demonstrated neither deficient performance nor prejudice. Doc. 42 at 11. The Government contends that counsel "was not ineffective for failing to develop a record in a futile attempt to show that the payroll tax scheme and the wire fraud and identity theft schemes were the same scheme." *Id.* The Government notes that Smith fails to specify evidence that counsel overlooked and that Brown states he is not aware of any. *Id.* In addition, the Government argues that Smith cannot demonstrate that he would have received a different sentence without the criminal history points. The Government also argues that "this type of guideline claim is not cognizable in a § 2255 proceeding." *Id.* at 10.

Smith has shown neither deficient performance nor prejudice. He fails to articulate what evidence counsel failed to present before the trial court or on appeal. *Estes v.*

United States, 883 F.2d 645, 647 (8th Cir. 1989) (conclusory allegation lacking details was insufficient to rebut strong presumption of counsel's competence). Rather, he "reincorporates by reference the extensive presentation of the basis for this claim in the pro se motion including pages 58 to 91 and 100 to 145 where Mr. Smith recounts the history of facts and circumstances jointly contributing to the payroll tax and wire fraud convictions." Doc. 20 at 16. Unfortunately, "extensive presentation" is an understatement. Smith's incorporation of approximately 80 pages from his initial single-spaced motion follows his pattern of inundating the court with the proverbial kitchen sink and refusing to direct the court to a focused argument rather than a long, rambling narrative. After an onerous review of Smith's filing, I find that Smith has not demonstrated that counsel's performance in presenting the relevant conduct argument either to the trial court or on appeal fell below a reasonable standard.

Moreover, the court's further mining of Smith's motion fails to reveal deficient performance related to the relevant conduct argument. For example, Smith argues that he requested counsel center on the common money thread rather than the common entity of Permeate Refining but that counsel failed to do so. Doc. 1 at 44-45. This is belied by the record. Brown and Nelsen addressed the common money thread and factual support thereof in the sentencing memorandum and at the sentencing hearing. Crim. Doc. 64 at 9-10; Crim. Doc. 116 at 156-61 (arguing continuity of time, party, entity, and money). Smith has not demonstrated that the presentation of that argument fell below an objective standard of reasonableness.

Smith's reply brief points to a page in Smith's appendix of pro se argument that now asserts a violation of *Brady v. Maryland*, 373 U.S. 83 (1962), based on the failure of the Government to report to the Eighth Circuit that: (1) "all three crimes were on one indictment sheet 'offered Smith' in 2015, through a prior counsel, Rosenberg" that Smith declined and (2) the government offered Smith a "global settlement." Doc. 48-1 at 19. Whether the Government offered him the opportunity to plead guilty to multiple offenses at one time is simply not relevant to the evaluation of whether the offenses are separate

schemes and thus relevant conduct for the calculation of criminal history. Smith entirely fails to demonstrate counsel was unconstitutionally deficient.

In addition, Smith has not established prejudice. It is true that the two points resulted in a criminal history category of II and a Guidelines range of 151 to 188 months, and that without the two points Smith would have been in criminal history category I with a Guidelines range of 135 to 168 months. *Smith,* 944 F.3d at 1015. However, during sentencing, the court made it clear that his actual sentence imposed would be the same regardless of the application of the two-level increase:

> MR. VAVRICEK: Just one thing, briefly. The issue that the Court resolved in the government's favor with respect to the relevant conduct on the payroll tax, I noted that, given the Court's sentence at the bottom of the range, if he had been criminal history category I, the sentence would still be within that range. And I guess that goes to the question of, is this also a nonguideline sentence?
>
> THE COURT: Yeah, *if the Eighth Circuit Court of Appeals determines that I have erred in the relevant conduct decision that I have made*, and I don't think I'm wrong on that, but if I were, *the sentence would be exactly the same for all the reasons that I have dictated and talked about* previously with regard to Mr. Smith, his conduct in committing this offense, his conduct while in custody awaiting disposition, and, actually, his conduct in the courtroom today.

Crim. Doc. 117 at 57-58 (emphasis added). Because the sentencing judge would have imposed the same sentence even if Smith was in the lower criminal history category, he does not establish prejudice.

Smith's reply brief raises for the first time the prejudice argument that a Guidelines amendment allowing a retroactive two-level offense reduction for defendants with zero criminal history points would result in a different Guidelines range for Smith. Doc. 47 at 21. If Smith feel that he is entitled to an Amendment 821 reduction, then he can file a motion to that effect. However, even though U.S.S.G. § 4C1.1(a) allows for a two-

level adjustment, Smith has not demonstrated he meets all the criteria for the reduction.[17] Thus, he has not demonstrated a reasonable probability that the sentencing results would have been different.

Because Smith has failed to demonstrate either deficient performance or prejudice, Claim 9 is denied.

G. Ineffective Assistance of Trial Counsel for Failure to Effectively Challenge the Number of Victims (Claim 11)

Smith argues that trial and appellate counsel were deficient for failing to effectively challenge a sentencing enhancement based on the number of victims, arguing that Gary Berkenes and Laura Winter should not have been deemed victims. Doc. 17 at 11; Doc. 20 at 19-24. Trial counsel objected to the PSR's recommendation of a two-level increase under USSG § 2B1.1(b)(2)(A)(i) because the offense involved ten or more victims. Crim. Doc. 37 at ¶ 59. Counsel asserted that there were only nine victims because Gary Berkenes was not a victim. The PSR stated that Berkenes authorized an initial $300,000 investment but Smith later "invested an additional $25,000 in Energae without asking Berkenes before doing so. Berkenes advised authorities that he later 'caved in' and 'okayed it' (referring to the additional $25,000)." Crim. Doc. 37 at ¶ 46.

Counsel objected to the PSR's recitation, stating "[Smith] denies Berkenes' claim of misappropriation or investment without permission. The defendant states that the alleged loss of $25,000 should be excluded as he returned the $25,000 to Berkenes." Crim Doc. 37 at ¶¶ 46, 52. In Smith's sentencing memorandum, he "denie[d] the Berkenes' claim of misappropriation or investment without permission. Absent competent proof by the government that Mr. Berkenes was victimized by misappropriation or investment without permission, there are nine victims in this case." Crim. Doc. 64 at 7.

[17] For example, one of the criteria is that the defendant may not have personally caused "substantial financial hardship." U.S.S.G. § 4C1.1(a)(6).

After Berkenes testified at the sentencing hearing consistent with the PSR, Brown withdrew an objection to including Berkenes as a victim. Crim. Doc 116 at 143, 144. During sentencing, Smith did not object to PSR's statements about Randal and Laura Winter or the PSR's inclusion of Laura Winter among the list of ten victims. Crim. Doc. 37 at ¶¶ 43, 44, 59.

Smith's amended § 2255 motion asserts that counsel was ineffective for not continuing to object to Berkenes as a victim and for failing to argue that Berkenes affirmed or ratified the investment at issue and therefore was not a victim as a matter of law. Doc. 20 at 22-23. Smith also argues that counsel was ineffective for failing to challenge the identification of Laura and Randy Winter as victims. Doc. 17 at 12. Smith contends that Laura Winter did not file a "financial claim" and the money at issue was not hers and her husband signed for release of the $8,000. Doc. 20 at 23. In the initial review order, I found that Claim 11's arguments about Berkenes and the Winters relates back to his initial § 2255 motion and thus Claim 11 is timely. Doc. 21 at 14.

Brown states generally that he "levied objections on Plaintiff's behalf that I believed had merit and tried to clean up Plaintiff's original objections to the draft PSR that I viewed basically as denial of acceptance of responsibility and obstruction-like at a minimum."[18] Doc. 26 at 7. Brown states that his advice to withdraw the objection to Berkenes as a victim was based on "the facts admitted in the Information regarding the generic scheme, the Offense Conduct Statement and the Final PSR and sentencing exhibits filed by the government." *Id.* at 8. Turning to the Winters, Brown states that the allegations in the PSR were fully supported by discovery evidence and "the district court did not erroneously find that Plaintiff's conduct with respect to the Winters' partial

[18] Brown states that Smith and his prior counsel filed elaborate objections to the draft PSR, but that "[g]iven that Plaintiff faced statutory maximum of 30 years on Count 1 and mandatory minimum two years on Count II, I had serious concerns from the nature of Plaintiff's objections that he would lose acceptance of responsibility and gain aggravating factors at sentencing under 18 U.S.C. Section 3553(a)." Doc. 26 at 2.

investment was highly risky, unsuitable and without express permission and was clearly part of the global scheme to defraud by taking client's monies to try to keep the flailing and failing Permeate/Energae investments afloat." *Id.* at 8.

The Government argues that Smith has demonstrated neither deficient performance nor prejudice. Doc. 42 at 12. The Government contends that counsel should not be found constitutionally deficient in failing to perform acts that would have been clearly futile or fruitless. *Id.* at 13. With respect to Smith's ratification theory for Berkenes, the Government notes that Smith "cites no law of which counsel should have been aware that holds that, for purposes of USSG § 2B1.1, a victim is retroactively stripped of his victim status under § 2B1.1 if the victim later 'caves in' and 'okays' the fraudster's prior theft." *Id.* at 13. The Government notes that § 2B1.1 defines "victim" as "any person who sustained any part of" the "reasonably foreseeable pecuniary harm that resulted from the offense." *Id.* The Government argues "[a]t a minimum, there is time value to money, and G.B. was a victim the moment Movant involuntarily parted G.B. from his money." *Id.* If anything, the Government argues, lulling activity is deemed part of the scheme to defraud itself. *Id.* As for the Winters, the Government contends that Smith "cites no law of which counsel should have been aware that the filing of a civil or administrative claim is a prerequisite to victim status under USSG § 2B1.1; to the contrary, as indicated above, the guidelines define 'victim' to include any person who has suffered part of the reasonably foreseeable pecuniary harm." *Id.* at 14.

1. Whether Counsel Provided Deficient Performance

Smith has not established that counsel provided unconstitutionally deficient performance when he did not advance the argument Berkenes was not a victim because he later ratified the $25,000 transfer. Gary Berkenes testified during the sentencing hearing and stated that Smith invested money without his permission. Crim. Doc. 116 at 29. He stated that he and Smith were sitting in a car and when Smith requested another $25,000, Berkenes replied "No" because he had already invested $300,000 in Smith's

investments. However, Berkenes received a brokerage account statement that showed "a transfer of 25,000 out of the account after I specifically told him that I had 300,000 in there and I didn't want any more invested." *Id.* at 29-30. Berkenes testified that, after that discovery, "I just caved in. I let it go, but I specifically told him that I –when we were sitting in the car, I had 300,000 in there and I didn't want any more in there, at that time anyway, because he had promised me there was an excellent chance of getting a 70 percent return on my investment and I was going to wait until I got something."[19] *Id.* at 30.

The application notes to USSG § 2B1.1 defines a "victim" in part as "any person who sustained any part of the actual loss" and defines "actual loss" as "the reasonably foreseeable pecuniary harm that resulted from the offense." Here, the offense was the unauthorized transfer of $25,000. Smith's argument is that Berkenes is not a person who sustained a part of the reasonably pecuniary harm that resulted from the unauthorized transfer because he later just caved to Smith lacks merit. Counsel is not constitutionally deficient for failing to advance the argument that Smith could erase the fraud he committed by later convincing a victim to accede.[20] The contract law Smith relies on is inapposite. Smith's reply asserts that the "government however cites no agreement between Smith and Berkenes that Smith had to seek prior, express approval before he invested Berkenes' money." Doc. 47 at 22. The Government has no burden to do so. Smith has the burden of demonstrating that counsel's performance was deficient in not challenging Berkenes as a victim after Berkenes testified he specifically told Smith he did

[19] Berkenes' sentencing testimony is consistent with the PSR's recitation of his loss.

[20] Smith attempts to make his own arguments about Berkenes via the appendix to the reply brief submitted by counsel. *See* Doc. 48-1 at 21-23. The appendix includes pages of argument written by Smith as an attempt to get around the court's requirement that a represented party may not file pro se briefs. Smith's unsupported arguments about his interactions with Berkenes that contradict Berkenes' testimony at sentencing do not demonstrate that counsel was deficient.

not authorize the transfer prior to Smith initiating it. Smith fails to establish counsel's performance was deficient.

Smith's reply brief points to an email from the prosecutor that alludes to Berkenes ratification of the transfer and indicates he would not be considered for restitution purposes. Doc. 47 at 23 (citing Doc. 48-1 at 20). The May 15, 2017, email offered tentative restitution figures – a "rough sketch" – prior to Smith's guilty plea and did not address whether Berkenes would be considered a victim under USSG § 2B1.1. Thus, it is not material to counsel's strategic decision whether to continue challenging Berkenes' inclusion as a victim in view of his testimony, the PSR and the record. Smith contends the email is significant because he interprets it as showing Berkenes incurred no loss, but an email about a rough sketch of restitution figures does not demonstrate Berkenes incurred no "actual loss" as defined by § 2B1.1. Ultimately, even if restitution amounts were relevant, the PSR specified a restitution amount for Berkenes and the court assigned Berkenes a restitution amount in the final judgment. [21] *See* Crim. Doc. 37 at ¶ 133; Crim. Doc. 98; Crim. Doc. 117 at 165-67.

As for the Winters, the PSR states that "the Winters ultimately discovered the defendant was moving money to Energae without their knowledge. Prior to January 2013, the Winters told the defendant in no uncertain terms that he could not transfer any more money without their permission. In January 2013, however, the defendant transferred $8,000 to Energae without the Winters' permission." Crim. Doc. 37 at ¶ 44. Brown attests that discovery confirmed that recitation of the Winters' loss. Smith does not point to any reliable evidence to the contrary. Smith does not demonstrate that Brown knew or should have known of any actual evidence that demonstrates that Winter was not a victim. Counsel was reasonable in not challenging including Laura Winter as a victim after her husband passed away, or based on an allegation that she didn't file some sort of

[21] Berkenes' loss was offset in part due to a settlement with the investment firm where Smith was broker related to negligent supervision and fraud. Crim. Doc. 116 at 165-67.

administrative claim. As the Government notes, Smith cites no authority that required Laura Winter to file an administrative claim to be included as a victim under USSG § 2B1.1. The definition of victim within the Guidelines belies Smith's argument.

Again, Smith is trying to relitigate sentencing enhancements rather than establish ineffectiveness of counsel during sentencing. Smith has not demonstrated that counsel's strategic decision to focus his sentencing objections and argument on other matters fell below an objective standard of reasonableness.

2. Whether Smith Was Prejudiced

Smith also has not demonstrated a reasonable probability that the sentencing court would have excluded Berkenes as a victim had Brown made the argument that he ratified the investment and thus was not a victim. As noted, Smith identifies no relevant caselaw demonstrating he was not a victim under USSG § 2B1.1. Similarly, Smith has not demonstrated a reasonable probability that the sentencing court would have excluded Winter. Moreover, even if the number of victims enhancement had been rejected, Smith has not demonstrated that he would have received a lower sentence, given that the sentence imposed remains within the Guideline range for an offense level of 31.

3. Discovery Request

In Smith's motion (Doc. 53) for leave to conduct discovery, he requests copies of documents regarding Berkenes and the Winters for Claim 11. Doc. 53 at 8-9. He also seeks leave to submit interrogatories to the Government asking whether it has: (1) copies of an agreement between Smith and Berkenes regarding their broker-client relationship and (2) documents establishing when Berkenes funds were transferred to Energae and to identify those documents. *Id.* at 11. Smith further seeks leave to submit discovery to determine what records the Government has relating to a January 2013 transfer of $8000. *Id.*

Smith appears to assert that he needs these documents to reply to the Government's argument that Berkenes became a victim when Smith invested $25,000 of Berkenes' funds in Energae without approval. *Id.* at 8. Smith asserts that "[t]he terms of the agreement Smith had with Berkenes for investing money on his behalf is relevant to this claim, as is whether the prosecution advised Smith's counsel that the transfer in question would not be considered as a loss or subject to restitution." *Id.* at 9. Smith does not describe what he expects these documents to show or how they would affect the claim that counsel was ineffective for failing to argue that Berkenes' later ratification of the transfer removed him as a victim as a matter of law. In addition, the terms of the agreement with Berkenes are irrelevant in the face of Berkenes' testimony that he explicitly informed Smith not to invest the $25,000.

In addition, Smith seeks discovery of documents possessed by the Government related to the January 2013 transfer of Winters' account. Doc. 53 at 9. Again, Smith does not explain what these documents would show, nor does he relate the documents to his claim that counsel was ineffective for failing to challenge Laura Winter as one of the ten victims. *See Moore*, 2022 WL 1658811, at *3.

Smith has not shown good cause for the requested discovery. As such, his request will be denied.

H. Ineffective Assistance of Trial Counsel for Failure to Effectively Challenge Obstruction of Justice Enhancement (Claim 12)

On May 9, 2018, the Government filed a supplement to its statement of offense conduct that detailed a series of phone calls between Smith and his brother. Crim. Doc. 36. The Government asserted that these calls demonstrated that Smith encouraged his brother to contact a victim – Christine Kuznicki – to encourage her not to cooperate with the investigation and prosecution of Smith. *Id.* The PSR in turn recommended an obstruction of justice enhancement based on the phone calls. Crim. Doc. 37 at 21-22, ¶¶ 53, 53A, 53B, 63. Smith's counsel lodged an objection to the two-level obstruction

increase. Crim. Doc. 37 at 22, 26. In his sentencing memorandum, Brown asserted that Smith did not obstruct justice, arguing that Smith was simply attempting to inform Kuznicki of assets available to her and attached a letter from a Board member to Brown describing his conversations with Kuznicki. *See* Crim. Doc. 64 at 8; Crim. Doc. 64-1. The sentencing judge reviewed the recorded phone calls and found that the two-level obstruction increase was appropriate. Crim. Doc. 117 at 3-5.

Smith argues in his amended § 2255 motion that counsel was ineffective in presenting the objection to that enhancement. Smith contends that "there were meritorious arguments and evidence that could have been presented regarding whether he knew that the person he supposedly attempted to improperly influence had been deemed or identified to be a victim in the case." Doc. 17 at 12; Doc. 20 at 24. Smith states that trial counsel should have effectively presented this to the court when objecting to the application of the obstruction of justice enhancement. He also states that his appellate counsel should have appealed the issue.

1. Procedural Bar

Smith's amended § 2255 motion contends that this claim relates to Point J from his initial § 2255 motion "at pages 6 and 7" and that "[t]he factual basis for the claim is discussed starting at page 344 of the pro se motion." Doc. 20 at 25 (citing Doc. 1 at 6, 7, 344). In Point J, Smith asserted:

> The defendant requests that the court consider all the facts with regard to the charge of 'obstruction of justice.' The defendant believes that the "obstruction of justice" charge against the defendant should be viewed relative to all the facts regarding Kuznicki's request for information. Kuznicki was required by the State Receiver action to file a claim for what she believed she owned in the Companies by November 30, 2017. The defendant had the information on his Hard Drive that she needed to prove her ownership claim(s). At the request of Company managers and Kuznicki's request, the defendant believed it was best to give Kuznicki the information for which she was asking. It is true that the defendant was not physically well while jailed. This lack of wellness clouded his judgment.

> Despite this fact, his contact with Kuznicki through his brother was designed to help Kuznicki receive proper restitution, not hinder her from filing a claim - a claim against the defendant she said she did not file. Kuznicki told the Company manager she had not filed a claim against the defendant. The obstruction charge can only be viewed relative to the defendant's past financial actions in trying to help Kuznicki and all investors.

Doc. 1 at 7. Smith included ten pages of argument for his recitation of Point J that challenge the underlying facts surrounding contact with Kuznicki and Smith's related conversations with his brother and Smith's motivations. Doc. 1-1 at 170-80. Much of his narrative disputes his intent for having his brother contact Kuznicki, but at another point he concedes that he "may have even asked his brother to look into Kuznicki's complaint that she not complain." Doc. 1-1 at 171.

Among his many factual allegations, Smith asserted that: (1) in a call between a Board Advisor and Kuznicki she stated that she had not complained to the Government: "Was the defendant supposed to be a mind reader in addition to not knowing who was going to be on the government's 'Claimant list'?" and (2) when Smith asked Lahammer if he expected her to be a claimant, he responded he did not know but it did not seem she would be. *Id.* at 173. Smith argued that "Lahammer should have called the government's office to determine if she was a Claimant. If Lahammer had told the defendant that she was a Claimant, NO communication would have been given to Kuznicki by the defendant or the defendant's brother." *Id.*

I previously ruled that Smith procedurally defaulted the claim set out in Point J by failing to pursue it at an earlier stage of litigation. Doc. 12 at 7. Smith' amended § 2255 motion recasts the claim as one of ineffective assistance of counsel for failing to effectively challenge the obstruction enhancement. Specifically, Smith asserts "there were meritorious arguments and evidence that could have been presented regarding whether he knew that the person he supposedly attempted to improperly influence had

been deemed or identified to be a victim in the case." Doc. 17 at 12; *see also* Doc. 20 at 24.

The initial review order noted differences between Claim 12 and Point J and stated that, "[w]hile it appears that this claim may be procedurally barred, I will allow it to proceed past initial review to permit briefing on this issue." Doc. 21 at 15. Smith does not explain how this claim is tied to a common core of operative facts with Point J. The Government argues that "[t]he relation-back doctrine does not apply, especially when the nature and vagueness of Point J is compared with the much more specific allegation in counsel's amended brief concerning 'whether he knew that the person he supposedly attempted to improperly influence had been deemed or identified to be a victim in the case.'" Doc. 42 at 15.

Under *Humphrey*, it appears that there is overlap in operative facts. Point J in the original motion includes allegations about what Smith knew about the identity of the claimants. An analysis of Claim 12's ineffectiveness of counsel claim based on failure to effectively challenge the obstruction enhancement would also consider that identity issue. I conclude Claim 12 sufficiently relates back and will therefore consider the merits of the claim.

2. Merits

In response to Smith's ineffective assistance claim, Brown responds that prior counsel did not initially object to the obstruction enhancement in the PSR, but Brown opted to object to the obstruction two-point increase. Doc. 26 at 8. He states that "I am not aware of any additional admissible evidence that changes the nature of the obstruction allegation or answers them in a way that would have effected the district court's determinations at sentencing." *Id.* at 8-9. Brown states that "[a]dditional 'facts' behind Plaintiff's account of the alleged obstructive behavior were dependent almost completely on Plaintiff testifying as to 1) his motivations and interpretations of the alleged obstructive behavior; and 2) the largely dubious at best claim that Plaintiff brought or held shares for

various clients in Greenbelt Resources and that all his witness contact was referencing." *Id.* at 8. Brown advised Smith not to testify at sentencing, because of his concerns that Smith likely would expose himself to additional charges if he chose to testify. *Id.* at 6, 8. He further alleges that "[t]he conduct alleged was clearly obstructive if even remotely occurring as characterized in the final PSR. The district court's factual findings would have been reviewed on direct appeal for abuse of discretion. No real basis existed to appeal the issue in terms of likelihood of success on appeal. I deemed such appeal issue frivolous." Doc. 26 at 9.

The Government argues Smith has established neither deficient performance nor prejudice for this ineffective assistance claim. Doc. 42 at 15. The Government notes that Brown stated the conduct alleged was clearly obstructive, Smith would have had to testify to rebut the obstruction evidence, and there was little likelihood of success on appeal. *Id.* The Government argues that "counsel should not be faulted for failing to raise meritless issues, for making strategic decision, or matters that are unlikely to succeed." *Id.*

I agree with the Government that Smith has not established deficient performance with respect to counsel's purported failure to argue about whether Smith knew that the person he supposedly attempted to improperly influence had been deemed or identified to be a victim in the case. By his own admission, Smith knew it was a possibility, given that he asserts he inquired whether she was a claimant. Smith claims Lahammer told Smith he did not know whether she would be deemed a claimant. The obstruction enhancement did not require Smith to know that Kuznicki was a claimant. To the contrary, he was accused of trying to dissuade her from becoming one. In addition, Brown's strategic decision not to call Smith to testify as to his knowledge and motivation is well within the wide range of reasonable professional assistance. Counsel cannot be deemed to have been constitutionally deficient for failing to argue and present evidence at sentencing of whether Smith knew she was a claimant.

Smith's reply directs the court to four pages of pro se argument included in the appendix, but Smith's pro se unsubstantiated arguments are not factual evidence. Doc. 47 at 24; Doc. 48-1 at 24-28. Those arguments reveal that Smith is really trying to relitigate the application of the obstruction enhancement. However:

> The movant ignores a further and deeper problem that encompasses these proceedings. Aside from laboring under the mistaken assumption that this is an entirely independent action with no history, the movant misunderstands the scope of proceedings under 28 U.S.C. § 2255. Any entitlement to collateral relief is severely limited. These proceedings are not a substitute for earlier proceedings, and, consequently, the movant cannot reformulate arguments, reconstruct the record or relitigate issues that have already been decided.

Rubashkin v. United States, No. 08-CR-1324-LRR, 2016 WL 237119, at *19 (N.D. Iowa Jan. 20, 2016).

In addition, Smith fails to establish a reasonable likelihood that the sentencing judge would have ruled differently had Brown presented argument or evidence on whether Smith knew Kuznicki was a claimant. During sentencing, the court considered the obstruction issue and stated:

> The Court finds by a preponderance of the evidence that defendant did obstruct justice by attempting to intimidate, threaten, or otherwise unlawfully influence a victim who also was a witness against him. The conduct that constitutes obstruction of justice is summarized in presentence investigation report Paragraph 53 and 53A. The conversations were also captured on audio recordings, and *I went back and listened to each and every one of them*. The defendant didn't directly contact the victim witness. He had his brother do the dirty work. Defendant stated to his brother why he needed to contact this victim. He told his brother that if she didn't withdraw her complaint against him, it would mean an additional 2 years in prison. The timing of his conversation fell within the timeframe, from about June 2017 to February 2018. It was after his arrest on these charges, April -- which was April 26th of 2017, and during the time of his plea and preparation of the presentence investigation report. The defendant by this time had some knowledge of how the advisory guidelines worked because,

> of course, he had already been prosecuted and sentenced under the advisory guidelines in the case that Judge Strand handled, 16-CR-2002-2.
>
> So defendant had his brother contact the victim multiple times. He told his brother to do the contacts by phone and not in writing. And that, I think, is very significant, because it's -- it may be harder to prove what was said and not said if the contact is oral. If you've got a document, it's easier to prove what was going on. There was an indication during these conversations between the defendant and his brother that there was some danger in contacting this victim and trying to talk her out of pursuing her complaint against him. So 2 levels are properly scored by the United States Probation Office at Paragraph 63.

Crim. Doc. 117 at 3-5 (emphasis added). The judge clearly rejected Smith's assertion of an innocent reason for contacting Kuznicki. The transcript makes it clear that she based her ruling on listening to and interpreting the calls herself. There is no reasonable probability of a different result for the obstruction enhancement had Brown presented or made any of the arguments that Smith has scattered throughout his filings. The sentencing judge found that the enhancement was appropriate based on Smith's conduct and no argument could undo that conduct. Moreover, even if the obstruction enhancement had been rejected, Smith has not demonstrated that Smith would have received a lower sentence, especially given that the sentence imposed remains within the Guideline range for an offense level of 31.

Smith also asserts that counsel was constitutionally deficient in not appealing the application of the obstruction enhancement. "Counsel is not required to raise every potential issue on appeal." *Anderson v. United States,* 393 F.3d 749, 754 (8th Cir. 2005). "Reasonable appellate strategy requires an attorney to limit the appeal to those issues which he determines to have the highest likelihood of success." *Parker v. Bowersox*, 94 F.3d 458, 462 (8th Cir. 1996). The Supreme Court recognized "the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." *Jones v. Barnes*, 463 U.S. 745, 751-52 (1983). Brown deemed an appeal of the obstruction enhancement to be frivolous. I agree, as Smith has

not demonstrated a basis to conclude the district court committed clear error in finding by a preponderance of evidence that Smith attempted to obstruct justice. *See United States v. Shaw*, 965 F.3d 921, 928 (8th Cir. 2020) (holding court did not clearly err in applying the obstruction of justice enhancement when witnesses testified defendant told them "not to tell on her"). Brown cannot be deemed constitutionally deficient in failing to raise meritless arguments on appeal. Claim 12 is denied.

3. Discovery Request

For Claim 12, Smith requests jail records for phone calls between Smith and his brother for the time period June 2017 to February 2018. Doc. 53 at 10. He asserts that "jail phone recordings of conversations between Mr. Smith and his brother would demonstrate the information in paragraphs 53 and 53A of the PSIR regarding what he and his brother discussed was taken out of context." *Id.* That request is denied.

Smith's conclusory allegations about the recordings do not establish good cause. He does not provide specific allegations of fact or reason to believe that discovery would show that he would be able to demonstrate he is entitled to relief. Smith offers no reason for the court to believe that, if the discovery were granted, he would be able to demonstrate he is entitled to habeas relief. *See Moore*, 2022 WL 1658811, at *3. Any possible demonstration that the conversations were taken out of context is not material to Smith's current claim that counsel was ineffective for failure to argue whether Smith knew that the person he was alleged to have attempted to improperly influence was identified as a victim in the case. Smith is trying to relitigate the obstruction enhancement as if he is at a sentencing hearing but the sentencing judge listened to all of the recordings and made her corresponding factual findings.

V. CERTIFICATE OF APPEALABILITY

In a § 2255 proceeding before a district judge, the final order is subject to review on appeal by the court of appeals for the circuit in which the proceeding is held. 28

U.S.C. § 2253(a). However, unless a circuit judge issues a certificate of appealability, an appeal may not be taken to the court of appeals. § 2253(c)(1)(A). A district court possesses the authority to issue certificates of appealability under § 2253(c) and Federal Rule of Appellate Procedure 22(b). *See Tiedeman v. Benson*, 122 F.3d 518, 522 (8th Cir. 1997). Under § 2253(c)(2), a certificate of appealability may issue only if a movant has made a substantial showing of the denial of a constitutional right. *See Miller-El v. Cockrell*, 537 U.S. 322, 335–36 (2003); *Tiedeman*, 122 F.3d at 523. To make such a showing, the issues must be debatable among reasonable jurists, a court could resolve the issues differently, or the issues deserve further proceedings. *See Miller-El*, 537 U.S. at 335–36 (reiterating standard).

Courts reject constitutional claims either on the merits or on procedural grounds. "'[W]here a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: [t]he [movant] must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.'" *Miller-El*, 537 U.S. at 338 (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). When a motion is dismissed on procedural grounds without reaching the underlying constitutional claim, "the [movant must show], at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 484.

Having thoroughly reviewed the record in this case, I find that Smith failed to make the requisite "substantial showing" with respect to any of the claims raised in his § 2255 motion. *See* 28 U.S.C. § 2253(c)(2); FED. R. APP. P. 22(b). Therefore, a certificate of appealability will not issue. If he desires further review of his § 2255 motion, Smith may request issuance of the certificate of appealability by a judge of the Eighth Circuit Court of Appeals in accordance with *Tiedeman*, 122 F.3d at 520–22.

VI. CONCLUSION

For the reasons set forth herein,

1. Smith's amended motion (Doc. 17) pursuant to 28 U.S.C. § 2255 is **denied** as to all claims and this action is **dismissed with prejudice.**[22]
2. Smith's motion (Doc. 53) for leave to conduct discovery is **denied.**
3. The Clerk of Court shall **close this case.**
4. A certificate of appealability will **not issue.**

IT IS SO ORDERED this 22nd day of July, 2024.

Leonard T. Strand
United States District Judge

[22] As I have repeatedly noted over the pendency of the various cases concerning Smith, his habit is to clutter the docket with extremely-lengthy filings, seemingly believing that a sheer volume of words can somehow overcome the weight of the evidence that led to his convictions. Based on past experience, I suspect Smith will claim that this order does not cover every argument he has made (or believes he made or wishes he would have made). Thus, I want to be clear that I have considered all of Smith's filings and that each and every one of his surviving claims and arguments are denied. Any motion to reconsider filed by Smith relating to any issue or argument previously raised will be summarily denied. If Smith feels this order is in error, he should seek a certificate of appealability from the Eighth Circuit Court of Appeals.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 24-3040

Darrell Smith

Appellant

v.

United States of America

Appellee

Appeal from U.S. District Court for the Northern District of Iowa - Eastern
(6:20-cv-02105-LTS)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

January 21, 2025

Order Entered at the Direction of the Court:
Acting Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Maureen W. Gornik

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 24-3040

Darrell Smith

Appellant

v.

United States of America

Appellee

Appeal from U.S. District Court for the Northern District of Iowa - Eastern
(6:20-cv-02105-LTS)

MANDATE

In accordance with the judgment of November 19, 2024, and pursuant to the provisions of Federal Rule of Appellate Procedure 41(a), the formal mandate is hereby issued in the above-styled matter.

January 29, 2025

Acting Clerk, U.S. Court of Appeals, Eighth Circuit

FMBROWN
LAW FIRM

EXHIBIT 1
1 OF 23

F. MONTGOMERY BROWN
hskrfan@fmbrownlaw.com

May 25, 2022

Darrell Smith, #316355-029
Federal Prison Camp
P.O. Box 1000
Duluth, MN 55814

Re: Correspondence concerning Motion for Summary Judgment, filed by Leonard Strand, Emails and Orders

Darrell:

After an exhaustive search, enclosed please find the only correspondence we were able to identify concerning the Summary judgment issue, with attached pleadings and email. We have made duplicate scanned images for your computer file, which we are retaining.

Please make sure to file your petition with the court releasing funds for payment of the $37,608.92 still due FM Brown Law Firm, PLLC.

Sincerely,
FMBROWN LAW FIRM PLLC

F. Montgomery Brown

Enclosures: As Noted

EXHIBIT 1 2 OF 23

URGENT / IMPORTANT 8/4/2018

Mr Brown,

PLEASE REVIEW THE ENCLOSED LAWSUIT FROM ALLIANT ENERGY AGAINST BFL ELECTRIC, A WHOLLY OWNED SUBSIDIARY OF PERMIAN LEASING. THE ATTORNEY REPRESENTING ALLIANT ENERGY IS LEONARD T. STRAND - THE SAME JUDGE WHO SENTENCED ME IN THE TAX CASE. THIS IS A "CONFLICT OF INTEREST."

1) STRAND WAS FULLY AWARE THAT PERMIAN PURCHASED BFL, GIVEN THAT BARNHILL FILED A MOTION TO WITHDRAW CITING PERMIAN AS THE NEW PURCHASING AGENT FOR BFE.

2) BUT, INSTEAD OF SENDING THE JUDGMENT PAPERWORK TO PERMIAN'S ADDRESS, IT ALL WENT TO BFE'S OLD ADDRESS!

3) WE, PERMIAN, MET WITH ALLIANT ENERGY IN NOVEMBER 2011. THOSE PRESENT FOR PERMIAN WERE MYSELF, RANDY LESS, & JERRY KRAUSE. THOSE PRESENT FOR ALLIANT ENERGY WERE 15 MEMBERS OF ALLIANT'S STAFF INCLUDING SHUPP, AND PENDLETON, BOTH HIGH LEVEL MANAGERS OF ALLIANT ENERGY.

4) THE CONSULTANT AGAINST THE FORMER OWNERS OF BFE, JEFF CARTER AND W. DUNCAN ALLIANT PAID CARTER AND BURNS, THEY SAID, $362,289.04 MORE THAN THEY SHOULD HAVE IN 2009.

EXHIBIT 1

3 of 23

5) Carter filed a counter suit. The lawsuit was to be heard April 13th, 2012 - ots scheduled for a hearing;

6) At the meeting with Allied Energy, both Shupp and Runion stated they would "drop the lawsuit and work with Permian going forward". Lesi and Kumar Com Attn to the conversation and its meaning.

7) Instead, Allied filed a Summary Judgment - sending the filing to the former owners, Jeff Carter and Warren Duncan. Permian did NOT receive a copy. However after the summary judgment had been filed, Allied Energy Tim contacted Ray Straoui, Permian's Attorney and sent him the paperwork for the summary judgment. But, Straoui said he never received notice or request for summary judgment.

8) Straoui and Barnhill should have filed a petition for improper notice - instead, Straoui said there "was nothing we could do" in court / favor

9) The bottom line is this.

A) Straoui knew Permian Purchased BEC with Barnhill - filing to withdraw

B) Straoui sentenced me to 13 months for tax evasion (Payroll taxes)

Even though it was clearly before him that both Permanente and BFC were involved in the tax matter (PSI).

10) Strand representation took place during the tax periods.

Please advise as this should be returned to all concerned.

(must have been?)

Additionally, Verchick was fully aware that Strand represented Alliant Energy legal matters in 2012. During the proffer sessions between Lahammer and I in ~~September November 20~~ September 2017, I brought up the fact that Alliant Energy had cheated BFC with their filing, and Verchick said he "really didn't want to hear about that", and changed the subject.

So, at least Verchick 1) knew that BFC was cheated by Alliant, and 2) knew the representation history of Strand.

Please advise what needs to be done. Barnhill and Strand should have been sued for 1) withdrawing and 2) for not filing a court motion for improper notice to Permanente the new owner. Permanente received no mailing!

EXHIBIT 1
5 OF 23

Darrell D. Smith

From:	Darrell D. Smith, IAR, RR <corpgold@netconx.net>
Sent:	Wednesday, March 21, 2012 12:09 PM
To:	'Matt Kinley'; 'Ken Boyle'
Cc:	'Ray Stefani'
Subject:	FW: Interstate Power & Light Company v. BFC Electric Co LC
Attachments:	Ct Order entering Judgment -.pdf; Ct Order - Def needs to file Resist by 2-27-12 - filed 2-15-12.pdf; Motion for Summary Judgment - filed 1-25-12.pdf; Decree and Entry of Judgment - 3-6-12.pdf; Notice of Filing Proposed Decree and Entry of Judgm't - filed 3-2-12.pdf; Statement of Undisputed Facts - filed 1-25-12.pdf; Brief in Support of MSJ - filed 1-25-12.pdf; Motion to Withdraw by Atty Barnhill - filed 3-12-12.pdf
Categories:	Red Category

From: Ray Stefani [mailto:RstefaniII@gsmlawyers.com]
Sent: Wednesday, March 21, 2012 10:16 AM
To: corpgold@netconx.net
Cc: Jessica Akery; uspt@qwestoffice.net
Subject: Interstate Power & Light Company v. BFC Electric Co LC

Darrell:

Per our discussion this morning, I attach the Motion for Summary Judgment with supporting documentation. Also, I attach Attorney Barnhill's Motion to Withdraw. Also, I attach the Judgment entry. Interestingly, I did not find a Court Order granting Ms. Barnhill's Motion.

Ray Stefani II
319-364-1535 – office
319-389-8284 – cell phone

From: Darrell D. Smith, IAR, RR [mailto:corpgold@netconx.net]
Sent: Wednesday, March 21, 2012 8:59 AM
To: Ray Stefani
Subject: FW: Payment Agreement

From: Penticoff, Jeanine [mailto:JeaninePenticoff@alliantenergy.com]
Sent: Wednesday, March 21, 2012 8:44 AM
To: corpgold@netconx.net
Cc: Shupp, Steven; Smith, Nick
Subject: RE: Payment Agreement

EXHIBIT
#127 ADM

EXHIBIT 1 6 of 22

Darrell: I can assure you that is has never been IPL's intent to put the BFC plant out of operation, and we are disappointed to hear any inference to the contrary. We have been more than willing to work with BFC throughout this process. We believe that our settlement proposal with two year repayment (even after having received a valid and enforceable judgment) is further indication of our willingness to work with BFC and its owners to resolve this matter. We have sent you that agreement, and upon receipt of an execution copy (with original to follow) and payment of the initial $50,000 amount, we will cease collection activities provided that the agreement is adhered to.

Our counsel has also contacted yours and indicated that if Permeate can supply documentation from the bank that BFC is not on the account, we would revise our collection efforts to avoid that account.

It is not our intention to withhold payment on the Power Purchase Agreement process. Unfortunately, a technical issue (not related to the judgment process) occurred with the payment this month. I have been in touch with the various areas that are involved with this process to help expedite it as much as possible. I know Nick has been in touch with you and will keep you posted as this proceeds. We have many employees working on this on your behalf.

Please contact me if you have any additional questions. Thank you.

--Jeanine

From: Darrell D. Smith, IAR, RR [mailto:corppold@netconx.net]
Sent: Tuesday, March 20, 2012 10:37 PM
To: Penticoff, Jeanine
Subject: RE: Payment Agreement

Jeanine

Thanks for the response.

The problem, of course, is that even when power is paid, the account is then swept clean of funds.

This, as an effect, is non-payment. And, even though the funds go to a court "holding tank" (whatever that is), they do not go to us to assist us in operating the plant.

Thus, we cannot pay Alliant to meet the terms of the contract.

When we sign this additional contract there is no assurance this won't continue.

We have a power purchase agreement in place – but this means nothing in the face of a swept account when judgments can be entered without review. We should have reviewed that case. It is my failure thinking I had more time. I have been up to 1 to 2 in the morning, months on end, preparing USDA and other documents for model replication.

But, I thought we were dealing with a "power purchasing partner" who had a greater interest in seeing that plant operate, and who was willing to give us time to assess a specific situation.

The court date was in April, and I had it on my schedule to meet with Mr. Shupp the last part of March. I communicated this time frame to Mr. Shupp. I don't think either he nor you were aware of the things Interstate was doing though. But, your legal department had the management structure change in their possession (you asked us for it on their behalf via email and it was emailed). I would have thought they would have tried to contact us.

It all seems much, much "too well planned"

EXHIBIT 1
7 of 22

In addition, it was Permeate's account that was swept, not BFC's. Collins Community Credit Union, where BFC's account is held, also called today and said they received notice of judgment against that account. BFC's funds actually pass through Bank of the West, not Wells Fargo or Collins. I don't have that account number, but, I suppose I can find it since we, Permeate, were blackmailed into putting money into it (i.e., "put money in or we will shut BFC down") nearly every month this past year.

The problem with this "Carter team" is that they openly communicated to their friends and associates that they would allow "Permeate Refining to pour money into BFC only to watch them fail, at which time we [Carter, et. al.] would take BFC back". This was communicated by Carter's employees more than once.

As it were, we defended Alliant Energy in the face of Carter and his associates.

In light of the events today, Carter is now proclaiming a "victory", that is, "Alliant wants the plant to fail – proving my point (exact words)". It is my opinion that Carter would rather see the plant fail and his comments regarding Alliant justified, rather than see the plant successful. This becomes a war between you and Jeff Carter. Permeate came in to help.

Our company is being damaged now, not Jeff Carter and his multiple companies.

And it is Permeate who is paying for Carter's problems with Interstate Power.

Permeate stepped in to help, to stop being blackmailed, and to put the plant back together. And, it is Permeate's investors that are being disenfranchised based on what we witnessed today.

Darrell

From: Penticoff, Jeanine [mailto:JeaninePenticoff@alliantenergy.com]
Sent: Tuesday, March 20, 2012 6:26 PM
To: corpgold@netconx.net
Cc: Shupp, Steven; Smith, Nick
Subject: RE: Payment Agreement

Darrell: We are not withholding payment for power as part of this process. My understanding was that you were to receive payment today. I will check with Nick tomorrow to confirm the status and circle back to you. Thank you for letting me know.

--Jeanine

From: Darrell D. Smith, IAR, RR [mailto:corpgold@netconx.net]
Sent: Tuesday, March 20, 2012 5:50 PM
To: Penticoff, Jeanine
Subject: RE: Payment Agreement

Jeanine

I am concerned.

If Alliant is going to withhold payment for power produced when problems arise, what good are agreements?

If you recall, we were told a power payment was forthcoming yesterday, and today we discover this is not the case.

We met in good faith with your department in October. I came away from that meeting believing we had at least until March, before the expected "trial" to work things through. I communicated this understanding.

At that meeting Steve said it was in "Alliant's best interest to see the plant operate". We met with your team. Your legal department requested copies of the "new management structure". We emailed them.

But, Interstate's counsel did not use these documents as a basis for contact.

Instead, after receiving the new management documents as emailed, Interstate requested a summary judgment allowing the court to send notices to individuals who were no longer involved with the Plant.

On our end, we proceeded to act in good faith and put $3 million into the plant to get it operational again.

Reference the 20 families who work at the plant, there is no game to compensate those families relative to potential loss of their jobs.

I do not know the details of this "overpayment" problem. And, now I do not know many other things.

I will get with you tomorrow on this agreement

Darrell Smith
515-422-3403

From: Penticoff, Jeanine [mailto:JeaninePenticoff@alliantenergy.com]
Sent: Tuesday, March 20, 2012 3:37 PM
To: Darrell D. Smith, IAR, RR
Cc: Shupp, Steven
Subject: Payment Agreement

Darrell: Thank you for your conversation today. Please find attached a draft of the proposed settlement agreement as well as an amortization schedule showing what payments will be over the length of the agreement. We prefer that the payment be either via wire or ACH. The instructions are noted in the attached agreement.

If you have any questions, do not hesitate to contact either Steve or me.

Thank you –
–Jeanine

Jeanine Penticoff
Director – Energy Efficiency, Economic Development and Account Management
Alliant Energy
319-786-4624
319-551-3134 (cell)

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Plaintiff provided a detailed account of the amount they were billed by BFC, the correct charges, and the difference between what IPL paid and the correct billing rate. Exhibit B. In addition, Exhibits C, D, and E document a series of communications between senior representatives of IPL and BFC. The documents illustrate that BFC, via Jeff Carter, agreed to a repayment plan proposed by IPL. Exhibits D, E. IPL's proposal, as documented in a letter to BFC signed by Vern Gebhart, IPL's Vice President of Energy Delivery Operations, was to recover the overpayment over five years at $6038.15 per month. Exhibit C.

CONCLUSIONS OF LAW

"Summary judgment is appropriate if there is no genuine issue as to any material fact, and the moving party is entitled to summary judgment as a matter of law." *Kolarik v. Cory Intern. Corp.*, 721 N.W. 2d 159, 162 (Iowa 2006) (citing Iowa R. Civ. P. 1.981(3)). A fact is considered material only if it affects the outcome of the suit. *Estate of Harris v. Papa John's Pizza*, 679 N.W. 2d 673, 677 (Iowa 2004)(citing *Phillips v. Covenant Clinic*, 625 N.W. 2d 714-718 (Iowa 2001)). The moving party bears the burden of showing the material facts are undisputed, and non-moving party must be given the benefit of any legitimate legal inference in evidence. *Faeth v. State Farm Mut. Auto Ins. Co.*, 707 N.W. 2d 328, 331 (Iowa 2005).

"When two legitimate, conflicting inferences are present at the time of ruling upon the summary judgment motion, the court should rule in favor of the nonmoving party." *Eggiman v. Self-Insured Services Co.*, 718 N.W. 2d 754, 763 (Iowa 2006)(citing *Daboll v. Hoden*, 222 N.W. 2d 727, 733 (Iowa 1974). ("When reasonable minds could draw different inferences and conclusions, even if the facts are undisputed, the matter must be reserved for trial."). The court must consider every reasonable, legitimate inference that could be reasonably deduced on behalf of the nonmoving party. *Phillips* at 717. However, an inference is not legitimate if it is "based on speculation or conjecture." *Id.*,citing *Butler v. Hoover Nature Trail, Inc.*, 530 N.W. 2d 85, 88 (Iowa Ct. App. 1994). Speculation does not create a genuine issue of material fact. *Hlubeck v. Pelecky*, 701 N.W. 2d 93, 96 (Iowa 2005).

"To obtain a grant of summary judgment on some issue in an action, the moving party must affirmatively establish the existence of undisputed facts entitling that party to a particular result under controlling law." *McVey v. National Organization Service, Inc.*, 719 N.W. 2d 801, 802 (Iowa 2006) (citing *Goodwin v. City of Bloomfield*, 203 N.W. 2d 582, 588 (Iowa 1973)). "To affirmatively establish uncontroverted facts that are legally controlling as to the outcome of the case, the moving party may rely on admissions in the pleadings...affidavits, depositions, answers to interrogatories by the nonmoving party, and admissions on file." *Id.* For their part, the resisting party "may not rest upon the mere allegations of his pleading but must set forth specific facts showing the existence of a genuine issue for trial." *Hlubeck* at 95.

This Court reviewed the Motion for Summary Judgment and the supporting documents. Plaintiff's claims as to BFC's agreement to repay are supported by the

documents presented and clearly indicate IPL was overcharged, BFC agreed to reimburse IPL's overpayment, and then refused to do so. Defendant BFC has failed to set forth any genuine issue of material fact that would preclude entry of judgment in favor of Plaintiff. See Iowa R. Civ. P. 1.981 (2011). Upon review of the file and being fully advised in the premises, the Court finds that the Motion for Summary Judgment should be **GRANTED** for the reasons stated therein.

IT IS THEREFORE ORDERED that Plaintiff's Motion for Summary Judgment is **GRANTED**.

Plaintiff is directed to submit a proposed decree that enters summary judgment consistent with the relief sought in the Petition and Motion and that sets forth an accurate procedural history for this action.

Clerk to notify.
pdf/krs

MAILED/DELIVERED ON 3/1/12
BY: B TO: K. Barnhill
R. Strand

[signature]

JUDGE, SIXTH JUDICIAL DISTRICT OF IOWA

EXHIBIT 1 11 of 22

IN THE IOWA DISTRICT COURT IN AND FOR LINN COUNTY

INTERSTATE POWER AND LIGHT COMPANY

Plaintiff,

v.

BFC ELECTRIC COMPANY, L.C. a/k/a BFC ELECTRIC COMPANY

Defendant.

NO. LACV072268

ORDER

THIS 15 th DAY OF FEBRUARY, 2012, the Court finds that a Motion for Summary Judgment was filed by Plaintiff on January 25, 2012. Defendant has not responded to the Motion for Summary Judgment in the time permitted by Iowa Rule of Civil Procedure 1.981.

ACCORDINGLY, IT IS THEREFORE ORDERED that the matter shall be submitted to the Court on February 27, 2012, for decision without oral argument. If Defendant intends to file a resistance to the Motion for Summary Judgment, Defendants should do so on or before February 27, 2012.

Clerk to notify.

pdf/krs

MAILED/DELIVERED ON 2/16/12
BY: [illegible] TO: L. Stroh [illegible]
K. Boeckholt [illegible]

JUDGE, SIXTH JUDICIAL DISTRICT OF IOWA

EXHIBIT

#127 part II

EXHIBIT 1
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IN THE IOWA DISTRICT COURT FOR LINN COUNTY

INTERSTATE POWER AND LIGHT COMPANY Plaintiff, vs. BFC ELECTRIC COMPANY, LC a/k/a BFC ELECTRIC CO Defendant.	No. LACV72268 MOTION TO WITHDRAW

COMES NOW, the undersigned as attorney for Defendant BFC Electric Company, LC a/kk/a/ BFC Electric ("BFC" hereinafter) and for the Motion to Withdraw states to the court as follows:

1. Substantial membership interests in BFC were purchased by Permeate Refining LLC "Permeate". This was not an asset sale.
2. Permeate Refining accepted the liability for all liabilities disclosed on the purchase and sale agreement documentation.
3. Permeate commenced operation of the BFC facility in August, 2011.
4. This lawsuit was disclosed and Permeate has been timely notified of the status of each phase of this lawsuit but has declined to act.
5. The undersigned does not represent Permeate Refining,LLC and has no authority to act for Permeate.

WHEREFORE, the undersigned respectfully moves the court for an order permitting her to withdraw. Permeate has it own counsel so that BFC is not and should not be proceeding pro se.

EXHIBIT 1
13 of 23

Original filed

Kathryn Barnhill AT0000624
Barnhill & Associates, Iowa PLLC
1721 25th Street, Suite 150
West Des Moines, Iowa 50266
(515) 223-7230
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ATTORNEY FOR DEFENDANT

Copy to:
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Mark A. Roberts
Simmons Perrine, PLC
115 Third Street, S.E., Suite 1200
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Phone: (319) 366-7641
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Email: lstrand@simmonsperrine.com
ATTORNEY FOR
PLAINTIFF

Permeate Refining LLC
205 Locust St. SE
Hopkinton, IA 52237

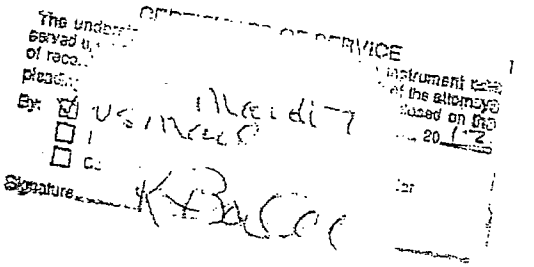

EXHIBIT 1
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IN THE IOWA DISTRICT COURT IN AND FOR LINN COUNTY

INTERSTATE POWER AND LIGHT COMPANY,	)	
Plaintiff,	)	NO. LACV72268
v.	)	
BFC ELECTRIC COMPANY LC, a/k/a BFC Electric Co.,	)	NOTICE OF FILING PROPOSED DECREE AND ENTRY OF JUDGMENT
Defendant.	)	

Pursuant to the Court's order of February 29, 2012, plaintiff Interstate Power and Light Company submits the attached, proposed decree and entry of judgment.

LEONARD T. STRAND AT0007675
Simmons Perrine Moyer Bergman PLC
115 Third Street SE, Suite 1200
Cedar Rapids, IA 52401
Phone: 319-366-7641
Facsimile: 319-366-1917
E-Mail: lstrand@simmonsperrine.com

ATTORNEYS FOR PLAINTIFF

Copy to:

Kathryn Barnhill
Barnhill Law Offices
1721 25th Street, Suite 150
West Des Moines, Iowa 50266

Attorney for the Defendant

PROOF OF SERVICE
The undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses disclosed on the pleadings on 5-3, 20[illegible] by:
✓ US Mail ___ FAX
___ Hand Delivered ___ Overnight Courier
___ Federal Express ___ Other:
Signature:

EXHIBIT 15 of 22

IN THE IOWA DISTRICT COURT IN AND FOR LINN COUNTY

INTERSTATE POWER AND LIGHT COMPANY,	)	
Plaintiff,	)	NO. LACV72268
v.	)	
BFC ELECTRIC COMPANY LC, a/k/a BFC Electric Co.,	)	PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
Defendant.	)	

FILED
2012 JAN 23 AM 10:51
CLERK OF DISTRICT COURT
LINN COUNTY, IOWA

Pursuant to Iowa Rule of Civil Procedure 1.981, plaintiff Interstate Power and Light Company ("IPL") moves the Court for entry of summary judgment in its favor on its claim against defendant BFC Electric Company LC, a/k/a BFC Electric Co. ("BFC"). IPL has contemporaneously filed a brief, a statement of undisputed facts and relevant evidentiary materials in support of this motion and incorporates those materials herein.

WHEREFORE, for the reasons set forth in its brief and other supporting papers, IPL respectfully requests that the Court enter judgment against BFC and in favor of IPL in the amount of $362,289.06, together with interest as provided by law, and the costs of this action.

EXHIBIT 1
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LEONARD T. STRAND AT0007675
Simmons Perrine Moyer Bergman PLC
115 Third Street SE, Suite 1200
Cedar Rapids, IA 52401
Phone: 319-366-7641
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ATTORNEYS FOR PLAINTIFF

Copy to:

Kathryn Barnhill
Barnhill Law Offices
1721 25th Street, Suite 150
West Des Moines, Iowa 50266

Attorney for the Defendant

PROOF OF SERVICE
The undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses disclosed on the pleadings on May 25, 2021 by:
X US Mail ___ FAX
___ Hand Delivered ___ Overnight Courier
___ Federal Express ___ Other:

Signature: [signature]

EXHIBIT 1

17 OF 22

IN THE IOWA DISTRICT COURT IN AND FOR LINN COUNTY

FILED
2012 JAN 25 AM 10:51
CLERK OF DISTRICT COURT
LINN COUNTY, IOWA

INTERSTATE POWER AND LIGHT COMPANY,	)	
Plaintiff,	)	NO. LACV72268
v.	)	
BFC ELECTRIC COMPANY LC, a/k/a BFC Electric Co.,	)	STATEMENT OF UNDISPUTED FACTS IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
Defendant.	)	

Plaintiff Interstate Power and Light Company ("IPL") submits the following statement of undisputed facts in support of its motion for summary judgment against defendant BFC Electric Company LC, a/k/a BFC Electric Co. ("BFC"):

1. On March 7, 1997, IPL and BFC entered into an agreement under which BFC agreed to sell, and IPL agreed to buy, energy produced by BFC at a facility in Cedar Rapids. *See* Exhibit A hereto.

2. In 2009, IPL discovered that for more than a year, it had been paying BFC at the incorrect rate. As such, it supplied BFC with an analysis showing that the total amount of the overpayment was $362,289.06. *See* Exhibit B hereto.

3. On September 29, 2009, IPL's Vern Gebhart wrote to BFC's Jeff Carter and offered to allow BFC to repay IPL over a five year period, with payments of $6,038.15 per month. *See* Exhibit C hereto.

4. On December 14, 2009, Mr. Carter responded to this offer with a one line letter:

> Per my email this morning, I am formally accepting the terms referenced in your letter dated September 29, 2009.

See Exhibit D hereto.

EXHIBIT 1
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5. In a subsequent email message to IPL's Tom Aller, Mr. Carter confirmed: "We have accepted Vern Gebhart's repayment terms and process." *See* Exhibit E hereto.

6. BFC has made none of the promised payments. As such, IPL is still owed $362,289.06 to recover the amounts it overpaid to BFC. *See* Petition.

LEONARD T. STRAND AT0007675
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ATTORNEYS FOR PLAINTIFF

Copy to:

Kathryn Barnhill
Barnhill Law Offices
1721 25th Street, Suite 150
West Des Moines, Iowa 50266

Attorney for the Defendant

PROOF OF SERVICE
The undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses disclosed on the pleadings on [illegible], 20[illegible] by:
☒ US Mail ☐ FAX
☐ Hand Delivered ☐ Overnight Courier
☐ Federal Express ☐ Other:

Signature: [illegible]

EXHIBIT 1

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IN THE IOWA DISTRICT COURT IN AND FOR LINN COUNTY

INTERSTATE POWER AND LIGHT COMPANY, Plaintiff, v. BFC ELECTRIC COMPANY LC, a/k/a BFC Electric Co., Defendant.	)	NO. LACV72268 BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

2012 JAN 25 AM 10:51
CLERK OF DISTRICT COURT
LINN COUNTY, IOWA

Plaintiff Interstate Power and Light Company ("IPL") submits the following brief in support of its motion for summary judgment against defendant BFC Electric Company LC, a/k/a BFC Electric Co. ("BFC"):

INTRODUCTION

IPL filed this action on April 8, 2011, to recover certain overpayments it had made to BFC in the course of performing a written contract between the parties. Trial is scheduled to begin on April 9, 2012. However, discovery has shown that BFC admitted to the amount of the overpayment and agreed to a payment plan to reimburse IPL for the amount owed. Because BFC has failed to make the promised payments, IPL is entitled to judgment as a matter of law.

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IN THE IOWA DISTRICT COURT IN AND FOR LINN COUNTY

INTERSTATE POWER AND LIGHT COMPANY, Plaintiff, v. BFC ELECTRIC COMPANY LC, a/k/a BFC Electric Co., Defendant.	)	NO. LACV72268 DECREE AND ENTRY OF JUDGMENT

Pursuant to its order of February 29, 2012, the Court hereby enters the following decree:

PROCEDURAL HISTORY

Plaintiff Interstate Power and Light Company ("IPL") filed this action against defendant BFC Electric Company LC, a/k/a BFC Electric Co. ("BFC") on April 8, 2011. The petition alleges that IPL made inadvertent overpayments to BFC during the performance of a written contract between the parties and that BFC refused to return the overpaid funds to IPL. The petition further alleges that the total amount of the overpayments is $362,289.06 and seeks judgment in that amount, plus interest as provided by law and the costs of this action. BFC was duly served with original notice and filed an answer on May 5, 2011. BFC's answer denied IPL's allegations.

On January 25, 2012, IPL filed a motion for summary judgment, supported by a brief, a statement of undisputed facts and various evidentiary exhibits. IPL demonstrated that it had overpaid BFC in the total amount of $362,289.06. IPL further demonstrated that it had offered to enter into an agreement with BFC under which BFC would repay this amount over five years at the rate of $6,038.15 per month and that BFC accepted this offer in writing. Finally, IPL demonstrated that BFC has failed to make any of the agreed payments.

BFC did not file a resistance to IPL's motion for summary judgment within the time specified by Iowa Rule of Civil Procedure 1.981. As such, on February 15, 2012, the Court entered an order advising the parties that the motion would be submitted for decision without oral argument

EXHIBIT 1
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RELEVANT FACTS

On March 7, 1997, IPL and BFC entered into an agreement under which BFC agreed to sell, and IPL agreed to buy, energy produced by BFC at a facility in Cedar Rapids. *See* Statement of Undisputed Facts ("Statement") at ¶ 1. In 2009, IPL discovered that for more than a year, it had been paying BFC at the incorrect rate. As such, it supplied BFC with an analysis showing that the total amount of the overpayment was $362,289.06. Statement ¶ 2. On September 29, 2009, IPL's Vern Gebhart wrote to BFC's Jeff Carter and offered to allow BFC to repay IPL over a five year period, with payments of $6,038.15 per month. Statement ¶ 3. On December 14, 2009, Mr. Carter responded to this offer with a one line letter:

> Per my email this morning, I am formally accepting the terms referenced in your letter dated September 29, 2009.

Statement ¶ 4. In a subsequent email message to IPL's Tom Aller, Mr. Carter confirmed: "We have accepted Vern Gebhart's repayment terms and process." Statement ¶ 5.

Unfortunately, BFC failed to follow through by making the promised payments. As such, IPL is still owed $362,289.06 for amounts overpaid to BFC. Statement ¶ 6.

SUMMARY JUDGMENT STANDARDS

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 1.981(3); *Hill v. Department of Human Services*, 493 N.W.2d 803, 804 (Iowa 1992). "An issue of fact is 'material' only when the dispute is over facts that might affect the outcome of the suit, given the applicable governing law." *Fees v.*

EXHIBIT 1
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Mutual Fire and Automobile Ins. Co., 490 N.W.2d 55, 57 (Iowa 1992). The resisting party may not upon mere allegations or denials but, instead, must set forth specific facts showing that there is a genuine issue for trial. I.R.C.P. 1.981(3); *Hoefer v. Wisconsin Education Ass'n Ins. Trust*, 470 N.W.2d 336, 339 (Iowa 1991). The purpose of summary judgment "is to avoid useless trials and streamline the litigation process." *Diamond Prod. Co. v. Skipton Painting and Insulating, Inc.*, 392 N.W.2d 137, 138 (Iowa 1986).

ARGUMENT

IPL IS ENTITLED TO SUMMARY JUDGMENT BECAUSE BFC HAS FAILED TO PAY AMOUNTS IT EXPRESSLY AGREED TO PAY TO IPL.

When IPL discovered that it had overpaid BFC, it made an express written offer to settle its claim against BFC by allowing BFC to repay the overpaid amount over a five-year period. Statement ¶ 3. BFC accepted this offer in writing. Statement ¶ 4. BFC did not dispute the amount of the overpayment or propose any changes to the terms offered by IPL. *Id.*

Iowa courts interpret and enforce settlement agreements like any other contracts. *See, e.g., Walker v. Gribble*, 689 N.W.2d 104, 109 (Iowa 2004). A contract is formed by the process of offer and acceptance. *Kristerin Development Co. v. Granson Inv.*, 394 N.W.2d 325, 331 (Iowa 1986). Here, the terms of IPL's offer were communicated in writing and BFC responded by stating, in writing, that it as "formally accepting the terms referenced in" IPL's offer. Statement ¶¶ 3-4. This resulted in the formation of a binding contract under which BFC obligated itself to repay $362,289.06 to IPL.

BFC breached the agreement by failing to make the payments it agreed to make. As

EXHIBIT C

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such, and as a matter of law, IPL is entitled to judgment in its favor for the full amount of its overpayment to BFC.

CONCLUSION

For the reasons set forth herein, and in its other supporting papers, IPL respectfully requests that the Court enter judgment against BFC and in favor of IPL in the amount of $362,289.06, together with interest as provided by law, and the costs of this action.

LEONARD T. STRAND AT0007675
Simmons Perrine Moyer Bergman PLC
115 Third Street SE, Suite 1200
Cedar Rapids, IA 52401
Phone: 319-366-7641
Facsimile: 319-366-1917
E-Mail: lstrand@simmonsperrine.com

ATTORNEYS FOR PLAINTIFF

Copy to:

Kathryn Barnhill
Barnhill Law Offices
1721 25th Street, Suite 150
West Des Moines, Iowa 50266

Attorney for the Defendant

PROOF OF SERVICE
The undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses disclosed on the pleadings on April 2, 2022 by:
X US Mail ___ FAX
___ Hand Delivered ___ Overnight Courier
___ Federal Express ___ Other:

Signature:

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EXHIBIT #: 1 OF 9

IN THE IOWA DISTRICT COURT
IN AND FOR POLK COUNTY

JOHN HARPOLE, JOAN PRIESTLEY, PRIESTLEY FAMILY TRUST U/A JOAN PRIESTLY AND THE PRIESTLY FAMILY FOUNDATION, Plaintiffs, vs. DARRELL DUANE SMITH, FREE FUELS CHARITABLE TRUST, CORPORATE BENEFITS, INC., ENERGAE, L.P. AND I-LENDERS, LLC, Defendants, vs. JON K. ALEXANDRES, et al. Intervenors.	SEE POINT #6 NO.: EQCE077590 **ORDER:** Temporary Restraining Order

On February 23, 2016, this Court, at Plaintiffs' request, appointed a committee of individuals (the "Receiver Committee") to act as a receiver for Defendants Energae, L.P. ("Energae") and I-Lenders, LLC ("I-Lenders"). This matter now comes before the Court on Intervenors' Motion to Reconfigure Receiver Committee ("Motion to Reconfigure") filed on October 19, 2016. Intervenors also requested the Court enter a temporary stay of actions by the Receiver Committee pending resolution of the merits of the Motion to Reconfigure.

On October 31, 2016, this Court held a hearing on Intervenors' request for temporary relief. Plaintiffs; Defendants Smith, Free Fuels Charitable Trust, and Corporate Benefits, Inc.; Receiver Committee; and Intervenors all appeared at that hearing through their counsel. Having heard argument from the parties and having reviewed Intervenors' Exhibits 1 through 5, this Court finds that a temporary restraining order governing the

Receiver Committee should be and is hereby entered pending the resolution of the merits of Intervenors' Motion to Reconfigure.[1]

IT IS THEREFORE ORDERED:

1. The Receiver Committee will make no substantive decisions regarding Energae or I-Lenders affecting any asset or liability of those companies in an amount exceeding $10,000.00 pending this Court's ruling on Intervenors' Motion to Reconfigure. If the Receiver Committee wishes to make any such decision before the resolution of the Motion to Reconfigure, the Committee must make application to this Court specifying the interest in question, the proposed action of the Receiver Committee, and requesting this Court's authority for the Committee to take such action.

2. The Receiver Committee will issue no communications to investors of Energae or I-Lenders without first obtaining the approval of this Court for such communications.

3. The Receiver Committee will provide Intervenors with at least seventy-two (72) hours advance notice of any meeting of the Committee or four or more of its members, whether that meeting is held in person, electronically, or telephonically. At any such meeting, the Receiver Committee shall permit one or more of the attorneys from Intervenors' counsel, Weinhardt & Logan, P.C., and up to two of the intervenors themselves to participate in the meeting ***strictly as observers***.

4. The Receiver Committee will provide Intervenors' counsel, not later than 4:00 p.m. on November 4, 2016, with all documents in the possession, custody, or control of the Receiver Committee concerning the following potential liabilities of Energae, I-Lenders, or any entities associated with them. Those documents shall include, but are not limited to, Permeate Refining, LLC ("Permeate") (collectively, the "Companies"):

---

[1] Hearing on the merits of Intervenors' Motion to Reconfigure will be set by way of separate Order.

a) Any actual or threatened foreclosure proceeding involving any asset of the Companies.

b) Any claim against any of the Companies by Randy Less and/or any entity with which he is associated, and

c) Any claim against any of the Companies by Dennis Roland and/or any entity with which he is associated.

5. The Receiver Committee will provide Intervenors' counsel, not later than 4:00 p.m. on November 4, 2016, complete, signed tax returns filed for Energae, I-Lenders, and Permeate including all schedules, but withholding or redacting individually identifiable K-1 documents or information for investors who are not members of the Intervenor group.

6. Plaintiff Joan Priestley will immediately cease any and all involvement or communication with the Receiver Committee or its members regarding the Companies, or the business of the Receiver Committee. A violation of this order by Ms. Priestley may subject her to a finding of contempt by this Court and such penalty as this Court deems appropriate.

So Ordered.

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EXHIBIT 2
4 OF 9

State of Iowa Courts

Type:	OTHER ORDER
Case Number	**Case Title**
EQCE077590	JOHN HARPOLE VS DARRELL DUANE SMITH ET AL

So Ordered

David Porter, District Court Judge,
Fifth Judicial District of Iowa

Electronically signed on 2016-11-01 10:51:12 page 4 of 4

EXHIBIT # 5 OF 9

HAND WRITTEN COMMENTS BY SMITH

LETTER WRITTEN BY PRIESLEY, SIGNED BY BILL NELSON — THIS IS FULL OF MISREPRESENTATIONS MARKED WITH STARS

Receivership Committee
P.O. Box 82
Clear Lake, Iowa 50428

To all shareholders and unitholders,

As you can see from this letter, the Receivership Committee is proud to let you know that we have met the filing deadline for the 2015 tax returns for Permeate, Energae and I-Lenders!

The few people who have the necessary financial information have continued to refuse to cooperate in any way with the Committee, so we were forced to spend a huge amount of time and effort, to acquire data from third party (non-company) sources. We also sent out a raft of letters and subpoenas, to acquire from third party (non-company) sources, the information needed to file these returns, on behalf of all the shareholders.

After some searching, we hired Denman & Company, LLP, a large and respected accounting firm in Des Moines. Personnel from both the CPA firm and our group put in some long hours in September, including over the Labor Day weekend, to make sure that all the tax returns could be timely filed.

Your personal K-1 Form is enclosed with this letter. Both of the plants were closed in 2013, and they have been closed ever since that year. Therefore, no investment or R & D tax credits were generated in 2015, so none are listed on your K-1s. However, there were sizeable business expenses (losses) that occurred in 2015, that flowed through to each investor.

THE PLANTS WERE INTENTIONALLY PURPOSEFULLY MISMANAGED

Our review of the 2014 tax returns of the companies revealed a number of significant and dismaying "math errors," for the K-1s of both I-Lenders and Energae investors. These mistakes were unfair, mathematically inscrutable- and mostly worked against the interests of many investors. We have concluded that the K-1 numbers for 2014, unfortunately, are largely meaningless and unreliable.

THERE WERE NO MATH ERRORS! A LIE!

For example:

1. People who were credited with vastly different investment amounts, have been given the same ownership percentage.

ALL LIES

THIS WHOLE LETTER IS FULL OF LIES

EXHIBIT C

2. A few people, who had not invested any capital in 2014, had ownership percentages at the end of the year that were higher than their ownership percentages at the beginning of the year. With no distribution of payoff of any investor, that outcome is mathematically impossible.

3. A number of other investors, who had not invested any Capital in 2014, had ownership percentages at the *end* of the year that were lower than their ownership percentage at the *beginning* of the year- but the decrease was not uniformly apportioned.

4. People were not credited with business losses, that were proportional to their ownership percentage. Investors with the same percent interest received from $ 10,000 to $ 75,000 credit for business losses.

We have also now started another large project on behalf of all the investors, that the state judge has asked us to accomplish. We are reviewing Subscription Agreements, checks, deposit slips and bank statements, letters and other records- from at least 16 accounts at 11 different banks, to determine definitely, just how much money each shareholder has contributed, and where the funds were deposited.

We are confident that we can construct a very accurate and complete list of each unit holder's investments, from 2008 through most of 2015. When this project is completed, we will send each shareholder an individual letter, with a copy of every check of theirs, and other records of payment, that we could find. Then, we will ask each investor if he/she agrees with our monetary determination, or if they have any objective evidence of other investment amounts that they have contributed, over the years, that we could not find.

In addition, Darrell Smith and others recently have sold certificates in a number of new companies that Darrell has created. These new enterprises include Renewable Energy Options, Texas Energy and Water, Newco, Purified Solutions, Interested Investors (no relation to I-Lenders), Diversified Biofuels, RWE ("Energae in South Carolina"), Thunderbird Energy, and perhaps even others, still.

When we send out your check copies, please tell us in which of these new companies (if any) you intended to invest, so we can credit your accounts correctly.

The judge also wants the Committee to determine the true number and value of the remaining tax credits that are still available as an asset, for the benefit of the shareholders. Those who have this information have refused to provide it to the Committee. Therefore, to perform this service, we will need help from you. We will send you a short form to complete, listing the amount and type of tax credits that you purchased each year, and how much money you have spent to acquire your tax credits.

Because of all the math problems with the 2014 ending ownership numbers, we expect to file amended 2015 tax returns in the future, once we can determine the true percentage ownership of each investor. However, we will not be adding any tax credits, in the next amended 2015 tax returns and K-1s. If you have purchased any 2015 tax credits, please let the Committee know about your situation.

Any shareholder who already has a K-1, that shows any tax credits issued in 2015, needs to disregard and discard that K-1. The IRS has the new and accurate K-1s that we filed with the tax returns, and that is the K-1 the IRS expects shareholders to use, with their own tax returns.

In order to provide more documents for the shareholders to review, we have created a website. The site's name is: en-ilrec.com It also has an email link, so you may communicate with the Committee more easily. Please understand that this is a very basic, "no-frills" website design- it just presents the documents that we know shareholders want to see.

We have posted on this website MANY informative reports and other records for all the shareholders, including:

1. A tour of both Permeate and BFC, with lots of photos and commentaries (the plants are both in unuseable condition).

2. A financial analysis of the various restart costs at each plant- overall, it will require between $ 19,000,000 and $25,000,000, including repairs and replacement costs, fines, judgment creditors, permits, mortgages, etc, that must be

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paid, to ever hope to restart and upgrade the production facilities.

3. A detailed analysis of the numbers shown in the 2014 K-1s, for investors in both I-Lenders and Energae.

4. A report about all the serious, potentially expensive permit problems that the plants must overcome.

5. A number of USDA documents related to the CRADA project (which has been deceptively overhyped and oversold).

6. Court pleadings, and orders from the judge, in the investors' state case against Darrell Smith.

7. Updates on the documents filed in Darrell Smith's federal criminal case.

8. And MANY MORE! Check back periodically, because updates and new documents will be added often, in the future.

We also want to give you an update on the Intervenor action in the case of *Harpole v. Smith*, that a number of investors have joined. We want you to know that most shareholders were recruited to sign up, under totally false pretenses. This state case against Darrell Smith has NOTHING to do with the reinstatement of your denied state tax credits, or your K-1s.

ANOTHER LIE →

It was false and deceptive, for anyone to make you think otherwise. Becoming an Intervenor in this case will NOT HELP IN ANY WAY to get your state tax credits back. The state tax credits are simply not an issue in this case, at all.

LIE → INTERVENOR ACTION HAD NOTHING TO DO WITH STATE CREDITS

A meeting that had been scheduled by the Intervenors for September 7th was canceled by the Intervenors, who wanted more time to acquire better information. Then the Intervenors called for a meeting between the Receivership Committee and the Intervenors, to be held on October 7th, in Des Moines. At the last possible minute, this October 7th meeting was canceled by the Intervenors, as well.

We want shareholders to know that the Committee had all your K-1 Forms ready for distribution when the tax returns were filed, on September 15th. The Intervenors, however, voiced a concern about "the continuity" between the data used for the 2014 and 2015 tax returns. Our accountants used all the 2014 numbers as the basis

for the 2015 returns and K-1s, so the "continuity" question really is not an issue.

However, the Intervenors demanded that the Committee not issue your K-1s, until the Intervenors could review them at the meeting they had scheduled, in October. They even threatened court action, if we did not comply. Then the intervenors canceled the October meeting. So we apologize for the delay getting these K-1 Forms out to the shareholders.

Lastly, Herbert Williams, the owner of Keuka Energy in Florida, recently held a preliminary meeting in Cedar Rapids, with shareholders. Herb wanted to discuss the present and future situation with the companies, and to assess the shareholders' desires, moving forward. We will post a transcript of that meeting on our website, as soon as it is available.

HELD HELD MEETING TO HEAR SHAREHOLDERS AND INVESTORS

Sincerely,

Bill Nelson

Bill Nelson, Chairman
Energae-ILenders Receivership Committee

Enclosure: personal K-1 Form

What Investors Signed Between Smith and His Insurer When They Received Back $2,580,274 in Cash Plus $300,000 Additional Paid to Priestley But Undisclosed - Agreement Signed September 15, 2015 Two Years Prior to Indictment for Wire Fraud

[Claimant agrees to release]...for which monies or other assets were taken with or without express permission...(e) all of the respective past, present and future shareholders. members, directors, officers, managers, supervisors, employees, registered representatives...from and with respect to all liabilities, claims, demands...judgments... damages...and causes of action of any type or nature whatsoever, **cognizable at law or in equity by statute or otherwise...any rights claims...or causes of action under the common law of any state and/or federal, state and locals laws...**arising directly or indirectly out of any relationship of any kind...provided, however, that the foregoing releases are intended to and shall be deemed limited to any losses associated with Darrell Smith, including without limitaions, Energae, LP, Black Lion Energae...I-Lenders, LLC, Greenbelt, and/or assigned or successor-in-interest to any of the foregoing..."

Please note:

1. Smith did not receive a copy of these signed agreements until August 2022, when he was delivered to Smith by the government;
2. Smith could not include this information in his originally filed §2255 because he didn't have it - but, the government had it and refused, via a Brady violation, to deliver (a) this information to the Court, and (b) when Smith delivered this information to Judge Strand in case 20-CR-2007, Judge Strand dismissed Smith's right to present this information as not relevant.

If this information is not taken into account, Smith must file a request for a second or successive §2255 since this represents "new information."

	2009	2010	2011	2012	2013	2014	2015	Totals
ODOM	**TOTAL CLAIMED INVESTMENT:**					**TOTAL**	**RETURN**	**$3,874,739**
Cash Back	36,750	36,750	72,750	72,750	--	--	1,345,000	1,600,000
Tax Crdts	81,297	480,104	676,241	477,500	36,683	2,854	?	1,755,079
Net Tax Ls	685	17,707	28,114	18,378	19,784	44,991	?	129,660
GRCO Stock	390,000	--	--	--	--	--	--	390,000
PRIESTLEY						**TOTAL**	**RETURN**	**$1,837,600**
Cash Back	--	--	--	12,000	--	--	500,000	512,000
Tax Crdts	--	26,072	224,436	232,865	--	37,589	?	620,962
Net Tx Ls	--	19,499	31,776	10,176	9,703	33,483	?	104,638
GRCO Stock	--	--	--	500,000	--	--	--	500,000
LACKORE						**TOTAL**	**RETURN**	**$412,793**
Cash Back	--	--	--	--	--	--	180,000	180,000
Tax Crdts	23,828	29,724	26,736	26,736	1,386	12,529	?	161,572
Net Tx Ls	57	3,582	506	506	4,197	8,039	?	27,221
GRCO Stock	--	--	44,000	--	--	--	--	44,000
WINTERS						**TOTAL**	**RETURN**	**$158,940**
Cash Back	--	--	--	--	--	--	--	--
Tax Crdts	22,871	5,328	19,149	25,021	53,004	5,609	?	130,982
Net Tax Ls	438	1,427	1,221	1,594	2,474	803	?	7,958
GRCO Stock	20,000	--	--	--	--	--	--	20,000
BURGER						**TOTAL**	**RETURN**	**$383,569**
Cash Back	--		20,000	--	--	--	90,000	110,000
Tax Crdts	33,948	13,979	30,532	49,442	79,781	--	?	207,782
Net Tax Ls	184	1,845	8,192	2,022	2,735	1,208	?	16,187
GRCO Stock	--	--	50,000	--	--	--	--	50,000
LIENAU						**TOTAL**	**RETURN**	**$150,131**
Cash Back	--	--	8,104	11,143	3,045	--	61,209	83,501
Tax Crdts	--	--	--	35,429	--	3,409	?	38,838
Net Tax Ls	48	2,108	2,970	607	2,057	--	?	7,792
GRCO Stock	20,000	--	--	--	--	--	--	20,000
KUZNICKI						**TOTAL**	**RETURN**	**$400,096**
Cash Back	10,000	6,000	7,000	11,000	10,000	9,000	13,500	66,500
Tax Crdts	17,690	16,939	45,598	21,112	35,236	80,009	?	216,584
Net Tax Ls	2,963	870	2,251	4,825	818	5,285	?	17,012
GRCO Stock	100,000	--	--	--	--	--	--	100,000
HAMMON						**TOTAL**	**RETURN**	**$202,469**
Cash Back	--	--	--	--	2,512	--	51,673	51,673
Tax Crdts	31,421	30,041	17,871	--	--	13,711	?	95,556
Net Tax Ls	5,846	1,135	1,855	--	--	6,403	?	15,240
GRCO Stock	20,000	--	--	20,000	--	--	--	40,000
BERKENES						**TOTAL**	**RETURN**	**$513,472**
Cash Back	--	--	[illegible]	25,000	--	--	227,500	252,500
Tax Crdts	15,542	71,117	65,291	53,130	20,856	6,906	?	233,472
Net Tax Ls	122	10,670	11,900	1,284	978	2,543	?	27,500
GRCO Stock	--	--	--	--		--	--	--
LAAVEG						**TOTAL**	**RETURN**	**$242,761**
Cash Back	14,190	--	--	--	36,000	--	--	50,190
Tax Crdts	--	5,906	35,896	18,161	276	1,465	?	61,704
Net Tax Ls	--	--	3,878	395	358	1,235	?	5,867
GRCO Stock	125,000	--	--	--	--	--	--	125,000
TOTALS PER YEAR						**TOTAL**	**RETURN**	**$8,176,970**
Cash Back	**60,940**	**42,750**	**107,854**	**106,893**	**39,035**	**9,000**	**2,513,802**	**2,880,274**
Tax Crdts	**226,997**	**779,210**	**1,184,013**	**867,293**	**227,222**	**164,081**	**?**	**3,448,816**
Net Tax Ls	**10,343**	**58,847**	**103,000**	**39,787**	**43,106**	**103,992**	**?**	**359,077**
GRCO Stock	**675,000**	--	**50,000**	**500,000**	--	--	--	**1,245,000**

TOTAL CLAIMED INVESTMENT: ($2,405,409) TOTAL RETURN $8,176,970

CASH BACK: $2,880,274

CONCLUSION: THEY TRIPLED THEIR INVESTMENT RETURN, WHY IS THE GOVERNMENT ASKING ME TO RETURN YET ANOTHER $1,056,909 WHEN (A) CLAIMANTS PROVABLY LIED UNDER OATH ABOUT WHAT THEY INVESTED, AND (B) WHAT THEY GOT BACK

Exhibit 3 3 of 3

PROOF THAT CLAIMANT ODOM LIED UNDER OATH - CLAIMING HE RECEIVED BACK $900,000 - HE GOT BACK $1,345,000. GOVT. STILL CLAIMS I OWE HIM $245,000 - HIS TOTAL RETURN WAS $3,874,739

Amount: $1,345,000.00 Sequence Number: 5090290156

Account: 3299027138 Capture Date: 09/09/2015

Bank Number: 061111278 Check Number: 101181

Everest National Insurance Company
477 Martinsville Road
Liberty Corner, NJ 07938

Bank of America
Atlanta, Dekalb County, Georgia
64-1275/611

DATE	CHECK NUMBER
09/01/2015	00110181

VOID AFTER SIX MONTHS

AMOUNT
****$1,345,000.00

PAY *One Million Three Hundred And Forty Five Thousand And 00/100 US Dollars*

TO THE ORDER OF

CETERA FINANCIAL GROUP
ATTN: PAOLO CORLETO
200 NORTH SEPULVEDA BLVD.
SUITE 1200
EL SEGUNDO CA 90245

Everest National Insurance Company

⑈00110181⑈ ⑆061111278⑆3299027138⑈

Pay to the Order of
Wells Fargo Bank, NA
For Deposit Only
Cetera Financial Group, Inc.
Account #4000062919

Electronic Endorsements:

Date	Sequence	Bank #	Endrs Type	TRN	RRC	Bank Name
09/03/2015	000030850702054	122105278	Rcm Loc/BOFD	Y		Wells Fargo Bank NA
09/09/2015	005090290156	11300016	Pay Bank	N		

Evan Baker
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EXHIBIT 4
1 OF 2

BARNES & THORNBURG LLP

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Roscoe C. Howard, Jr.
Partner
(202) 371-6378
rhoward@btlaw.com

January 29, 2016

VIA EMAIL
corpgold12@gmail.com
Mr. Darrell D. Smith
Chief Executive Officer
Permeate Refining, LLC
202 Locust Street
Hopkinton, IA 52237

Re: Engagement Letter

Dear Mr. Smith:

We are pleased to be of service to Darrell Duane Smith ("you" "your" "client") in connection with advice and counsel related to a criminal matter alleging a failure to account for and pay over employment tax currently pending in the United States District Court for the Northern District of Iowa (the "Matter"). The purpose of this letter is to confirm the terms and conditions under which our Firm will represent you. This representation commenced January 28, 2016.

It is important from the outset of our relationship that we have a clear understanding as to the identity of our clients. Our only client in this matter is Darrell Duane Smith. Our representation of you in this Matter does not extend to any subsidiary, parent, affiliate, member, officer, director or other persons or entities who are not specifically identified in this engagement letter.

Effective representation of you in this Matter requires you to cooperate fully with us and, if necessary, be available to attend meetings, discovery proceedings and conferences, hearings and other proceedings. Furthermore, it is essential that you disclose fully, accurately and timely all facts and details, keeping us apprised of all developments relating to the Matter. Our willingness and ability to continue to represent you in this matter is based on your compliance with these requirements.

Since the outcome of any litigation matter is subject to the uncertainties and risks inherent in the litigation process, we have made no promises or guarantees to you concerning the outcome of this Matter, nor can we do so. Nothing in this letter shall be construed as such a promise or guarantee.

I am enclosing our Standard Terms of Engagement for Legal Services dated March 2012, setting forth the standard terms upon which our Firm accepts client engagements. Our engagement by you in connection with this matter will be governed by these standard terms to the extent not expressly modified by this letter. We have agreed that our engagement is limited to performance of services related to this Matter. You may call upon Barnes & Thornburg LLP for additional litigation, government contracts, or other legal counseling as needed. It is agreed that if we provide such services, you shall be responsible to pay for our time and other charges.

Our fees will be based on the reasonable value of our services as determined in accordance with the District of Columbia Rules of Professional Conduct. The primary basis for computing our fees in this

EXHIBIT 4
2 OF 2

matter will be the applicable hourly billing rate for each lawyer who works on it. Our applicable hourly billing rates currently range from $455.00 (USD) per hour to $915.00 per hour for lawyers, based on experience levels and the type of services performed. My current applicable hourly billing rate is $735.00 (USD) per hour. These hourly billing rates are adjusted annually, typically in December.

Although I will be the lawyer responsible for this matter, I may assign portions of the work to other Firm lawyers. Leasa W. Anderson will be one of these lawyers. Her current applicable billing rate is $635.00 (USD) per hour. In an effort to affect greater efficiencies and to reduce total fees, I may also ask our legal assistant to assist in this matter as well. The current applicable hourly billing rate for our legal assistant is $345.00 (USD) per hour; this rate is also adjusted annually.

In addition to our fees, you will be responsible for payment of our other charges as set forth in our Standard Terms of Engagement for Legal Services.

We have agreed to represent you in this matter on the understanding that you will provide us with an advance deposit of $25,000.00 (USD). We will begin work on this matter as soon as we have received your advance deposit.

We will place your advance deposit in our general trust account as security for the payment of our fees and other charges in representing you in this matter. Your advance deposit will be charged by us in the manner described in our Standard Terms of Engagement for Legal Services. We will provide you a written statement each time your advance deposit is charged. When the level of your deposit falls below the amount of $5,000.00 (USD), it will be necessary for you to replenish it to the $25,000.00 (USD) level.

By signing this letter, you agree that we may represent other clients in certain matters adverse to you as described in the Standard Terms of Engagement for Legal Services under the caption "**Waiver of Certain Potential Conflicts of Interest**." For example, Barnes & Thornburg LLP represent hundreds of businesses across the U.S. including many regional and national financial institutions. Such other clients may loan you money, license intellectual property to or from you, contract with you for goods or services, or oppose your efforts to obtain a government authorization, such as zoning, an air permit, a patent or a license, or you may oppose theirs. Based on your consent, it is our understanding that we will be permitted to represent such clients in the negotiation of transactions and agreements adverse to you, the interpretation or modification of such agreements, and the resolution or litigation of any disputes that may arise between them and you.

If this letter does not correctly reflect your understanding of the terms and conditions of our representation of you, please inform me at once. If you agree with the terms and conditions as stated above, please acknowledge your agreement by signing below and returning this letter to me via email.

We are pleased to have this opportunity to be of service and to work with you.

Sincerely,
BARNES & THORNBURG LLP

Roscoe C. Howard, Jr.

AGREED AND CONSENTED TO:
Mr. Darrell Duane Smith

By: _____
Darrell Duane Smith

Date: 2/2/2016

Enclosure: Standard Terms of Engagement for Legal Services

DMS 35981235v1

EXHIBIT 5
10F 20

Discovery Phone Calls
Between Smith, Attorneys Battle & Anderson
and Brother Richard Smith
Affidavit of Support and Proof

Statement of Discovery:

Seeks to prove:

1. Attorney Battle lied to Smith about not receiving wire fraud plea agreement(s) from the government;

2. Attorney Battle overcharged Smith on billing, billing Smith $920 an hour, when Smith agreed to pay $720 an hour;

3. Attorney Battle refused to correct billing unless he received $200,000 extra in payments, on top of the $420,000 he had already been paid;

4. Attorney Battle lied to Smith saying the "government was dropping their wire fraud claims due to 'lack of evidence', when in fact Battle was not getting his way on receiving additional $200,000 without first correcting wrong billing;

5. Attorney Battle refused to submit Smith's objections to the provable lies placed in the PSI. Smith has witness to prove objections were written and mailed to Battle;

6. Attorney Battle violated Strickland Standard of ineffective assistance of counsel when he (a) told Smith he had to sign a tax plea agreement which contained no plea waiver, and (b) Smith had to agree with the provably wrong statements made by the government in the tax case plea agreement.

7. Attorney Battle lied to the Court when he wrote that he offered Smith a "global settlement agreement" which included both the wire and tax fraud charges. No such agreement was offered or spoke of by Battle, and any proof provided the Court to the contrary will have been manufactured well after the facts as presented relative to the phone conversations related herein.

EXHIBIT 5
2 OF 20

Table of Contents

Phone Calls **Page(s)**

EXHIBIT 5

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All Calls Paraphrased
Originals Available

Historical Note: Smith Pled Guilty to Non-Payment of Taxes
Smith Hears From Attorney Anderson Regarding "Wire Fraud" Charge

(1)

Cotext of the Call: Smith had signed a plea agreement, agreeing to plead guilty to the taxes. Even though the tax plea agreement stated that the government could still come after Smith for wire fraud, Battle advised Smith that (1) if Smith pled guilty, and (2) admitted to wrong government facts, then the government would unlikely come after Smith for additional charges (shown in a June 6, 2016 government memo). Smith told attorneys Battle and Anderson on more than one recorded jailhouse phone call, that he was not guilty of the tax charges - and would fightit in court if given the opportunity. Smithhad no signed control of Permeate and was not a "de facto officer" - but, rather, its main investor.
Time of Call: First week of August, 2016 - called after 3pm:
Call To/From: From Smith to Anderson over recorded jailhouse phone, calling attorney Anderson at her office:

Smith: What is going on...?
Anderson: They want to charge with wire fraud afterall.
Smith: Okay.
Anderson: They say you made unauthorized investments - was it over or under $1 million?
Smith: Over.
Anderson. That is not good. Do you want us to fight this, or work with the government in resolving this?
Smith: I will speak to my wife first, but, I believe work with the government. I don't have access to any documents - how can I fight any of this? I will also call my SEC attorney, Conrad Lysiak and ask his oipinion. Please let me know how all this works now.
Anderson: They will send over a similar plea agreement, similar to the one you signed for the tax charge.
Smith: When should I call again?
Anderson: Call next week, about this same time or day.

(2)

Conext of the Call: Following up on the previous call made to Anderson, regarding the wire fraud. I had spoken to my wife about the wire fraud charge. She had worked in law enforcement for over 20 years. She advised that I not fight the proposed charges, but go along with them - work with the government. Smith had zero access to thousands of pages which would support a claim of non-guilt.- attorneys were overcharging.
Time of Call: Second Week of August 2016;
Call To/From: From Smith to Battle and Anderson over recorded jailhouse phones:

Smith: What is the status of the wire fraud?
Battle: They are preparing paperwork to send to me.
Smith: You said they were "tired of this case" and wouldn't bring wire fraud charges if I pled guilty to the taxes?
Battle: They must have found something.
Smith: Are they going to make the charges concurrent or consecutive - I've been talking to people in jail here about that.
Battle: I don't know - but, they want you to sign a cooperation agreement. This may mean less time if you agree to it.
Smith: Of course I will cooperate. What do they want cooperation about?
Anderson: An attorney, or attorneys.
Smith: What attorneys?
Anderson: Ed Davis, and possibly one other.

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Smith: Yes, I will cooperate. But, what did Davis do wrong?
Battle: Also, there is the billing matter - who should I call about this?
Smith: Please send a billing statement to review.
Battle: We have a meeting, need to go. I will look into the billing.
Smith: When should I call again?
Battle: We should know something in a week or two.
Smith: What about consecutive versus concurrent?
Battle: We're discussing it. Remember to get us paid current.

(3)

Conext of the Call: I spoke to Anderson again about the wire fraud charge. The date of this conversation may have occurred during the first call, or a second call a few days later discussing the "cooperation agreement."

Time of Call: Early August 2016
Call To/From: From Smith to Anderson over recorded jailhouse telephones, call made to Anderson's office since I did not have her cellphone.
Anderson: They want you to cooperate with the goverment regarding Ed Davis.
Smith: Ed Davis? Davis didn't do anything wrong. Why would they want to cooperate about him?
Anderson: I don't know. Is that a yes or no you will not cooperate?
Smith. There were others that stole money - Priestley, Roland, Krause, Less - Krause stole the vodka - but Ed Davis?
Anderson: Ed Davis and possibly Katherine Barnhill. Will you cooperate regarding these?
Smith: Yes, okay.
Anderson: You can probably bring up that other information when they interview you.

I never spoke to Anderson again following this phone call. Battle stated she had "taken an extended leave."

(4)

Conext of the Call: I had spoken to Battle serveral times, off and on in late August and early September - each call was his demand for an additional $200,000 in legal fees, and sometimes we'd discuss the case.

Time of Call: Late August, early September 2016
Call To/From: From Smith to Battle over recorded jailhouse telphones.
Smith: What happened to Anderson, she's not answering her phone or she is never in her office?
Battle: She took an extended leave.
Smith: What is the status of the wire fraud?
Battle: We're still waiting for paperwork. We need to get paid $200,000 to continue representation.
Smith: I have not yet recieved an updated billing statement showing what has been paid, and what is owed.
Battle: Do you have $200,000?
Smith: Yes, I have it in some stock - but, I'm not sure I can sell it - because Lysiak is working with Multi to release my account so I can get you paid - I own some 2 million GRCO stock - if I can sell it I can pay you from that [the government was holding 889,000 GRCO shares and Multi was holding the rest - GRCO was trading between $.10 and $.20 a share at the time].

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Battle: Is there someone I can call to get that sold - your wife?
Smith: No, attorney Lysiak is working on it. But, you said you'd send a billing statement, and I've not recieved that yet.
Battle: I will ask them to do that.

(5)
Context of the Call: Early September 2016. Battle discusses that he received a concession from the government to run the tax and wire cases concurrent.
Battle: **Good news** - the government agreed to run the tax and wire cases concurrent. But, in order to get that done, I need to get paid $200,000.
Smith: Yes, I'm working on that. Are they going to send you paperwork on this agreement?
Battle: I'm sure they will - when can we expect the $200,000?
Smith: I haven't received an updated billing.
Battle: I checked with the office, they said they sent it to you.
Smith: I will call you back when I recieve the billing and we can talk about payment.

(6)
Context of the Call: I did receive a billing statement from Battle - but, it was not a specific billing per hour - but a "monthly summary" of what was owed, showing that I was billed $720,000 and had paid him $420,000, with approximately $300,000 currently due.
Time of the Call: Early September 2016 to mid-September.
Call To/From: From Smith to Battle over recorded jailhouse phones.
Smith: I received your billing statement - but, it was not specific - it was generalized - summarized via month on a single sheet of paper. This does not look like it came from accounting. I need an hourly specific statement - a billing that shows how much was charged per hour, per day - the airline flights - all that.
Battle: I will ask them to send that.
Smith: Have they sent you the information on the wire fraud yet?
Battle: No I've recieved nothing.
Smith: Please send a specific hourly billing.
Battle: I will do that.

(7)
Context of the Call: A week after my last conversation wtih Battle my wife received a detailed billing from Battle. I asked her what the average billing rate was. She said it wasn't listed. I then asked her to divide the billed amount by the number of hours charged. She did this for several billed items and lines - it all came out to $920 an hour. I had signed a contract with Barnes and Thornburg to pay them $720 an hour and I was being billed $920 an hour. I asked my wife to mail me a copy of the billing statement. Upon receipt of a "summary", I then went through the billing, reducing the hourly rate to $720 and affixing "secretary fees" where necessary which was charged at $340 an hour. Additionally, work by Anderson was agreed to be paid at $625 an hour - and yet, **everything on the billing statement that I could see was at $920 an hour** (as I recall - it was either a summarized billing from my wife over the phone, or the actual copy sent me). When these corrections were made, my billing analysis showed $420,000 owed - exactly what he had been paid (not the $720,000 as billed).
Smith: I went through the billing statement, and you're charging me

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$920 an hour. As I recall, I agreed to pay $720 an hour.
Battle; I think your contract allowed for $920 an hour under "special circumstances. Besides, our hour rates went up.
Smith: But, you work for Roscoe Howard, and he was billing, he said, at $720 an hour - and Denise Anderson was to charge about $625 an hour. I assumed you bill at Anderson's rate?
Battle: No, I took Roscoe's place, and so my hourly billing is the same, given the increase.
Smith: I mailed you a recompilation of what I believed the accurate billing should be - and my numbers come out that I owe you $420,000, not the $720,000 your "summarized" billing shows. Would you please have your accounting department look at my analysis and respond to this.
Battle: Regardless, I still need an additional $200,000 to keep working on your case, otherwise I don't think I can continue to take your phone calls.
Smith: I am still working on this with Lysiak.
Battle: When can I expect the $200,000 - or who can I call to ask for payment?
Smith: Did you try speaking to Herb again?
Battle: I don't think I should call him again.
Smith: As soon as I hear back from your accounting department, I will make some phone calls to try and get you paid something. But, by my calculations, I only owe you $420,000 - or somewhere in that range.

(8)
Context of the Call: I called Battle serveral times during the last part August, early to mid-September, asking if he had received the wire fraud paperwork from the government yet - each time he denied having received any wire fraud paperwork from the government, yet, he continued to demand $200,000 extra in payment to "handle the wire fraud charges."
Smith: Did you recieve the paperwork on the wire fraud from the government yet?
Battle: No, nothing.
Smith: Why?
Battle: I don't know. When am I going to get my $200,000?
Smith: Why do you think there is a delay in getting you the paperwork?
Battle: I can't say why. Maybe I should call them and ask them for it.
Smith: Why would you want to do that? Is it not their responsibility to email you the paperwork on additional charges?
Battle: I think so. So, should I call them?
Smith: I don't know - you're the attorney - but, for me, no, wait for them to approach you. Did your accounting department receive my accounting "re-do?"
Battle: I don't know.
Smith: Can't you find out? You want to get paid, yet, I'm simply asking you correct your billing and I will then get you paid something.
Battle: Why can't you get me paid something now?
Smith: I want that billing corrected. Did you get that letter from attorney Conrad Lysiak stating that "unauthorized investments" is not wire fraud - especially since I had authorization to invest?
Battle: Yes, I got some email from him. But, I can't say whether I agree with his opinion or not.
Smith: He took a case just like this to the Supreme Court (of Arkansas) and won. Isn't that worth something? Can't you look into this?
Battle: I need to get paid before I do more research.

(9)

Context of the Call: I called Battle more than once asking if he had not yet received the information from the government regarding the wire fraud. Each time he demanded more money if he were to do additional work. Accessing the recorded jailhouse telephone calls would prove all the conversations Smith's summarizes herein.
Time Frame of the Call: Late September 2016
Call To/From: From Smith to Battle over recorded jailhouse phones.
Smith: Have you received the information from the government yet on the wire fraud?
Battle: No. Have you arranged payment yet? We can sell your stock to pay.
Smith: No because I've not heard back from your accounting department regarding the bill irregularities - the $920 an hour versus agreeing to $720 an hour for one thing. Even if you made this single change - the 790 hours billed at $920 an hour equals about $720,000, but, at $720 an hour, the $720,000 owed drops to $568,000. Then you further reduce this for Anderson's lower charges - which I thought you were also billing at, and the secretary charges - then, we're at $420,000 or so, but, not much more than this.
Battle: I'm not sure I can take your phone calls any more if I don't get paid.
Smith: I told you that Lysiak is working on it, but, I can't make the lawsuit against Multifinancial go any faster.
Battle: Can you get me something paid this week?
Smith: I will make a phone call. **But, I want that billing corrected.**

Historical Move from Lynn County Jail to Ana Mosa Iowa State Prison due to Cedar Rapids Flooding

From late September through all of October, and part of early November, all the inmates at Lynn County Jail were moved from Lynn County Jail to Anamosa Iowa State Prison. At Anamosa Iowa State Prison Smith was on continuous lockdown, being given but two showers a week, but, otherwise locked in the cell with **ZERO** access to telephone calls and no mail. Upon return to Cedar Rapids County Jail during the last few days of October (may have been October 31, 2016), Smith immediately called Battle to discover the status of the wire fraud.

(10)

Context of the Call: Upon Smith's return to Lynn County Jail, the first call he made from the jail on recorded lines was to Mike Battle (Nov. 2016)
Smith: What is the status of the wire fraud?
Battle: **I guess they are dropping the wire fraud charge.**
Smith: Really? Why?
Battle: Not enough evidence I guess.
Smith: Well, I guess this is good news. What does it mean?
Battle: They will schedule sentencing on the tax charge shortly. Probation will call you to complete an interview regarding the tax charge and I will be in-on the interview - it will be conducted by telephone.

Historical Note: With this Momentous Call to Battle Regarding Wire Fraud, Smith Immediately Called Family Members to Share this News

Smith does not recall how many family members he spoke to about the "dropping of the wire fraud" charges, but. Smith recalls one phone

call to his brother Richard on a recorded jailhouse telephone.
(11)
Context of the Call: Smith telling his brother Richard the "good news" regarding dropping the wire fraud charges.
Time Frame of Call: Early November 2016
Call To/From: From Smith to brother Richard over recorded jailhouse telephone calls.

Richard: What's Up?
Smith: **Attorney Battle just told me they are dropping the wire fraud charges!**
Richard: I've been praying all this week that something good would happen, I believed God had heard my prayer and was going to do something special. So, what happens now?
Smith: They schedule sentencing for the taxes. But, I'm going to fight this tax charge at some point.

(12)
Historical Note: J. Simpson Conducted PSI for Probation, Battle Was Present Via Telephone for the PSI

Smith received a "visual copy" of the PSI, but, was not allowed to keep the copy. Smith was held in a specific room where he could read the PSI and make notes, but, he could not keep a copy. There were **multiple errors - lies - in the PSI** which Smith desired to object to. Smith contacted Battle regarding these multiple wrong statements.

Conext of the Call: Calling Battle to discuss the wrong statements in the PSI.
Time Frame of the Call: Mid-November 2016
Call To/From: From Smith to Battle over recorded jailhouse telephones.
Smith: The PSI has multiple errors in it - I'm told here by inmates I can file objections to it before it is presented by the Court?
Battle: I read it, it's not that bad. I don't think the Judge will make any harsh ruling relative to what's in the PSI.
Smith: But, they are lies! There are about 8 outright lies - I can't let these lies go unchallenged!
Battle: Well, I can't read your handwriting very well - maybe you can tell me what you're challenging on the phone and I can make note of it.
Smith: It would take too long - another inmate here has better handwriting than mine. He will write it up for me and we will mail it for signature delivery.
Battle: Okay.

Historical Note: Smith Gets with "Jail Friend" and Both Wirte-Up PSI Objetions Together

Smith still has the name of this "inmate" that helped him write the PSI objections. Smith could call him in as a witness to testify that the objections were sent to Battle in a timely manner for consideration by the Court. However, at sentencing, **Battle did not present a single objection to the Court reference the PSI.** Prior to sentencing, Smith asked Battle if he had received the objections - and he replied that he did - but, they were not "meaningful enough" to make difference. Battle stated the Judge's "sentencing" would come

down to what Smith said during "allocution" - and whether Smith rightly accepted guilt or not, telling Smith just say he was sorry - even though Smith told Battle the entire thing **was a lie from start to finish and the PSI was full of lies.**

During sentencing, however, Judge Strand cited **the very lies that were in the PSI when sentencing Smith,** sentencing Smith to 13 months in prison, all of which Smith served in County jails, never being transferred to prison. Thus, during allocution, Smith was left with having to "accept responsibility" for the lies told about him registered in the PSI. For example, with Krause made a claim in the in the PSI, the government backed him up - yet when Smith made a claim the government, and the PSI stated, "Smith claims." This was totally **bogus - IT WAS KRAUSE THAT WAS THE LIAR AND THE THIEF ALONG WITH ROLAND, PRIESTLEY, LESS AND OTHERS.** THIS IS A NON-NEOGITABLE POSITION AND SMITH WILL NEVER CHANGE HIS WORDS ON THIS SUBJECT regardless.

Historical Note: Battle Calls Smith While in Bremer County to Deliver "Bad News" Regarding Wire Fraud Charge

In March 2017 Smith received a call from his wife to call Battle back. Smith called Battle. Battle told Smith they would charge him with wire fraud afterall.
(13)

Context of the Call: Battle saying "wire fraud" charges afterall.
Time Frame of the Call: March 2017
Call To/From: From Smith to Battle, Bremer County Jail.

Battle: They are going to charge you with wire fraud afterall.
Smith: Okay.
Battle: But, I need $200,000 to represent you in this matter.
Smith: I may be able to get you $50,000 - but, not $200,000 given that the settlement with Multi.
Battle: When can you get me $50,000?
Smith: Well, I shouldn't say $50,000 - I think that amount would be first $25,000, and then $15,000 to follow sometime.
Battle: That is not good enough. I can no longer take your phone calls. So, don't bother to call the office or my cellphone. But, you need to act on this charge ASAP, otherwise if you ignore it, you'll have more complications.

Smith was not aware that an attorney had to "stay with a client" through the "first right of appeal." Thus, when Battle (1) "split the two cases" (the taxes and wire fraud) and (2) placed in the tax case plea agreement **"no right of appeal,"**, he set himself up to be rid of Smith since (1) he refused to correct his billing, and (2) Smith was not going to pay any additional attorney fees until he did correct his billing. The wire fraud case was complicated - consisting of over 500,000 pages of documents - and Smith had zero access to any of these pages in County Jail making it impossible for Smith to attack his case with any reasonable hope of success. Smith was going to take the tax case to trial - but, the government threatened Smith with "multiple charges" if he did not plead guilty to taxes - a crime of which Smith was not guilty.

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Conclusion

The following can be concluded from the previous conversations that Smith will sign an affidavit that they occurred, and in the general verbal context that they occurred:

1. Denise Anderson asked Smith if he would plead guilty to wire fraud. Smith said he would;
2. Battle states government is sending over "wire fraud" charges and wants Smith to sign a cooperation agreement - agreeing to testify against Ed Davis. Battle demands more than the $420,000 already paid. Smith requests billing statement update;
3. Smith holds second conversation with Denise Anderson - again asks to testify about Ed Davis. Smith says "yes,", but it wasn't Davis that did anything wrong - it was Krause, Less, Roland, Priestley, and others who were stealing money and lying;
4. Battle demands money, or we won't take Smith's calls any longer. Smith asks for time to see what he could do about that;
5. Battle tells Smith that the **good news** is that the government agreed to make the **wire fraud and the tax cases concurrent** if Smith agrees to cooperate against Ed Davis. Again, Smith iterates it was others who did things wrong - and Smith will gladly show proof of this. **But, Battle tells Smith he needs $200,000 to get this all done**;
6. Battle tells Smith he has received "nothing" from the federal government regarding wire fraud - but continues to demand Smith pay him more. Smith again request detailed billing;
7. Smith received a "full billing" versus "summarized billing" -showed charging Smith $920 an hour when Smith had agreed to $720. Smith made corrections reducing Battle's charges from $720,000 to $420,000. Battle rejects Smith's arguements, demands more money, and continues to claim the government sent him nothing on wire fraud;
8. Smith discusses attorney Conrad Lysiak's opinion - that Smith is not guilty of wire fraud. Smith asks Battle if he received Lysiak's letter about Smith not being guilty of wire fraud? Battle says he did but didn't agree with some of the conclusions. Battle again claims he's recieved nothing from the government for wire fraud, and agains demands more money. Smith asks Battle to to call accounting and correct the billing;
9. Battle again claims he recieved nothing from the government on wire fraud and claims he is due $920 an hour, not the $720 as agreed upon, as signed prior to representation (signed with Roscoe Howard and Denise Anderson);
10. Battle tells Smith **THE GOVERNMENT IS DROPPING THE WIRE FRAUD CHARGES.**
11. Smith is elated and calls his brother Richard to share the good news;
12. Smith talks to Battle over Bremer County Jailhouse phones. Battle tells Smith the government wants to charge Smith with wire fraud afterall. Battle demands more money from Smith or he, Battle, will no longer take Smith's phone calls.

Battle comitted **multiple constitutional violations** against Smith relative to conversations with him: (1) materially lying, (2) violating the Strickland stqndard, (3) refusing to represent Smith "under appeal" by telling Smith that Smith "had to sign a no-appeal waiver" in the tax case, (4) that Smith **had to accept the government facts as true, even though they were provably false.**

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Discovery Calls/Conversations
Between Smith and Attorney LaHammer
Regarding Mike Battle's Misrepresentations to the Court
Affidavit of Support and Proof

Statement of Discovery:

Affidavit seeks to prove:

1. That attorney Lahammer had conversations with Mike Battle, the content of which contradicts what Battle told Smith over jailhouse telephone calls;

2. That attorney Battle lied to attorney Lahammer telling attorney Lahmmer that Smith told Battle, that "Smith would take his chances" relative to not pleading guilty to the wire fraud charges to run concurrent with the tax charge;

3. That Smith spoke with Lahmmer about how to go about proving that Battle's statement to Lahammer, that "Smith would take his chances", was in fact a lie. Lahammer advised that Smith should (a) write a letter to Lahammer disavowing "attorney-client" privilege between Smith and Battle, and (b) request that Lahammer request recorded conversations between Smith and others, recorded over jailhouse telephone conversations that took place at Lynn County Jail and Bremer County Jail;

4. That Smith followed up on the letter he sent to Lahammer, with attorney Lahammer telling Smith over recorded Bremer County jailhouse telephone calls, that he, Lahammer was "following up on the written request disavowilng attorney-client privilege" between Smith and Battle, with Lahmmer telling Smith he was "looking into Smith's written request" for jailhouse telephone calls;

5. That Smith wrote Lahammer a letter requesting a copy of this letter with Lahammer responding back, via letter, to Smith in 2020, denying he had retained a copy of such a letter, or, his Lahammer's words, he "searched his files" and could not find the letter regarding Battle;

6. That Smith has retained a copy of the letter written to Lahammer in 2017 requesting that "attorney-client" privilege between Battle and Smith be disavowed, a copy of which Smith has among his legal records at home.

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Phone Calls

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All Calls/Talks Paraphrased
Original Conversations Available Through Bremer County Jail

Historical Note: For whatever reason, Lahammer was reluctant to broach the "Ineffective Assistance" Argument Regarding Battle's Provable Lies to Smith

(1)

Context of the Call: Smith requested that Lahammer call attorney Battle and ask that Battle supply information regarding the conversation Smith had with Battle over recorded jailhouse telephone in Lynn Couny Jail, with Battle telling Smith that the government had offerred "concurrent sentences." Lahammer was hesitant to speak to Battle about this, but, stated he had to request copies of records from Battle, and that he may bring this up during the request for records.
Time of Call: Approximately May/June 2017
Call To/From: Call from Smith to Attorney Lahammer over recorded jailhouse telephones;

Smith: I would ask that you request information from Battle regarding the government's offer of concurrent sentences for both the tax and wire charge.
Lahammer: Uh-huh.
Smith: This is important because I agreed to accept both the tax and wire charge together, in return for cooperation, and Battle told me the government "had dropped the wire fraud charges" due to "lack of evidence," he said;
Lahammer: Uh-hun.
Smith: Are you going to bring this subject up when you speak with attorney Battle?
Lahammer: I need to call Battle and request records from him. I can ask how all that went down when I speak to him then.

(2)

Context of the Call: Smith followed up with Lahammer after Lahammer had received records from Battle regarding Battle's comments about the sentences being concurrent or consecutive.
Time of Call: Approximately May/June 2017
Call To/From: Call from Smith to Attorney Lahammer over recorded jailhouse telephones;

Smith: Did you ask Battle about the consecutive versus concurrent conversation he had with the government?
Lahammer: I asked him about this, and he said you stated you "would take your chances."
Smith: What? Take my chances on concurrent versus consecutive? That is a lie. You need to call the government and tell them that Battle was lying to them. There was never a single time I told him I would "take my chances." That is just ridiculous and foolish. I can't beat the government from jail - I have no access to records, its a complex case - why would I take my chances?
Lahammer: You tell me. I'm just saying what he said.
Smith: Are you going to speak to Vavricek and tell him Battle is lying?
Lahammer: I may bring it up.
Smith: Well, it's very important, don't you think?
Lahammer: (As with many Lahammer calls, Lahammer's non-answers to Smith's questions were frequent, or always very evasive, as recorded calls prove.)

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(3)
Context of the Call: There were **MANY** calls like the following where Smith is asking Lahammer if he, Lahammer, followed up with Vavricek regarding Battle's statement that "Smith would take his chances", an outright lie. And, as was generally always true, Lahammer would saying he was "looking into it", but, never get back to Smith on definitive answers.
Time of Calls (multiple calls like this): Between June 2017 and December 2017.
Calls To/From: From Smith to Lahammer over recorded jailhouse telephone calls in Bremer County Jail.

Smith: Did you talk to Vavricek about the offer he made to Battle regarding concurrent versus consecutive sentences?
Lahammer: I'm still looking into it.
Smith: Don't you think this is important?
Lahammer: (No answer).
Smith: What do I need to do to get this message to Vavricek - should I write him a letter?
Lahammer: I wouldn't advise that.
Smith: Should this not be a subject that is brought up before you get to sentencing?
Lahammer: I think it will be brought up.
Smith: I would prefer it be brought up sooner than later. Please do this?
Lahmmer: Okay.

(4)
Context of the Call: Again, after several failed calls like the one above wherein Lahammer is not taking any initiative to bring up "concurrent" versus "consecutive", I get more specific about how to prove that Battle was lying about me "taking my chances."
Time of Call: November - December 2017.
Calls To/From: Smith to Lahammer over recorded jailhouse telephones.

Smith: Have you checked with Vavricek regarding the concurrent versus consecutive sentencing?
Lahammer: I'll bring it up.
Smith: Can you order the jailhouse telephone calls between myself and Battle and Lynn County jail?
Lahammer: Attorney/client calls are privileged.
Smith: But, these calls were all recorded over jailhouse phones - and I am familiar with their recording/call system - all calls are recorded since there is no way to stop a recorded call without number separation and they have no number separation at Lynn County.
Lahammer: The only way to get recorded jailhouse calls between you and an attorney is that you write me a letter and tell me that you are waiving attorney-client privilege.
Smith: Okay, I will do that. Do I simply say I'm waiving attorney client privilege and then give you the telephone call information?
Lahmmer: Yes, I think that would be okay.
Smith: And then you'll submit this to Vavricek and/or the Court?
Lahammer: Yes.

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(5)
Context of the Call: After writing a letter to Lahammer waiving attorney/client privilege between me and Battle, I followed up with a call to make sure he (a) received the letter and (b) was acting on the letter. Unfortunately, after this call was made (more than once), Lahammer went on a thirty-five day extended vacation during the month of February through early March, not returning any calls unitl late March, since he stayed on vacation longer than he had expected. Upon his return, he met with me in county jail and told me he was resigning as my attorney due a "conflict-of-interest" that came up.
Time of Call: January - February 2018.
Call To/From: From Smith to Lahammer over recorded jailhouse phones in Bremer County Jail.

Smith: Did you follow-up with Lynn County jail regarding my letter giving up attorney-client privilege between me and Battle for those recorded jailhouse phone calls?
Lahammer: I'm still looking into it. I'll call Vavricek and talk to him about it.
Smith: Can you do this before you go on vacation?
Lahammer: I'll see if there is enough time, but, I have a lot to do between now and then.
Smith: This is very important and it is making me nervous that you've not done this yet, when I've asked many times.
Lahammer: More important is the matter of restitution - have you got that extra $1 million you said you could bring in to full restore the Claimants?
Smith: What are you saying - I've told you more than once now that they received $2.4 million in cash - have you requested the cash payouts from Vavricek yet?
Lahammer: I'm looking into it. But, it would help your case if you deposited that extra $1 million.
Smith: But I don't owe them $1 million - I've told you this many times. Why do I have to pay them twice? They all asked for and received tax benefits over a five year period as well -
Lahammer: But, as you recall. Vavricek said he wouldn't count the tax benefits?
Smith: Why not? They invested for the tax benefits?
Lahammer: I'm just telling you what Vavricek said.
Smith: Please find out about the jailhouse telephone calls. I will call my friend one more time about "extra cash " but, it seems to me you need to count the cash they've already been paid. Doesn't money coming from an insurance company count as restitution?
Lahammer: I don't know if it counts.
Smith: Can you find out?
Lahammer: I will look into it. But, if you had extra cash, that would go a long way with the judge. Especially this judge.
Smith: Please follow-up on those jailhouse telephone calls - and the letter I mailed you giving up attorney-client privilege.
Lahammer: Okay.

(6)
Regarding Follow-up with Attonrey Brown: After Lahammer quit, I hired attorney Brown. I followed up with attorney Brown reference the same request for jailhouse telephone calls between me and Battle. Brown

stated he was "receiving all the information that Lahammer had" and would follow-up on requesting the jailhouse telephone calls. Attorney Browns' conversations, however, were mostly about getting paid. I agreed to take my $120,000 IRA out and give it to my brother so my brother could pay attorney bills with it. However, the government seized the untained assets claiming they were for restitution - when **restitution had already been paid several times over** - yet, attorney Brown refused to request the insurance company payment record from Vavricek - despite multiple requests for him to do so. Looking back, I can't believe I allowed these attorneys "walk over me" and not request the records I was requesting.

Thankfully, I retained a copy of the letter I sent to Lahammer - that letter copy being among the jailhouse records I still retain at the house.

Conclusion

The bottom line is that:

1. I spoke to Lahammer about ordering the jailhouse telephone calls between me and Mike Battle;
2. Lahammer stated I needed to send him a letter declining attorney/client privilege. I did that. I followed-up with him regarding his receipt of the letter. He confirmed he had received the letter and was looking into the matter. Lahammer was extremely evasive in his answers as to whether he was going to order the jailhouse tapes, or had ordered them. Like Brown, Lahammer was constantly talking about getting paid - my brother David was paying all my legal bills for me - so there were conversations between me and David about getting Lahammer paid and current;
3. Lahammer constantly argued for an additional $1 million in restitution even though I had advised Lahammer on **multiple ocassions** that the Claimants **had received back all th cash. THERE IS CONFIRMATION OF THESE CALLS,** because I asked Lahammer to ask Vavricek about insurance payments to Claimants as restitution - and Vavricek responded to Lahammer saying that Smith "wouldn't have to pay double."

EXHIBIT 5
17 OF 20

Vavricek's response to Lahammer **was via email** - a copy of the email which I have retained and will produce upon request. Additionally, during a "cooperation session" with Vavricek, I told Vavricek, and his assistant Agent Irwin, if I would have to pay double restitution, seeing that all the Claimants had received their cash back via insurance payments - even naming the insurance company (Everest) and Vavricek responded, "No, you will not have pay double." Vavricek was recording this conversation.

4. Lahammer never did order the jailhouse tapes - but, quit instead.
5. I asked attorney Brown to order the tapes - attorney Brown said he would wait for "discovery given him from Lahammer" before proceeding to order the tapes. Brown **never followed-up** on these conversations, but, instead, spent more time demanding money than speaking of my case. I also asked Brown to submit to the court the following **signed payout agreement** to each Claimant - the agreement they all signed in order to receive the $2.6 million in final cash payouts:

> [Claimant agrees to release]...for which monies or other assets were taken **with or without** express permission or implicit knowledge approval and/or authorization and (e) all the respective past, present and future shareholders, members supervisors, employees, registered representatives [Darrell Smith], control persons, agents, insurers...from and with respect to all liabilities, claims,demands, dues, sums of money, costs expenses, attorney's fees, forums convenants, promises, **judgments**, executions, suits, grievances, controversies, agreements, damages, actions and causes of action of any time or nature whatsoever, **cognizable at law or in equity by statute or otherwise**, which the [Claimant] had, have, or may now have angainst anyone or more of the releated parties, based upon or arising out of any matter, cause, act, omission or thing whatsoever, including without limitation, any rights, claims, demands, actions or causes of **action under the common law of any state and/or FEDERAL, state and local laws, ordinances, rules or or regulations (including, without limitation,** contractor tort law, arising directly or indirectly out of any relationship of any kind before the [Claimant]...provided, however, that the forgoing releases are intended to and **shall be deemed limited to any losses associated with Darrell Smith including without limitations, Energae LP, Black Lion Energae...I-Lenders, LLC, Greenbelt,** and/or assignee or successor-in-interest to any of the foregoing..."

EXHIBIT 5
18 of 20

Given that each Claimant signed the precedding agreement prior to receiving their $2.6 million in cash payouts, it seemed to me they would be forbade from bringing a criminal complaint against me. While this agreement was shared with both Lahammer and Brown, only Lahammer believed it had value and was going to bring it up prior to quitting. Brown would not bring it up at all. This agreement ties in with Battle's jailhouse tapes because, combined it shows attorneys not paying attention to detail, lying to Smith, and generally providing ineffective assistance of counsel.

In 2020 Smith wrote a letter to Lahammer asking that Lahmmer render to Smith a copy of the letter Smith sent to Lahmmer in 2017 asking that Lahammer requesting jailhouse telephone calls between Smith and Battle. Lahammer wrote back to Smith saying he had searched "his files and could not find a copy of that letter" which disavowed attorney-client privilege between Smith and Battle. However, Smith has retained a copy of the letter and the copy is with Smith's legal files in Forest City, Iowa.

EXHIBIT 5

19 OF 20

Signature Page
28 USC §1746 Statement of Attestation

I, Darrell Smith, do hereby attest, under penalty of perjury, as the preceeding conversations are true and accurate to the best of my recollection, namely conversations as rendered herein between me and attorneys Lahammer and Brown. The conversations are paraphrased, and the exact verbage can be obtained from the following recorded jailhouse telephone exchanges:

Conv. No.	Phone Number	Recorded Place of Call	Time Frame of Call
(1)	319-364-1140	Bremer County Jail	May/June 2017
(2)	319-365-1140	Bremer County Jail	May/June 2017
(3)	319-365-1140	Bremer County Jail	June/December 2017
(4)	319-364-1140	Bremer County Jail	Nov/January 2017/2018
(5)	319-364-1140	Bremer County Jail	Jan/February 2018
(6)	515-225-0101 or 515-669-4399	Bremer County Jail	May/July 2018

All the above calls were corded over jailhouse telephones.

Signature Attesting to Affidavit _____

Date of Signature 5/4/2024

Note: The above phone call "analysis" was included in multiple documents to **all attorneys**, with this information being reported in §2255 and subsequent documents filed reference the case against the Companies 20-CR-2007, U.S. v. Energae LP & I-Lenders, LLC.

Darrell D. Smith #16355-029
Federal Prison Camp
PO Box 1000
Duluth, MN 55814

EXHIBIT 5
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Signature Page
28 USC §1746 Statement of Attestation

I, Darrell Smith, do hereby attest, **under penalty of perjury**, as being the substance of conversations held between the parties noted herein, namely Mike Battle, attorney, Denise Anderson, attorney, and Richard Smith. The calls are paraphrased, and the exact verbage which would not change one word of meaning, can be derived from the following phone numbers and time frame; originals requested via FOIA.

Phone Number(s)	Recorded Place of Call	Time Frame of Call
347-216-1865	Lynn County Jail	Aug. 2016 to Dec. 2016
202-371-6350	Lynn County Jail	Aug. 2016 to Dec. 2016
425-512-4915	Lynn County Jail	Aug. 2016 to Dec. 2016
347-216-1865	Bremer County Jail	Feb. 2017 to Mar. 2017
202-371-6350	Bremer County Jail	Feb. 2017 to Mar. 2017
425-512-4915	Bremer County Jail	Feb. 2017 to Mar. 2017

All the above calls were recorded over jailhouse telephones.

Signature Attesting to Affidavit _____

Date of Signature 4/25/2024

Note: The above phone call "analysis" was included in multiple documents - including the originally filed §2255 in the wire fraud case. The substance of the phone calls were also included in the Coram Nobis "tax case, case number 16-CR-2002, U.S. v. Smith.

Darrell D. Smith #16355-029
Federal Prison Camp
PO Box 1000
Duluth, MN 55814

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1 OF 2

quarters, with each calendar quarter constituting a separate count of this Indictment:

Count	Quarter		Quarterly Due Date	Approx. Tax Due
6	2011	1st	Apr. 30, 2011	$32,141
7	2011	2nd	Jul. 31, 2011	$32,022
8	2011	4th	Jan. 31, 2012	$30,559
9	2012	1st	Apr. 30, 2012	$52,624
10	2012	2nd	Jul. 31, 2012	$85,267
11	2012	3rd	Oct. 31, 2012	$75,282

/307,895

Each of these counts is a separate violation of Title 26, United States Code, Section 7202.

A TRUE BILL
s/Foreperson

Grand Jury Foreperson — Date 1/21/16

KEVIN W. TECHAU
United States Attorney

By:

MATTHEW R. HOFFMAN
Trial Attorney
Tax Division

for Timothy L. Vavricek

TIMOTHY L. VAVRICEK
Assistant United States Attorney

COMPARISON OF TAXES PAID AND AMOUNTS DEBITED BY ALLIANT ENERGY (STRAND)

Count	Quarter	Quarter Mon/Year	Approx. Total Tax Due	Tax Amount Paid By Permeate	Remaining Amount Due	Funds Taken By Alliant Enq.
[6	[1st	[Apr. 2011	[$56,486*	[$24 345	[$32 141	[ ]
[7	[2nd	[Jul. 2011	[$47,450	[$15.428	[$32 022	[ ]
[8	[3rd	[Oct. 2011	[$79 410	[$79 410	[$0	[ ]
[8	[4th	[Jan. 2012	[$43.455	[$12.895	[$30 559	[ ]
[9	[1st	[Apr. 2012	[$52.624	[$0	[$52.624	[$169.289]
[10	[2nd	[Jul. 2012	[$85.267	[$0	[$85 267	[$112.000]
[11	[3rd	[Oct. 2012	[$75.282	[$0	[$75.282	[$81.000]
[	[	[**Totals**	[**$439.974**	[**$142,078**	[**$307.895**	[**$362,289**]

* Of the total tax bill of $439.974 during this time. $67.400 was penalties and interest. making the actual bill $372.574, close to what Alliant took

Please Note the Following:

1. Permeate was paying taxes up until (a) the takeover of BFC and the unexpected debit of funds by Alliant Energy during the first quarter of 2012;
2. Alliant's "hit" of Permeate's account caused payment failures to other vendors. including Cargill which ceased feedstock deliveries
3. Alliant captured all of BFC's revenue in 2013 to complete the amount they believed they were owed.
4. Because of the "dispute with Alliant," Jerry Krause. Permeate's CFO. stole $100.000 from Permeate during 2012. The government used Krause as a "cooperating witness" against Smith. when Smith was (a) not on Permeate's payroll. (b) not part of Permeate's management. (c) nor part of Energae's management at this time

Exhibit 7 1 to 10

EXHIBIT 7. 1 OF 10

TRULINCS 16355029 - SMITH, DARRELL - Unit: DTH-O-A

7/29/24

FROM: 16355029
TO: Meyer, Mark
SUBJECT: RE: RE: please respond
DATE: 07/29/2024 05:45:17 PM

Recusal

please prepare a request

i will get you the subjects next week, but in order of importance:
1. recusal issue is an open and shut book. judge strand as an attorney caused the failure of permeate refining and its subsidiary BFC. he was the attorney working for alliant energy which dishonored their verbal agreement. because they dishonored the agreement, strand, with the court's authorization debited permeate's account for 380,000. as a result, the taxes went unpaid in 2012. he then became my judge regarding unpaid permeate taxes. in the tax case 16-cr-2002, u.s. v. smith, i did not connect "attorney strand" with "judge strand" thinking they were different people. but, two weeks before sentencing in the wire case, brown sent me documents regarding permeate/bfc electric and in those documents was strand's order to debit permeate's account - how he requested summary judgment against BFC electric - how they sent the summary judgment to the wrong address - not Permeate's who owned BFC, but to BFC's old address used before permeate bought BFC. so we didn't even know there was a summary judgment issued against permeate re BFC until Alliant Energy called the day they won the judgment and asked him if i was going to pay in cash or wire. permeate's attorney, stafani, was in on the gag, because he could have stopped the whole thing had he argued improper service - but, he did not, saying nothing could be done, allowing attorney strand to debit permeate's account. barnhill, bfc's attorney lies on paper saying permeate now owned BFC and it was permeate's problem - she lied to us, then saying she never received notice of the summary judgment. the lies go on and on. when i discovered his involvement, i asked brown what to do. he said filed a 2255. i did, and in that filing i told of strand's involvement. but, because i was in county jail so long, i was past the 12 month 2255 filing period. strand appointed attorney bishop - but only allowed an argument as to whether we could file a 2255 past the 12 month period. bishop explained the late filing circumstances and judge strand denied the 2255.

in my appeal, that i faxed to you, i write all these details, and you can look them up on line at the 8th circuit in st. paul, under that case number i gave you. i will email more when time permits

2. then comes the brady violation by vavricek - which i've also filed at the 8th circuit

3. the other issues - the restitution - claimants receiving $2.6 million in cash in 2015, two years before indictment of fraud, and $3.3 million in tax benefits over a five year period. vavricek is the one that subpoened the info and has it - a brady vioaltion that he hasn't submitted this proof to the court - the multiple filings i made - strand's order in the case against the companies, 20 -cr-2007, u.s. v. energae lp and i-lenders llc, at sentencing, saying he would adjust restitution if smith's 2255 info proved good enough to warrant decreasing the rest. owned to $0. then in the 2255 he rules that i can't argue restitution. this is totally wrong.

4. i'm limited on email space - so i will write this and fax it to you, then mail a back-up copy

5. Priestley's poisonous tree - calling all the claimants lying to them about my financial activities. claimants lying under oath - this is just crazy - some information i didn't receiving until 2022 and upon receipt filed on it.

i am working on a supreme court filing for the companies, also asking for recusal, and i will get this to you next week.

i apologize for the delay; but, his denials are just terrible, calling black white

darrell
-----Meyer, Mark on 7/24/2024 11:21 AM wrote:

>

An application for relief under 2255 is considered a civil case. Civil appeals have a 60-day deadline if the United States is a party. When a certificate of appealibity is denied, you have to get permission to appeal by asking the Court of Appeals for permission to appeal. It is good practice to submit a brief with the request focusing on the best issue or issues.

Here is are the applicable rules ... feel free to go to the law library to check them out.

Let me know if you plan on filing for a certificate of appealability, or want my help, or if you want me to prepare a request (which

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EXHIBIT 7 2 OF 10
RECUSAL

TRULINCS 16355029 - SMITH, DARRELL - Unit: DTH-O-A

10/24/24

FROM: 16355029
TO: Meyer, Mark
SUBJECT: RE: RE: hear from you
DATE: 10/24/2024 06:06:48 PM

okay; i didn't ask the question as to whether you were the attorney. i asked if you had filed a notice to withdraw, and he said no such notice was filed.

i will call tomorrow to determine if i misunderstood that you were still counsel. regardless, i mailed it today anyway. it goes out tomorrow morning. I pray to God they hear this case. it is so wrong what they've allowed in this case against me and my family.

i re-read the arguments that judges reade and strand made against me over time, and it is just terrible what these judges have done to me. i will say no more here, but i would welcome the chance to go back to court

they were all involved with BFC - Judge Reade siding for Gypsum supply (see BFC v. Gypsum Supply, N.D. Iowa, 2015) and Judge Strand being attorney Strand working for Alliant. Alliant, as you know, is the largest company in Cedar Rapids, and of course they would all be intertwined with the numerous suits that Alliant was facing. Reade had handled several Alliant cases, several BFC cases prior to Gypsum. But, she dismissed Gypsum and fined Barnill $50,000 for filing the lawsuit - Scoles did, that is. that is why Scoles acted like he knew me when I was indicted for taxes - making false claims (about my "posture" - arrogance, "disrespectful" when I hadn't said a single word yet? - i don't recall the exact language, but it was very wrong), having never met him before, yet, I was in shock at the indictment hearing on Jan 29, 2016. so, ruling was already in before i stepped foot in court.

just so you know, Jeff Carter ended-up with BFC because, he claims, he found Alliant mishandling their accounting in 2004 thr[illegible]h 2006. If you look at Alliant's stock price during this time, he dropped from mid-40s to below $16, due to accounting iss[illegible], being fined by the SEC for "irregularities" (fraudulent records). Carter claims he was the one who discovered this and reported some of it - so Alliant and Carter owned 50% each of BFC in 2004/2005. Alliant had it sold to a company in Minnesota for $8 million, for which Carter and his partner Dunham would have received about $500k, after debts paid? this wasn't enough for Carter, he claims, so, he told me he would "expose Alliant's accounting," and as a result, Alliant signed over 100% ownership of BFC to Carter in 2006 for "an undisclosed sum" that sum, Carter said, was $1

but, Carter was a liar too - but, this is the story he gave me, and it bears some fruit as Shupp stated, plainly, they were going to "make things right with Carter" and not in a good way - but, instead, they got back at me as I took on Carter's problems, and Carter went on to get, yet, rich again on compressed natural gas. i was such a fool

i pray they hear my recusal arguments and the MVRA at least - i'm filing a second or successive 2255 request in the 16-CR-2002 case as ruled by Judge Tunhiem in Minnesota under case 23-CV-00357, Smith v. Eishen; thus, the 8th circuit will receive "similar arguments" regarding recusal in this pro se request for a 2255 successive
-----Meyer, Mark on 10/24/2024 4:51 PM wrote:

>

Hello Darryl, I am back in town (had to go to St. Paul via Rochester for an oral argument on Tuesday, before the 8th Circuit. I checked with the Clerk and I am not counsel of record in the on appeal ... be advised, though, the case number is 24-3040.

Hope you see this in time ..;.

DARRELL SMITH on 10/23/2024 1:06:55 PM wrote
well, if i don't hear from you by tomorrow morning, oct. 24, 2024, thursday, i will assume it is okay to send my pro se package to the 8th cir. i'm sure it is going to upset Strand, but, there is nothing in that document that is false; all is provable.

dar[illegible]

EXHIBIT 7 3 of 10
8/6/24

TRULINCS 16355029 - SMITH, DARRELL - Unit: DTH-O-A

FROM: 16355029
TO: Meyer, Mark
SUBJECT: lockdown this week
DATE: 08/06/2024 07:14:28 AM

we are on lockdown this week - can't move, one email a day

i can't write-up strand's ridiculous denial until this is lifted

regardless, look at document 133 in case number 20-cr-2007, u.s. v. energae lp & i-lenders llc, n.d. Iowa. This document as well as other documents (i believe 84, 85 - strand's recusal denial is in document 87, I believe).

document 133 was written up with documented proof of judge's strand's direct involvement with the Companies prior to becoming my judge - it has attachments to it.

this is the main argument to develop, along with violation of MVRA rules - there was no accounting of either the claimed investment amounts or what they got back - yet vavricek is committing a brady violation by not submitting the subpoened documents he has showing the claimants received back $2.6 million cash in 2015, two years before indictment. i paid for some of this, and did this insurer, along with all the attorney fees to settle it.

the investment amounts are wrong - lackore, for example, claims i invested unauthorized $224,000 for her, of which $50,000 was authorized. this is a lie. she invested $160,000 and received back $180,000 cash.

this is one example.

i will mail a write up along with proof next week when lockdown is hopefully over. these people at this place are verifiably insane. prison doesn't work for true criminals and their methods of curtailing behavior is childish. "children thinking" running prisons. it is communication, trust and mercy that brings people to hope and change. little else works.

Darrell

EXHIBIT 7 4 of 10

DID NOT SEE IT BEFORE IT WAS SUBMITTED

TRULINCS 16355029 - SMITH, DARRELL - Unit: DTH-O-A

FROM: 16355029
TO: Meyer, Mark
SUBJECT: other thing - Luis v. US, capture of my IRA
DATE: 03/14/2024 11:20:34 AM

the govt. violated Luis v. U.S. when they captured my IRA $120,000 - money intended for legal fees

i needed this argued in the 2255 - the IRA money was to be used to pay legal counsel

i know you're good, but, i really wanted to see it before it was submitted thank you

Exhibit 7 5 of 10

EXHIBIT 7 5 of 10

February 21, 2024

RECUSAL 2/21/24

Mark Meyer, Attorney
103 East State Ste 300
Iowa City, IA 52240

Dear Mr. Meyer

Being faxed is a copy of the motion I submitted at the Minnesota court reference my Habeas Corpus filed there (case number 23-cv-357 JRT/DJF).

It contains the information regarding my recusal argument.

Judge Reade should have also recused herself since she decided cases against Permeate for (1) BFC in 2008/2009 and (2) Tate and Lyle in 2010.

I'm sure Judge Strand is your acquaintance and friend - but, no Judge has adjudged me rightly - taking procedure over truth is not what I thought the courts should be about.

Darrell Smith #16355-029
Federal Prison Camp
PO Box 1000
Duluth, MN 55814

800-351-2493

EXH 1017 6 of 10

RECUSAL

2/13/2024

800-351-2493

February 13, 2024

Attorney Mark Meyer
103 East State Ste Suite 300
Iowa City, IA 50422

Dear Mr. Meyer,

Enclosed is my write-up on the case laws as cited and given to you via email - (1) the Wells case and (2) the Amaya case.

I've done my best to try and explain the cases as it relates to my case. What really bothers me about my case is the multitude of lies that Vavricek is telling about me in the sentencing record. Even Brown, at sentencing, turned to me and said he knew he was lying. This makes no sense - I had more confidence in the government than this.

RECUSAL

This whole thing about the tax credits is wrong - the tax credits given Claimants were based on (1) Energae investments, (2) Permeate's and BFC's production and (3) the investment portion that was allocated to research - all being done with legal oversight and letters from attorneys. The "consortium" which Vavricek likes to bring up held $26.5 million credits which were unissued - **never issued. THE SAME METHOD OF TAX CREDIT ALLOCATION FOR PERMEATE AND BFC WAS THE SAME METHOD OF TAX CREDIT ALLOCATION THAT ALLIANT ENERGY WAS USING ON THEIR TAX RETURNS FOR INVESTING IN BFC FROM 1997 THROUGH 2006.** Alliant "gave" its ownership interest in BFC to Jeff Carter - Judge Strand was part of this "handover", and he was part of the Permeate/BFC takeover in 2012 - trying to take $380,000 from Permeate's account (signing the bank draft to take this money), then becoming Permeate's judge on the taxes - the same taxes that went unpaid because of the false representations Alliant Energy (represented by Strand) made to me and Permeate in Alliant meetings in 2011. So, of course, there is no more clear recusal issue than this case. Yet, Strand refused to recuse himself in the case against the Companies, ruling "it was too long ago." I cited a Supreme Court case wherein it stated that time, relative to recusal issues, was not be used as a weapon against a defendant. So, of course it makes me nervous having Strand as my judge yet again - he denied every motion relative to the Companies - monumental constitutional violations - and he is still denying them - and you are saying he is fair? I don't understand this.

Jeff Carter even said he had "dirt on Alliant Energy", which I presume would be their legal counsel as well - look at their trading history - around 2006 their price dropped from $40+ a share to less than $16 due to "financial irregularities" at the same time they were "signing over" BFC to Carter.

Sincerely,

Darrell Smith #16355-029
Federal Prison Camp
PO Box 1000
Duluth, MN 55814

Exhibit 7 7 of 10

EXHIBIT 7 7 OF 10
STIPULATED, RECEIVED
7/23/24

TRULINCS 16355029 - SMITH, DARRELL - Unit: DTH-O-A

FROM: 16355029
TO: Meyer, Mark
SUBJECT: RE: Rulling
DATE: 07/23/2024 11:47:11 AM

the supreme court case in dubin came after the i.d. theft i was charged with

how could he call that procedurally barred when it was new case law?

this is so very wrong and so very criminal. please tell me your cellphone number. mr. johnson is very busy here

this is very discouraging given all the lies.

i asked that strand be removed from the case in a 2241 appeal to the 8th circuit pending 24-2148, sending them proof that strand was an attorney that created the financial problems for the companies before he became my judge

please look up this appeal and tell me if i should reference it in my request for appeal on the 2255

should i file a complete a appeal, or just request for appeal within 14 days - do i have to cite case law to request a review of nonappealability? especially given pending appeal 24-2148, filed two years ago in minnesota, and only now getting heard at the appeallate level
-----Meyer, Mark on 7/22/2024 8:06 PM wrote:

>

I am sorry to inform you that Judge Strand issued a 62 page order denying your application for 2255 relief. I copied the ruling and mailed it to you this afternoon. He addressed many of the clailms and found them not have merit, and several others he found were procedurally defaulted.

Judge Strand also denied a certificate of appealability. This will make it very difficult for you to get the 8th Circuit to accept an appeal of his ruling.

You should receive a copy of the order by the later this week, I would think.

PCR applications are rarely granted, so you are far from being alone in having a 2255 application dismissed.

EXHIBIT 7 8 of 10

TRULINCS 16355029 - SMITH, DARRELL - Unit: DTH-O-A

FROM: 16355029
TO: Meyer, Mark
SUBJECT: RE: RE: package paper
DATE: 08/29/2024 03:53:24 PM

no, don't withdraw

i believe i'm going to lose regardless, but, i stand a better chance with your argument if you'll still do it. however, i needed to compile my thoughts in that way.

i'm sure you don't like the recusal argument - but, what am i supposed to do - judge strand caused the companies financial failure - this is not a guess, i was there - i didn't know what i was doing - believing alliant was good to their word, not following up on documents. always pressed for time, even as i am now, scattered

it really bothers me that this judge can do this - avoid priestley's lies and the MVRA - it makes no sense to me. but, those are the main issues

it would not have mattered what you argued - he took bits and pieces of nonsense (my comment re conrad lysiak hidden in an obscure document from long ago - but, conrad had a securities win record and was well known, but he died while he was entering his name to defend me) - i mean to pick up on the lysiak comment and not consider that everything priestley said was a lie - and that she lied to others?

so, you can argue the better themes better - i'm just too hurt by all this. my main goal was to get the phone calls re battle

will call on monday if allowed as the phones are down until then
---(eyer, Mark on 8/28/2024 6:06 PM wrote:

>

hello, I did receive a large stack of docs today at my Iowa City office. There is a cover letter. I will copy it and mail it back to you.

I wonder, since you went to all the time and trouble to prepare the application for certificate of appealability, if I should withdraw as your counsel so you can then submit pro se the application you prepared to the Eighth Circuit Clerk. I suppose that I could withdraw and then mail the application you sent to me to the Eighth Circuit with a letter indicating that you had sent this to me before I withdrew and I am post-withdrawal acting as an intermediary for getting the document to the Court?

DARRELL SMITH on 8/23/2024 12:36:36 PM wrote
Mr.. Meyer
I mailed you my write-up requesting appealability. You should receive it tuesday, latest wednesday.

It is in the general format that they use; you can write your own and attach mine as an exhibit, or use mine attached to yours.

Regardless, i did not have enough funds to copy the cover letter sent to you. Upon receipt, please mail me back a copy of the cover letter.

thank you for your help. please advise upon receipt. I'm mailing a copy of this write-up to the appeallate case on appeal smith v. eischen given that the recusal argument is in both, and both are linked because the minn. court stated I had to argue certain arguments in the 2255 - well strand refused those arguments which belays the minn. judge's order - such nonsense, the whole of it.

what is wrong is that vavricek recieved subpoenaed payouts from everest twice - and yet he still rules i must pay $1 million. Judge Reade then rules she wouldn't lower my sentence even if the restitution had been paid. Both Reade, and now Strand, ca(Priestley's lies compelling. it pays to lie in Northern Iowa at court - plead guilty to something you didn't do - that is okay, they go easy on you. object, however, and they give you 175 months and call me obstinate. there is a higher judge to which they will account and on that day I will be a witness against them. Isaiah 10:1-3

darrell

EXHIBIT 7
9 of 10

TRULINCS 16355029 - SMITH, DARRELL - Unit: DTH-O-A

FROM: 16355029
TO: Meyer, Mark
SUBJECT: denial of discovery request
DATE: 04/22/2024 04:40:30 PM

NOT FILING. THE DISCOVERY REQUEST SMITH HAD REQUESTED

Mr. Meyer,

This is a formal request that you immediately amend your discovery request to include those minimal changes I made in the document I filed, and informed you of that I was filing.

Please respond back ASAP. My entire case revolves around those discovery changes - and more - the 100s of lies that Priestley told to investors, the Claimants and the Courts.

You knew the court denied my request 7 days ago, yet, you did not amend your discovery request. I don't care why - but, those changs must be made immediately.

There was no written correspondance that Battle ever provided me - this is stuff he can invent after the fact; and he would do that. Asking only for correspondance is destroying my case and you know this.

Please repond ASAP. I have no time for this.

Darrell Smith

EXHIBIT 7
10 OF 10

TRULINCS 16355029 - SMITH, DARRELL - Unit: DTH-O-A

FROM: 16355029
TO: Meyer, Mark
SUBJECT: RE: RE: also re brown
DATE: 02/06/2024 08:19:49 PM

this is case law - case law states that any attorney testifying against you at sentencing RELATES DIRECTLY TO INEFFECTIVE ASSISTANCE

i cited the Hurleow case from the 7th circuit in my reply to you
-----Meyer, Mark on 2/6/2024 7:51 PM wrote:

>

I have noted your comments ... what claim that Judge Strand kept alive would this relate to? 2255 is a series of procedural trap doors, no new claims allowed at this point in the proceedings, as I know you are aware but just want to reaffirm.

DARRELL SMITH on 2/2/2024 6:36:52 PM wrote
atty brown called me "mad" in the sentencing document

is this testifying against me since he is agreeing with the govt' argument regarding consortium? a terribly false claim by the way - only liars are mad

the only madness was brown's refusal to consider what was true, or read the information as presented to him from me

regardless, this seems to me to be a violation of strickland - testifying aginst your client (u.s. v. hurelow, 7th cir.). is this not testifying against me given that the subject of "madness" came up due to the govt's lies regarding the consortium? - the consortium was real, it was the govt. prosecutor making up stories about it - which i covered in a document sent to you (given Vavricek's, yet again, very tiring and very wrong comments regarding the consortium - we had one of the nation's best tax attorneys for hire - and he hired another - talked to the IRS - emailed them the USDA CRADA document - all that - and vavricek calls this fraud - priestley called it fraud, and she was not a tax expert, even though she gladly used the tax credits she was asking for).

i am sending one last document which goes over each claimant, name by name - obviously, they must not think lying is important under oath unless you are lying for them. this is disgraceful. they will see god someday, i pray it comes up then.
-----Meyer, Mark on 2/2/2024 4:51 PM wrote:

In my experience, Judge Strand is a fair and reasonable judge.

But federal postconviction relief claimants face a minefield of procedural barriers to relief, which judges duly apply.

Finality is, unfortunately, the goal, in part because too many claimants abused the system and diverted scarce judicial resources to frivolous claims. So now it is a very few claims that ever get decided on the merits.

As far as characterizing the tax case as fraud, fraud seems to be used to cover anything deemed to be dishonest.

DARRELL SMITH on 2/1/2024 6:23:22 PM wrote
i mailed an explanation of the chart on page 9 of claim 6

it should arrive at the same time as the other package

judge strand denied my coram nobis in the tax case (16-cr-2002) as untimely; however supreme court ruling did not limit coram nobis to filing when out - so i appealed to the 8th circuit

regardless, i wonder if he really is looking for truth, or if he simply wants to white was my wire fraud case due to all the lies prosecution and claimants provably told? in the coram nobis in the tax case, he again called my case case "tax fraud"; when, in fact the word "fraud" never came up one time - it was "failure to handover past due tax dollars". why is he callings this fraud, when "fraud" is not menioned in anything? it seems he's trying to send a message, which is wrong. they even put this in the

truthfully account for and pay over to the United States, namely the Internal Revenue Service, all of the federal income taxes withheld and Federal Insurance Contributions Act ("FICA") taxes due and owing to the United States on behalf of Permeate and its employees, for each of the following quarters, with each calendar quarter constituting a separate count of this Indictment:

TAXES DUE BEFORE LEVER SALE WAS INVALVED

Count	Quarter		Quarterly Due Date	Approx. Tax Due
1	2009	4th	Jan. 31, 2010	~~$6,711~~
2	2010	1st	Apr. 30, 2010	$13,954
3	2010	2nd	Jul. 31, 2010	$16,920
4	2010	3rd	Oct. 31, 2010	$28,569
5	2010	4th	Jan. 31, 2011	$45,926

Each of these counts is a separate violation of Title 26, United States Code, Section 7202.

Counts 6–11

Failure to Account For and Pay Over Employment Tax

13. The Grand Jury hereby repeats and realleges paragraphs 1 through 10 of this Indictment as if fully set forth here.

14. On or about the dates set forth below, in the Northern District of Iowa, Defendants RANDY LESS and DARRELL SMITH, responsible persons of Permeate, did willfully fail to truthfully account for and pay over to the United States, namely the Internal Revenue Service, all of the federal income taxes withheld and Federal Insurance Contributions Act ("FICA") taxes due and owing to the United States on behalf of Permeate and its employees, for each of the following