No. _____

IN THE SUPREME COURT OF THE UNITED STATES

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**JULIA GREENBERG,**

*Petitioner*,

v.

**UNITED STATES OF AMERICA,**

*Respondent*.

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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# APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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Beau B. Brindley
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**INDEX TO APPENDICES**

# In the
# United States Court of Appeals
## For the Second Circuit

August Term, 2024

(Argued: January 8, 2025 Decided: February 3, 2025)

Docket Nos. 23-7168 (L), 23-7249 (Con)

UNITED STATES OF AMERICA,

*Appellee*,

–v.–

JULIA GREENBERG, AKA SEALED DEFENDANT 3, ULADZIMIR DANSKOI, AKA SEALED DEFENDANT 2,

*Defendants-Appellants*,

YURY MOSHA, AKA SEALED DEFENDANT 1, ALEKSEI KMIT, AKA SEALED DEFENDANT 4, TYMUR SHCHERBYNA, AKA SEALED DEFENDANT 5, KATERYNA LYSYUCHENKO,

*Defendants*.*

Before: WALKER, ROBINSON, and MERRIAM, *Circuit Judges*.

* The Clerk's office is directed to amend the caption as reflected above.

Defendants-Appellants Julia Greenberg and Uladzimir Danskoi appeal from criminal judgments entered in the United States District Court for the Southern District of New York (Oetken, *J.*) convicting them of a single count of conspiracy to commit immigration fraud. Defendants raise several challenges to the convictions, most of which are addressed in a summary order issued contemporaneously with this opinion.

In this opinion, we address only Defendant Greenberg's challenges to the legal sufficiency of one of the charged objects of the conspiracy—namely, committing immigration fraud by obtaining certain immigration documents knowing them to be "forged, counterfeited, altered, or falsely made, or to have been procured by means of any false claim or statement, or to have been otherwise procured by fraud or unlawfully obtained," in violation of 18 U.S.C. § 1546(a) para. 1 ("Paragraph 1"). Greenberg argues that Paragraph 1 does not reach the possession of *authentic* documents that one knows to have been procured by a false claim or statement but is instead limited to *counterfeit* documents.

We conclude that the plain language of Paragraph 1 applies to the possession of authentic documents known to have been procured by means of a false claim. Through the summary order and this opinion, we thus AFFIRM the district court's judgments.

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DAVID R. FELTON (Jonathan E. Rebold, Jacob R. Fiddelman, on the brief), Assistant United States Attorneys, *for* Damian Williams, United States Attorney for the Southern District of New York, New York, NY, *for Appellee*.

BEAU B. BRINDLEY, The Law Offices of Beau B. Brindley, Chicago, IL, *for Appellant Greenberg*.

JAMES M. BRANDEN, Law Office of James M. Branden, Staten Island, NY, *for Appellant Danskoi.*

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PER CURIAM:

Defendants-Appellants Julia Greenberg and Uladzimir Danskoi appeal criminal judgments entered in the United States District Court for the Southern District of New York (Oetken, *J.*). For the reasons set forth below and in a summary order issued contemporaneously with this opinion, we AFFIRM the judgments.

## BACKGROUND

Defendants-Appellants Julia Greenberg and Uladzimir Danskoi were convicted of a single count of conspiracy to commit immigration fraud. Danskoi was a partner at Russian America, an immigration services firm in New York that purported to provide translation and other services for individuals in immigration proceedings. The government presented evidence that Danskoi and other charged conspirators associated with Russian America steered clients into fraudulently applying for asylum based on fabricated stories, and that Greenberg, an immigration attorney, then represented those individuals in immigration proceedings and further bolstered their applications, despite knowing that they were fictitious. Both Defendants were convicted pursuant to a general verdict following a two-week jury trial in December 2022.

Most of Defendants' challenges to the convictions are addressed in a summary order issued contemporaneously with this opinion. This opinion deals solely with Greenberg's challenge to whether the government met its burden to prove the second alleged object of the conspiracy—namely, committing immigration fraud by obtaining certain immigration documents knowing them to be "forged, counterfeited, altered, or falsely made, or to have been procured by means of any false claim or statement, or to have been otherwise procured by fraud or unlawfully obtained," in violation of 18 U.S.C. § 1546(a) para. 1 ("Paragraph 1").

As relevant to this opinion, the government introduced evidence that Greenberg coached CS-1 and CS-3, two government informants who were posing as applicants for asylum based on fabricated stories, in their asylum proceedings after Russian America submitted the applicants' written applications. The government's theory at trial was that Defendants' conspiracy to secure I-94 forms, documenting grants of asylum, was tantamount to a conspiracy to violate Paragraph 1. Greenberg contends that as a matter of law, Paragraph 1 does not apply to that conduct.

## DISCUSSION

Paragraph 1 punishes:

> Whoever knowingly forges, counterfeits, alters, or falsely makes any immigrant or nonimmigrant visa, permit, border crossing card, alien registration receipt card, or other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States, or utters, uses, attempts to use, possesses, obtains, accepts, or receives any such visa, permit, border crossing card, alien registration receipt card, or other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States, knowing it to be forged, counterfeited, altered, or falsely made, or to have been procured by means of any false claim or statement, or to have been otherwise procured by fraud or unlawfully obtained . . . .

18 U.S.C. § 1546(a).

Greenberg argues that this provision does not reach possession of *any* authentic immigration documents – no matter how they were procured – but rather punishes only counterfeiting and possession of counterfeit documents. She contends that the triggering requirement of Paragraph 1 is that the documents in question be forged, counterfeited, altered, or falsely made, and that the reference to obtaining, possessing or using "any such" documents refers *only* to documents that were forged, counterfeited, altered, or falsely made. *See* Greenberg Br. at 28. We disagree.

Paragraph 1 reaches *both* "knowingly forg[ing], counterfeit[ing], alter[ing], or falsely mak[ing]" any of the specifically listed immigration-related documents

in the statute, *and* receiving, possessing, or using "any such [document] . . . knowing it to be forged, counterfeited, altered, or falsely made, *or to have been procured by means of any false claim or statement, or to have been otherwise procured by fraud or unlawfully obtained*." 18 U.S.C. § 1546(a) para. 1 (emphasis added). We read "any such" document as referencing the specific list of immigration-related documents covered by the statute, not the means of falsifying those documents.

It is a "cardinal principle of interpretation that courts must give effect, if possible, to every clause and word of a statute." *Liu v. Sec. & Exch. Comm'n*, 591 U.S. 71, 89 (2020) (citation omitted). "[I]f it can be prevented," we construe statutes such that "no clause, sentence, or word shall be superfluous, void, or insignificant." *El Omari v. Int'l Crim. Police Org.*, 35 F.4th 83, 90 (2d Cir. 2022) (citation omitted). Greenberg's construction would effectively require the Court to ignore the statute's specific reference to receipt, possession, or use of documents known "to have been otherwise procured by fraud or unlawfully obtained." That statutory clause expressly encompasses fraudulent acquisition of immigration documents through means other than forgery and counterfeiting. Greenberg's reading would render it inoperative. This reinforces our conclusion that the plain language of Paragraph 1 proscribes the receipt or possession of an authentic document that one knows to have been procured by a false claim or statement.

Every court to have considered this provision has reached the same conclusion. *See, e.g.*, *United States v. Kouevi*, 698 F.3d 126, 134 (3d Cir. 2012) (holding that the plain language of Paragraph 1 "prohibits the possession and use of authentic immigration documents obtained by fraud"); *United States v. Krstic*, 558 F.3d 1010, 1017 (9th Cir. 2009) (concluding, based on statutory history and "common sense," that Paragraph 1 "prohibits possessing an otherwise authentic document that one knows has been procured by means of a false claim or statement").

Greenberg relies primarily on *United States v. Campos-Serrano*, 404 U.S. 293 (1971), for the proposition that Paragraph 1 pertains only to "counterfeiting," whereas *other* paragraphs of § 1546(a) address fraud in the acquisition of authentic immigration documents, *id.* at 301 n.13. We agree with the district court that "*Campos-Serrano* cannot support the weight Greenberg places upon it." *United States v. Greenberg*, No. 1:21-cr-00092, 2022 WL 827304, at *18 (S.D.N.Y. Mar. 9, 2022) (Nathan, *J.*) (alterations accepted). In *Campos-Serrano*, the Court considered whether an "alien registration receipt card" was a document required for "entry into . . . the United States" such that § 1546(a) para. 1 proscribed possession of a counterfeit version of it. 404 U.S. at 295. The Court did not address whether

Paragraph 1 prohibited possession of an otherwise authentic document obtained through a false claim.

And, contrary to Greenberg's argument, reading Paragraph 1 to reach both authentic and inauthentic documents does not render Paragraph 4 of § 1546(a) superfluous. Paragraph 4 punishes "knowingly mak[ing] under oath . . . any false statement with respect to a material fact" in an immigration application. 18 U.S.C. § 1546(a) para. 4. Paragraph 4 does not cover the *possession* or *receipt* of fraudulently obtained documents, which is addressed only in Paragraph 1.

In sum, based on the plain text of the statute, we conclude that Paragraph 1 unambiguously prohibits the knowing acquisition, possession, or use of authentic immigration documents obtained by fraud or false statement and thus the rule of lenity doesn't apply. *See United States v. DiCristina*, 726 F.3d 92, 104 (2d Cir. 2013) ("[T]he rule of lenity only applies if, after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute." (citation omitted)).

Greenberg does not otherwise challenge the factual sufficiency of the government's evidence on this reading of the statute. Accordingly, the district court's inclusion of violating Paragraph 1 as one object of the charged conspiracy was not error and provides no basis to overturn Greenberg's conviction.

## CONCLUSION

For these reasons and for the reasons set forth in the separately issued summary order, we AFFIRM.

23-7168 (L)
*United States v. Greenberg*

**UNITED STATES COURT OF APPEALS**
**FOR THE SECOND CIRCUIT**

**SUMMARY ORDER**

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

At a stated term of The United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 3rd day of February, two thousand twenty-five.

PRESENT:

JOHN M. WALKER JR.,
BETH ROBINSON,
SARAH A. L. MERRIAM,
*Circuit Judges*.

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UNITED STATES OF AMERICA,

*Appellee,*

v. Nos. 23-7168 (L), 23-7249

JULIA GREENBERG, AKA SEALED DEFENDANT 3,
ULADZIMIR DANSKOI, AKA SEALED DEFENDANT 2,

*Defendants-Appellants,*

YURY MOSHA, AKA SEALED DEFENDANT 1,
ALEKSEI KMIT, AKA SEALED DEFENDANT 4,
TYMUR SHCHERBYNA, AKA SEALED DEFENDANT 5,
KATERYNA LYSYUCHENKO,

*Defendants*.*

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|---|---|
| FOR APPELLANT GREENBERG: | BEAU B. BRINDLEY, The Law Offices of Beau B. Brindley, Chicago, IL. |
| FOR APPELLANT DANSKOI: | JAMES M. BRANDEN, Law Office of James M. Branden, Staten Island, NY. |
| FOR APPELLEE: | DAVID R. FELTON (Jonathan E. Rebold, Jacob R. Fiddelman, *on the brief*), Assistant United States Attorneys, *for* Damian Williams, United States Attorney for the Southern District of New York, New York, NY. |

Appeal from criminal judgments entered in the United States District Court for the Southern District of New York (Oetken, *Judge*).

**UPON DUE CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that, for the reasons set forth in a separate *per curiam* opinion issued today and in this summary order, the September 8, 2023 and September 28, 2023 judgments are **AFFIRMED.**

Defendants-Appellants Julia Greenberg and Uladzimir Danskoi were convicted after a jury trial of a single count of conspiracy to commit immigration fraud. Danskoi was a partner at Russian America, an immigration services firm

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* The Clerk's office is directed to amend the caption as reflected above.

in New York that purported to provide translation and other services for individuals in immigration proceedings, and Greenberg was an immigration attorney. The government presented evidence that Danskoi and other conspirators associated with Russian America steered clients into fraudulently applying for asylum based on fabricated stories, and that Greenberg then represented those individuals in immigration proceedings and further bolstered their applications, despite knowing that they contained false information.

The charged conspiracy based on this evidence had three alleged objectives: (1) defrauding the United States, in violation of 18 U.S.C. § 371; (2) immigration fraud by obtaining visas and asylum grants by means of false claims, statements, or other fraudulent means, in violation of 18 U.S.C. § 1546(a) para. 1; and (3) immigration fraud by knowingly presenting false statements under oath regarding a material fact in an application, affidavit, or other document required by the immigration laws, in violation of 18 U.S.C. § 1546(a) para. 4. Both Defendants were convicted pursuant to a general verdict following a two-week jury trial in December 2022.

On appeal, each defendant argues that the evidence was insufficient to show that he or she entered into an agreement with another person to pursue an

alleged object of the conspiracy[1] and that the district court erred by giving the jury a conscious avoidance charge. In addition, Greenberg contends the district court committed plain error when it instructed the jury about an attorney's ethical duties. We assume the parties' familiarity with the underlying facts, procedural history, and arguments on appeal, to which we refer only as necessary to explain our decision to affirm.

## I. Sufficiency of the Evidence

We review a challenge to the sufficiency of the evidence *de novo*, meaning without deference to the district court's decision. *United States v. Dove*, 884 F.3d 138, 150 (2d Cir. 2018). In assessing the sufficiency of the government's evidence, "we must view the evidence in the light most favorable to the government, and construe all permissible inferences in its favor." *United States v. Heinemann*, 801 F.2d 86, 91 (2d Cir. 1986).[2] "This deferential standard of review is especially important when reviewing a conviction of conspiracy because a conspiracy by its very nature is a secretive operation, and it is a rare case where all aspects of a

[1] Greenberg poses a legal challenge concerning the second objective—immigration fraud in violation of 18 U.S.C. § 1546(a) para. 1. We address this legal challenge in a separate published opinion issued contemporaneously with this summary order.

[2] In quotations from caselaw and the parties' briefing, this summary order omits all internal quotation marks, footnotes, and citations, and accepts all alterations, unless otherwise noted.

conspiracy can be laid bare in court with the precision of a surgeon's scalpel." *United States v. Pauling*, 924 F.3d 649, 656 (2d Cir. 2019).

"To prove conspiracy, the government must show that two or more persons entered into a joint enterprise for an unlawful purpose, with awareness of its general nature and extent, and that those persons agreed to participate in what they knew to be a collective venture directed toward a common goal. But the government need not prove that the defendant knew all of the details of the conspiracy or the identities of all of the other conspirators." *United States v. Jimenez*, 96 F.4th 317, 324 (2d Cir. 2024).

*A. 18 U.S.C. § 371*

We first consider whether the evidence was sufficient to prove a conspiracy to "commit any offense against the United States, or defraud the United States, or any agency thereof in any manner or for any purpose[.]" 18 U.S.C. § 371. "To prove a conspiracy under the 'defraud clause,' the government must establish (1) that the defendant entered into an agreement (2) to obstruct a lawful function of the government (3) by deceitful or dishonest means and (4) at least one overt act in furtherance of the conspiracy." *United States v. Atilla*, 966 F.3d 118, 130 (2d Cir. 2020).

i. Danskoi

During the investigation, a confidential source known as CS-3 posed as an asylum applicant seeking the assistance of the Defendants; evidence regarding his application and his interactions with Defendants was introduced at trial. Danskoi contends the evidence was insufficient to show that he did not believe that CS-3 was gay when he helped CS-3 pursue an asylum claim based on feared persecution based on sexual orientation, and further argues that there is insufficient proof that he acted with anyone else.

There is ample evidence from which the jury could conclude that Danskoi believed that CS-3 was falsely claiming to be gay in his asylum application. For one, CS-3 testified that after he and Danskoi began discussing a claim based on sexual orientation persecution—an approach Danskoi identified as the best option—CS-3 expressly told him that he was "not a gay . . . not gay." Tr. 173:22.[3] Rather than changing course, Danskoi said that he "doesn't hear it" and that CS-3 should not be talking to him about that. *Id.* 173:24–25. Danskoi then referred CS-3 to an associate, Kateryna Lysyuchenko, whom he described as "sort of an expert talking about the subject," to help CS-3 develop his claim. *Id.* 174:11–12.

[3] "Tr." refers to the trial transcript available on the district court's docket.

Lysyuchenko, an indicted co-conspirator, gave CS-3 sample asylum narratives based on sexual orientation persecution, talked to him about his claim, and completed the application and wrote most of the accompanying narrative. When CS-3 returned to Danskoi's office to sign the final application, Danskoi recommended that CS-3 "look around in New York" for what CS-3 characterized as "[h]omosexual associated organizations." *Id.* 214:19–23. Neither Danskoi nor anyone in his office read the contents of the completed document to CS-3 in his native language.

In response to CS-3's request for an attorney to accompany him to the asylum interview, Danskoi arranged for Attorney Greenberg to represent CS-3. After CS-3 signed his application, Danskoi assured him that Greenberg would help him "strengthen his case" and "prepare for the interview." *Id.* 215:1–5.

This evidence is sufficient to support the conclusion that Danskoi conspired with one or more people to defraud the United States.

ii. Greenberg

Similarly, when Greenberg met CS-3, she said, "Oh. You are going it as a gay." Tr. 231:5. CS-3 repeatedly implied that he was not, in fact, gay, responding to her initial question by saying, "Well, like as if," and explaining

that he didn't want to but "they said it is better that way." *Id.* 231:6, 8–9. He asked her, "Do I look like one?" *Id.* 231:12.

In preparing CS-3 for his interview, Greenberg coached CS-3 to style himself in a manner stereotypically associated with being gay. In preparing CS-3 to talk about a purported incident when he claimed to have been beaten up at a bar, she asked him what month the incident occurred. He said the narrative did not indicate a month and asked Greenberg, "What would be better?" *Id.* 248:25–49:1. Greenberg coached him to say the assault took place in March, because at that time Ukraine was still subject to the Soviet Union's criminal code that criminalized homosexuality. She told CS-3: "[T]hat's the explanation for why you didn't call the police." *Id.* 249:24–25. She also coached CS-3 to falsely state in his asylum interview that Russian America had provided only translation services and that they read his story back to him in his native language before it was submitted. Moreover, Greenberg submitted supplemental country conditions evidence to support CS-3's claim for persecution.

The government also introduced texts between Greenberg and Yury Mosha, who was Danskoi's partner at Russian America and an indicted co-conspirator. In the emails, Mosha arranged for a client, A.S., to meet with

Greenberg to discuss his asylum prospects. Before meeting with A.S. but after reviewing his paperwork, Greenberg texted Mosha that A.S.'s asylum claim was weak. When Greenberg met with A.S., she steered him toward seeking asylum based on sexual orientation, though he had provided no basis for such a claim. A.S. was not receptive to that approach, but Greenberg messaged Mosha after her meeting with A.S. and said, "He is 100, effectively 100 percent gay but does not admit." *Id.* 958:15–16.

Finally, the government introduced evidence that Russian America discussed Greenberg's fees with their clients, and when Greenberg did not receive a fee from a client referred by Russian America, she expected Russian America to ensure she was paid. In fact, before Greenberg's first meeting with A.S., Mosha told her not to discuss finances with A.S.

This evidence is sufficient to show that Greenberg entered into an agreement with one or more people to defraud the United States.

*B. 18 U.S.C. § 1546(a) para. 4 ("Paragraph 4")*

We need not address Greenberg's separate contention that the evidence was insufficient to support a conviction for conspiracy to violate 18 U.S.C. § 1546(a) para. 4. Paragraph 4 makes it a crime to submit an application or other

document required by immigration laws knowing that it contains a false statement under oath. The government conceded at trial that this objective did not reach oral statements Greenberg made to immigration officials, and Greenberg contends the evidence is insufficient to show that she entered a conspiracy to enter any falsified documents.

Because we conclude that the evidence is sufficient to support Defendants' convictions based on the first objective identified in the indictment, we need not address Defendants' challenges to the sufficiency of the evidence with respect to this third object. *See United States v. Duncan*, 42 F.3d 97, 105 (2d Cir. 1994) ("[W]hen a defendant is convicted of a multiple object conspiracy by a general verdict, the conviction is sustainable if one of the conspiratorial objects is supported by the evidence, even if the other is not." (citing *Griffin v. United States*, 502 U.S. 46, 49 (1991)).[4]

[4] When a defendant challenges the *legal* rather than *evidentiary* adequacy of one of the possible bases for conviction, this rule does not apply. *Yates v. United States*, 354 U.S. 298, 311–12 (1957) ("In these circumstances we think the proper rule to be applied is that which requires a verdict to be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected."); *see also Griffin v. United States*, 502 U.S. 46, 59 (1991) ("When . . . jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error. Quite the opposite is true, however, when they have been left the option of relying upon a factually inadequate theory, since jurors *are* well equipped to analyze the evidence."). For that reason, by separate opinion issued contemporaneously with this order, we do address Greenberg's challenge to the legal sufficiency of the second alleged object of the conspiracy.

## II. Conscious Avoidance Charge

"We review challenged jury instructions *de novo* but will reverse only if all of the instructions, taken as a whole, caused a defendant prejudice." *United States v. Applins*, 637 F.3d 59, 72 (2d Cir. 2011). "A conscious avoidance instruction may only be given if (1) the defendant asserts the lack of some specific aspect of knowledge required for conviction, and (2) the appropriate factual predicate for the charge exists." *United States v. Svoboda*, 347 F.3d 471, 480 (2d Cir. 2003). Both Defendants challenge the factual predicate supporting the charge.

We reject their claims. Both Defendants argued to the jury that they were unaware of the falsity of various clients' asylum claims, and the evidence was sufficient to support a finding that both Defendants were "aware of a high probability" of the disputed fact and deliberately avoided confirming otherwise. *Id.* at 480. As stated above, when CS-3 explicitly told Danskoi he was not gay, Danskoi told him he did not want to hear it. That is textbook conscious avoidance. Similarly, CS-3 effectively – though not directly – conveyed the same information to Greenberg, who proceeded to coach him on how to make his story believable.

And we easily reject Greenberg's separate argument that the instruction allowed the jury to convict without evidence of actual intent to enter into an agreement. The district court expressly instructed otherwise:

> Here, because the Defendants are charged with participating in a conspiracy, it is also important to note that the concept of conscious avoidance cannot be used as a substitute for finding that the Defendants knowingly agreed to a joint undertaking, and you can only find the Defendants guilty if the evidence proves, beyond a reasonable doubt, that the Defendants knowingly and intentionally joined the conspiracy charged in the Indictment.

Jury Instructions at 47, No. 1:21-cr-00092(JPO) (S.D.N.Y. Dec. 16, 2022), ECF No. 187 ("Jury Instructions").

## III. Legal Ethics Charge

Given Greenberg's role as a lawyer barred in New York, the district court instructed the jury as to her ethical duties. Greenberg did not challenge the instruction at trial but now argues that the instruction (1) should not have been given at all and (2) was erroneous. We review for plain error, meaning that Greenberg must show, among other things, that any claimed error affected her "substantial rights." *United States v. Miller*, 954 F.3d 551, 557–58 (2d Cir. 2020).

Greenberg specifically challenges the district court's instruction that "a USCIS agent conducting an asylum interview qualifies as a tribunal" for the purposes of New York professional conduct rules providing that if a lawyer comes to know of the material falsity of evidence offered to a tribunal by a client, or knows a client is engaging in fraudulent conduct relating to a proceeding before a tribunal, the lawyer must take "reasonable remedial measures, including, if necessary, disclosure to the tribunal." Jury Instructions at 39. Greenberg contends that an asylum interview is not a proceeding before a "tribunal" for purposes of this ethical rule.

We need not determine the application of these specific provisions of New York's ethics codes to asylum interviews because any error in giving this instruction, or in its precise formulation, did not affect her substantial rights.

Instructions about the ethical requirements that applied to Greenberg were relevant in light of her suggestion at trial that her conduct was consistent with her duty as a lawyer. But the instructions emphasized that "[p]roof that Greenberg violated one or more of her professional duties does not, without more, mean that she is guilty of any crime. That is, a lawyer can violate her ethical duties under New York law and Board of Immigration Appeals and

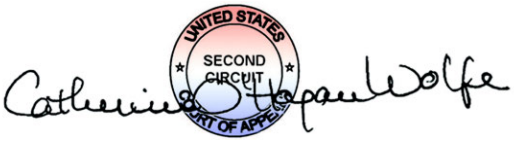
Immigration Court disciplinary rules without having the intent required to commit a crime." *Id.* at 41. Moreover, Greenberg herself testified that a USCIS proceeding *is* a tribunal. Insofar as the rules are relevant to Greenberg's state of mind, her understanding of the rules is what matters.

Moreover, the district court also instructed that "a lawyer is prohibited from counseling or assisting a client as to conduct that the lawyer knows is illegal or fraudulent," including by "suggesting how the wrongdoing might be concealed." *Id.* at 38. And the court instructed, "Although an attorney must use all reasonable lawful means to attain the objectives of the client, counsel is precluded from taking steps or in any way assisting the client in presenting false evidence or otherwise violating the law." *Id.* at 39. These instructions were not linked to the existence of any proceeding before a "tribunal." Greenberg does not challenge these instructions. For all of these reasons, any error with respect to a lawyer's duties to a tribunal did not affect Greenberg's substantial rights.

* * *

We have considered Appellants' remaining arguments and conclude that they are without merit. Accordingly, the District Court's judgments are **AFFIRMED**.

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



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

| | | |
|---|---|---|
| UNITED STATES OF AMERICA | : | SEALED<br>SUPERSEDING INDICTMENT |
| - v. - | : | |
| | : | S1 21 Cr. 92 |
| YURY MOSHA,<br>ULADZIMIR DANSKOI,<br>JULIA GREENBERG,<br>ALEKSEI KMIT,<br>TYMUR SHCHERBYNA, and<br>KATERYNA LYSYUCHENKO | : | |
| Defendants. | : | |

**COUNT ONE**
**(Conspiracy to Commit Immigration Fraud)**

The Grand Jury charges:

1. "Russian America" is a company which, at all times relevant to this Indictment, purported to assist clients, primarily aliens from Russia and the Commonwealth of Independent States ("CIS"), seeking visas, asylum, citizenship, and other forms of legal status in the United States. YURY MOSHA and ULADZIMIR DANSKOI, the defendants, operated Russian America. At all times relevant to this Indictment, DANSKOI maintained one of Russian America's office in Brooklyn, New York (the "Brooklyn Office), and at all times relevant to the Indictment up to and including at least in or about December 2019, MOSHA maintained a second office in Manhattan, New York (the "Manhattan Office").

2. At all times relevant to this Indictment, Russian America helped certain of its clients obtain asylum under fraudulent pretenses. It did so in a number of ways. Among other things, YURY MOSHA and ULADZIMIR DANSKOI, the defendants, advised clients regarding the manner in which they were most likely to obtain asylum using false claims, knowing that these clients did not legitimately qualify for asylum; connected clients with coconspirators, such as JULIA GREENBERG, TYMUR SHCHERBYNA, and KATERYNA LYSYUCHENKO, the defendants, so that these individuals could knowingly assist Russian America clients with various aspects of the clients' fraudulent asylum applications; and prepared and submitted to United States Citizenship and Immigration Services ("USCIS") clients' asylum applications and affidavits, knowing that these documents contained materially false information.

3. For example, YURY MOSHA, the defendant, advised certain clients to establish and maintain online blogs that were critical of the clients' home countries, as a way to generate a claim that, based on the clients' political opinions, it was no longer safe for the clients to return to their native countries. MOSHA did so understanding that the clients' decision to blog was prompted not by their own idea or initiative, but by MOSHA's instruction, and that the clients' motive for blogging was to

contrive a basis for asylum, rather than to publicly express a sincerely held opinion.

4. Further, YURY MOSHA, the defendant, understood that, in some instances, his clients did not have the desire, topical knowledge, journalistic ability, and/or technical expertise to write blogposts and/or maintain and operate their blogs. To the contrary, MOSHA referred certain Russian America clients to TYMUR SHCHERBYNA, the defendant, a Ukraine-based purported journalist, with the understanding that, in exchange for a fee, SHCHERBYNA would and did maintain and ghost-write Russian America's clients' blogs. SHCHERBYNA, in turn, understood that Russian America clients would use these blogs as a fraudulent basis to seek asylum.

5. Defendant YURY MOSHA also referred Russian America clients to individuals such as KATERYNA LYSYUCHENKO, the defendant, and others known and unknown, who knowingly helped Russian America clients draft fraudulent affidavits ("Asylum Affidavits") so that they could be submitted as part of the clients' asylum applications. These Asylum Affidavits, which were designed to support clients' false persecution claims, conveyed purported aspects of the clients' personal histories and contained material falsehoods, such as fabricated events, incidents of alleged persecution, and false claims about the clients' authorship and maintenance of their blogs.

6. YURY MOSHA, the defendant, also personally prepared clients' fraudulent asylum applications and submitted them, along with Asylum Affidavits and other documents containing material falsehoods, such as fabricated claims of past persecution, to USCIS.

7. YURY MOSHA, the defendant, also connected Russian America clients with attorneys, such as JULIA GREENBERG, the defendant, who knowingly prepared and encouraged certain Russian America clients to lie under oath about their fraudulent asylum claims during interviews conducted by USCIS Officers ("Asylum Officers"). GREENBERG would accompany these clients to, and represent them, during these interviews and in proceedings conducted by immigration judges, during which clients and/or GREENBERG made claims that GREENBERG understood were false.

8. Russian America also employed individuals, including ALEKSEI KMIT, the defendant, who, among other things: served as certain clients' primary point of contact; coordinated communications between these clients and other coconspirators such as YURY MOSHA, TYMUR SHCHERBYNA, KATERYNA LYSYUCHENKO, and JULIA GREENBERG, the defendants; and provided advice to clients about their asylum applications, Asylum Affidavits, and related forms of evidence, understanding that these documents were fraudulent in nature.

9. ULADZIMIR DANSKOI, the defendant, also knowingly assisted Russian America clients to prepare and submit fraudulent asylum applications, performing many of the same functions as YURY MOSHA, the defendant. For example, DANSKOI knowingly assisted and advised a Russian America client (who was in fact a government confidential source ("CS-3") acting at the direction of law enforcement), to fraudulently seek asylum by claiming persecution based on sexual orientation when DANSKOI fully understood that CS-3 endured no such persecution. In addition to advising CS-3 how to lie in CS-3's asylum application and affidavit, and how to defraud an Asylum Officer, DANSKOI connected CS-3 with KATERYNA LYSYUCHENKO, the defendant, so that LYSYUCHENKO could knowingly assist CS-3 draft an asylum affidavit falsely claiming persecution based on sexual orientation. DANSKOI also referred CS-3 to JULIA GREENBERG, the defendant, so that GREENBERG could knowingly prepare the client to lie under oath during immigration proceedings, including during an interview with an Asylum Officer.

BACKGROUND ON THE ASYLUM PROCESS

10. Pursuant to federal immigration law, to obtain asylum in the United States, an alien is required to show that he or she has suffered persecution in his or her country of origin on account of race, religion, nationality, political opinion, or

membership in a particular social group, or has a well-founded fear of persecution if he or she were to return to such country.

11. Alien applicants seeking asylum are required to complete and present a form, Form I-589, to USCIS. The Form I-589 requires a detailed and specific account of the basis of the claim to asylum. Alien applicants are permitted to append to the Form I-589 an Asylum Affidavit, providing greater detail about the applicant's background and basis for seeking asylum. If the Form I-589 is prepared by someone other than the applicant or a relative of the applicant, such as an attorney, the preparer is required to set forth his or her name and address on the form. The alien applicant and preparer are required to sign the petition under penalty of perjury. The alien applicant must typically apply for asylum within one year of his or her arrival in the United States.

12. After the Form I-589 is submitted, the alien applicant is interviewed by an Asylum Officer to determine whether the applicant qualifies for asylum. At the interview, the applicant is permitted to speak on his or her own behalf, and can present witnesses or documentation in support of his or her asylum claim. After the interview, the Asylum Officer determines whether the alien applicant qualifies for asylum.

13. If an alien applicant is granted asylum, he or she receives a completed Form I-94 that reflects that the USCIS has

granted him or her asylum status. The grant of asylum typically applies to the applicant's spouse and children as well. An alien who has a Form I-94 can apply for, among other things, lawful permanent resident status. A grant of asylum status does not expire, although USCIS can terminate asylum status if, among other things, it is later discovered that the applicant obtained asylum through fraud or no longer has a well-founded fear of persecution in his or her home country.

14. If the Asylum Officer determines that the applicant is ineligible for asylum status, and if the applicant is in the United States illegally, the matter is referred to an Immigration Judge at the Executive Office for Immigration Review. The Immigration Judge holds a hearing during which the alien applicant, and commonly an immigration lawyer, appear before the Immigration Judge and present evidence in support of the asylum application. For asylum applicants residing in the Southern and Eastern Districts of New York, all immigration hearings take place in Manhattan, New York. After the hearing, the Immigration Judge renders a decision on the alien's asylum application. If the Immigration Judge denies the asylum application, the applicant may appeal that decision to the Board of Immigration Appeals ("BIA"). If the applicant loses his or her appeal before the BIA, the applicant may appeal to a federal court.

15. At all times relevant to this Indictment, a successful application for asylum generally required, among other things, that:

a. The applicant submit his or her application within one year of his or her last arrival in the United States;

b. The applicant demonstrate that he or she is a "refugee," meaning, in general terms, that he or she is unable to return to his or her country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion;

c. The applicant subscribe to the assertions contained in his or her application for asylum under penalty of perjury; and

d. The applicant be interviewed, under oath, by an asylum officer.

16. In the course of their work for and with Russian America, YURY MOSHA, ULADZIMIR DANSKOI, JULIA GREENBERG, ALEKSEI KMIT, TIMUR SHCHERBYNA, and KATERYNA LYSYUCHENKO, the defendants, and others known and unknown, conspired to provide applicants and potential applicants for asylum with assistance in making and supporting fraudulent claims for asylum. Specifically, MOSHA, DANSKOI, GREENBERG, KMIT, SHCHERBYNA, LYSYUCHENKO, and others known and unknown, helped applicants and

potential applicants to, among other things, (i) concoct false and fraudulent bases that would purport to satisfy the aforementioned criteria for asylum, (ii) generate fraudulent evidence that purported to support those false and fraudulent assertions, (iii) prepare and submit asylum applications, affidavits, and documents containing the false and fraudulent assertions, and (iv) prepare for and accompany applicants to the asylum interview at which the applicant would be required to reiterate the false and fraudulent assertions.

Statutory Allegations

17. From at least in or about August 2018, up to and including at least in or about February 2021, in the Southern District of New York and elsewhere, YURY MOSHA, ULADZIMIR DANSKOI, JULIA GREENBERG, ALEKSEI KMIT, TIMUR SHCHERBYNA, and KATERYNA LYSYUCHENKO, the defendants, and others known and unknown, knowingly and willfully did combine, conspire, confederate and agree together and with each other to defraud the United States of America and an agency thereof, to wit, USCIS, and to commit offenses against the United States, to wit, to violate Section 1546(a) of Title 18, United States Code.

18. It was a part and an object of the conspiracy that YURY MOSHA, ULADZIMIR DANSKOI, JULIA GREENBERG, ALEKSEI KMIT, TIMUR SHCHERBYNA, and KATERYNA LYSYUCHENKO, the defendants, and others known and unknown, willfully and knowingly would and did

defraud the United States and USCIS for the purpose of impeding, impairing, obstructing, and defeating the lawful governmental functions of USCIS in processing, reviewing, and deciding upon applications for asylum.

19. It was further a part and an object of the conspiracy that YURY MOSHA, ULADZIMIR DANSKOI, JULIA GREENBERG, ALEKSEI KMIT, TIMUR SHCHERBYNA, and KATERYNA LYSYUCHENKO, the defendants, and others known and unknown, unlawfully, willfully, and knowingly would and did utter, use, attempt to use, possess, obtain, accept, and receive an immigrant and nonimmigrant visa, permit, border crossing card, alien registration receipt card, and other document prescribed by statute and regulation for entry into and as evidence of authorized stay and employment in the United States, knowing it to be forged, counterfeited, altered, and falsely made, and to have been procured by means of a false claim and statement, and to have been otherwise procured by fraud and unlawfully obtained, and would and did make under oath, and as permitted under penalty of perjury under section 1746 of Title 28, United States Code, subscribe as true, a false statement with respect to a material fact in an application, affidavit, and other document required by the immigration laws and regulations prescribed thereunder, and would and did present such application, affidavit, and other document which contained such false statement and which failed to contain a reasonable

basis in law and fact, in violation of Title 18, United States Code, Section 1546(a).

Overt Acts

20. In furtherance of said conspiracy and to effect the illegal objects thereof, the following overt acts, among others, were committed in the Southern District of New York and elsewhere:

a. In or about September 2018, TYMUR SHCHERBYNA, the defendant, agreed to and subsequently did ghost-write and maintain a blog on behalf of a cooperating witness ("CS-1") that was critical of the Ukrainian government, understanding that this blog would form a basis for CS-1's asylum application, and that CS-1 would further claim to United States immigration authorities that CS-1 personally wrote and maintained said blog.

b. In or about April 2019, while in Manhattan, New York, YURY MOSHA, the defendant, prepared, signed, and mailed CS-1's Form I-589 asylum application and Asylum Affidavit to USCIS, knowing that these documents contained several material misrepresentations, including that (1) CS-1 started a blog to criticize the Ukrainian government, when in fact MOSHA understood that CS-1 started the blog, at MOSHA's instruction, to generate a basis to seek asylum; (2) CS-1 authored the blogposts on CS-1's online blog, when in fact MOSHA understood that CS-1's blogposts were ghost-written by SHCHERBYNA, whom

MOSHA introduced to CS-1; and (3) CS-1 was allegedly assaulted to the point of unconsciousness in Ukraine because CS-1 was overheard speaking Russian, when in fact MOSHA understood that no such incident actually occurred.

c. In or about September 2019, while in Manhattan, New York, JULIA GREENBERG, the defendant, knowingly prepared and coached CS-1 to lie under oath to a USCIS Asylum Officer, understanding that CS-1 would convey false information about, among other things, (1) CS-1's reason for starting a blog that was critical of the Ukrainian government; (2) CS-1's alleged authorship and maintenance of said blog; and (3) CS-1's alleged persecution endured in Ukraine, including an incident in which CS-1 was allegedly assaulted because of CS-1's status as a Russian-speaking Ukrainian.

d. In or about September 2019, while in Manhattan, New York, a government confidential source ("CS-2"), met with KMIT, who explained that CS-2's Form I-589 asylum application had already been prepared by Russian America, even though CS-2 had not yet established an online blog criticizing CS-2's home government, which KMIT understood was the exclusive basis for CS-2's asylum claim.

e. In or about September 2019, while in Brooklyn, New York, CS-3 met with ULADZIMIR DANSKOI, the defendant, who knowingly helped CS-3 pursue asylum on the fabricated basis that

CS-3 was persecuted in Ukraine for his sexual orientation, knowing that CS-3 was actually a heterosexual male who suffered no such persecution.

f. In or about October 2019, KATERYNA LYSYUCHENKO, the defendant, helped CS-3 seek asylum on the fraudulent basis that CS-3 was persecuted in Ukraine for his sexual orientation, while understanding that CS-3 was actually a heterosexual male who endured no such persecution.

g. In or about December 2020, while in Brooklyn, New York, JULIA GREENBERG, the defendant, understanding that CS-3 was a heterosexual male who did not suffer persecution in his home country, prepared CS-3 to defraud a USCIS Asylum Officer by, among other things, conducting a mock asylum interview, advising CS-3 how to falsely answer certain anticipated questions, and instructing CS-3 to appear and dress for CS-3's asylum interview in a manner that comported with GREENBERG's estimation of the appearance of, and clothing worn by, a gay male.

(Title 18, United States Code, Section 371.)

**FORFEITURE ALLEGATION**

21. As a result of committing the offense alleged in Count One of this Indictment, YURY MOSHA, ULADZIMIR DANSKOI, JULIA GREENBERG, ALEKSEI KMIT, TIMUR SHCHERBYNA, and KATERYNA LYSYUCHENKO, the defendants, shall forfeit to the United States, pursuant to Title 18, United States Code, Section 982(a)(6)(A)(ii)(I), all property, real and personal, that constitutes or is derived from or is traceable to the proceeds obtained directly or indirectly from the commission of the offense, including but not limited to a sum in United States currency representing the amount of proceeds obtained as a result of the offense.

**Substitute Assets Provision**

22. If any of the above-described forfeitable property, as a result of any act or omission of the defendants:

a. cannot be located upon the exercise of due diligence;

b. has been transferred or sold to, or deposited with, a third person;

c. has been placed beyond the jurisdiction of the Court;

d. has been substantially diminished in value; or

e. has been commingled with other property which cannot be subdivided without difficulty;

it is the intent of the United States, pursuant to Title 21, United States Code, Section 853(p) and Title 28, United States Code, Section 2461(c), to seek forfeiture of any other property of the defendants up to the value of the above forfeitable property.

(Title 18, United States Code, Section 982;
Title 21, United States Code, Section 853; and
Title 28, United States Code, Section 2461.)

FOREPERSON

AUDREY STRAUSS
United States Attorney

Form No. USA-33s-274 (Ed. 9-25-58)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

v.

YURY MOSHA,
ULADZIMIR DANSKOI,
JULIA GREENBERG,
ALEKSEI KMIT,
TIMUR SHCHERBYNA, and
KATERYNA LYSYUCHENKO

Defendants.

SEALED
SUPERSEDING INDICTMENT

S1 21 Cr.

(18 U.S.C. §§ 371 and 1546.)

Audrey Strauss
United States Attorney

Foreperson

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

United States of America,

–v–

Julia Greenberg,

Defendant.

21-CR-92 (AJN)

OPINION & ORDER

ALISON J. NATHAN, District Judge:

The Government filed a one-count superseding indictment against six Defendants, including Julia Greenberg. Greenberg now moves to dismiss the indictment due to outrageous government conduct, to dismiss the indictment as duplicitous, to sever Greenberg's trial from the other five Defendants, to dismiss the indictment for failure to allege a crime, to suppress her statements allegedly obtained in violation of the Fifth Amendment, and to produce minutes of the grand jury proceedings to her or for *in camera* inspection. For the reasons that follow, the Court DENIES Greenberg's motion.

## I. Background

Generally, in evaluating a motion to dismiss, the Court "accept[s] as true all of the allegations of the indictment." *United States v. Goldberg*, 756 F.2d 949, 950 (2d Cir. 1985). The Court first recites the facts as drawn from the superseding indictment filed February 18, 2021. S1 Indictment, Dkt. No. 12. Greenberg's motions to dismiss for outrageous government conduct and to suppress her post-arrest statements, however, necessarily implicate facts beyond the confines of the superseding indictment and, in resolving those issues, the Court is permitted to consider facts extrinsic to the indictment. *See United States v. Cuervelo*, 949 F.2d 559, 567 (2d Cir. 1991); *United States v. Regan*, 103 F.3d 1072, 1082 (2d Cir. 1997).

**A. Facts alleged in the superseding indictment**

The superseding indictment alleges a conspiracy to commit immigration fraud by preparing and submitting false asylum claims. Generally, to obtain asylum, applicants must show that they have suffered persecution in their country of origin on account of race, religion, nationality, political opinion, or membership in a particular social group, or have a well-founded fear of persecution if they were to return to their country. S1 Indictment ¶ 10.[1] An asylum applicant must complete Form I-589 and present it to U.S. Citizenship and Immigration Services. *Id.* ¶ 11.[2] Because Form I-589 asks for a detailed account of the applicant's asylum claim, applicants often attach to it an asylum affidavit that provides more detail about their background and the basis for their claim. *Id.* If another individual, like an attorney, prepares Form I-589 for the applicant, then that preparer must provide her name and address. *Id.* Both the applicant and the preparer must sign Form I-589 under penalty of perjury. *Id.*

After Form I-589 is submitted, the applicant is interviewed by an Asylum Officer to determine if the applicant is eligible for asylum. *Id.* ¶ 12. The applicant may speak, under oath, on her own behalf at the interview and may present witnesses or additional documentation to substantiate her claim. *Id.* The Asylum Officer then determines the applicant's eligibility. *Id.* If the applicant is deemed eligible, she receives a completed Form I-94, which demonstrates that she was granted asylum and permits the applicant to pursue other relief like permanent resident status. *Id.* ¶ 13. If the applicant is deemed ineligible, her application is referred to an Immigration Judge who holds a hearing to determine the applicant's eligibility. *Id.* ¶ 14. If the

[1] *See generally* 8 U.S.C. § 1158 (primary asylum statute); *id.* § 1101(a)(42) (defining "refugee"); 8 C.F.R. § 1208.1 *et seq.* (primary asylum regulations); *United States v. Dumitru*, 991 F.3d 427, 430 (2d Cir. 2021) (per curiam), *cert. denied*, 142 S. Ct. 831 (2022).

[2] *See Liang v. Garland*, 10 F.4th 106, 109 n.2 (2d Cir. 2021).

Immigration Judge also denies the applicant, the applicant may appeal to the Board of Immigration Appeals and, if still unsuccessful, to the U.S. Court of Appeals. *Id.* ¶ 14.

Russian America is a company that assists its clients, primarily noncitizens from Russia, Ukraine, and nearby countries, in seeking asylum, visas, citizenship, and other forms of legal status in the United States. S1 Indictment ¶ 1. Defendants Yury Mosha and Uladzimir Danskoi operated Russian America, Mosha from an office in Manhattan and Danskoi from an office in Brooklyn. *Id.* The indictment alleges that Mosha and Danskoi advised Russian America clients to obtain asylum by false claims, knowing they did not qualify for asylum. *Id.* ¶ 2. According to the indictment, in advising these false asylum claimants, Mosha and Danskoi conspired with Defendants Julia Greenberg, Tymur Shcherbyna, and Kateryna Lysyuchenko, who knowingly assisted with the clients' fraudulent asylum claims and helped them prepare and submit asylum applications and affidavits to USCIS. *Id.* Greenberg is a licensed immigration attorney. *Id.* ¶ 7. In the alleged scheme, she prepared applicants that she knew would lie to USCIS officers to obtain asylum and she accompanied these applicants to their USCIS interviews, during which she and the applicant made statements that she knew were false. *Id.*

The superseding indictment identifies three cooperating witnesses that acted as clients of Russian America. The first of these is CS-1, a Ukrainian national, who in April 2019 started a blog critical of the Ukrainian government, "at Mosha's instruction, to generate a basis to seek asylum." *Id.* ¶¶ 3–4, 20. Mosha submitted CS-1's Form I-589, which claimed that CS-1 authored the blog posts when Mosha knew that the blog was in fact written by Defendant Shcherbyna, who Mosha introduced to CS-1. *Id.* ¶ 20. CS-1's Form I-589 also recounted an incident when CS-1 was assaulted in Ukraine because he spoke Russian, though Mosha understood that this incident did not occur. *Id.* Greenberg in September 2019 "knowingly

prepared and coached CS-1 to lie under oath to a USCIS Asylum Officer, understanding that CS-1 would convey false information about" why he started the blog, who wrote the blog, and the persecution he faced in Ukraine. *Id.*

The second cooperating witness, CS-2, met with Defendant Aleksei Kmit, who told CS-2 that Russian America had already prepared his Form I-589 on the basis of a blog that CS-2 had not yet written. *Id.* The superseding indictment does not allege that Greenberg ever interacted with CS-2 or that Russian America ever submitted CS-2's Form I-589 to USCIS.

The third cooperating witness, CS-3, met with Danskoi in Brooklyn. *Id.* Danskoi assisted CS-3 in preparing a Form I-589 on the basis of CS-3's sexual orientation while knowing that CS-3 was a heterosexual male who did not face persecution. *Id.*[3] CS-3 was further assisted in preparing his application by Defendant Lysyuchenko. *Id.* Danskoi referred CS-3 to Greenberg, knowing she would prepare CS-3 to lie in his interview. *Id.* ¶ 9. In December 2020, Greenberg met with CS-3 and helped prepare him for his interview with a USCIS Asylum Officer, knowing that CS-3 would falsely claim persecution based on his sexual orientation. *Id.* ¶ 20. Greenberg further instructed CS-3 to appear and dress in a manner that comported with the expected appearance of a gay man. *Id.*

**B. Relevant facts extrinsic to the superseding indictment**

The Court draws the following facts, which reflect only a portion of the Government's investigation, from representations in the parties' briefing and the exhibits attached to Greenberg's motion. Where the parties differ, the Court accepts as true the allegations proffered by Greenberg. An evidentiary hearing is therefore unnecessary. *See United States v. LaPorta*,

[3] "Persecution on account of sexual orientation has been recognized by the Attorney General as a protected ground under the 'particular social group' category of the definition of a refugee." *Morett v. Gonzales*, 190 F. App'x 47, 48 (2d Cir. 2006) (citing *Matter of Toboso-Alfonso*, 20 I. & N. Dec. 819, 822 (BIA 1990)).

46 F.3d 152, 160 (2d Cir. 1994); *United States v. Davis*, 57 F. Supp. 3d 363, 364 n.1 (S.D.N.Y. 2014) ("Because the Court accepts as true all of the facts proffered by the Defendants, and nonetheless finds that the Government's alleged conduct does not render the indictment constitutionally defective, a hearing need not be held.").[4]

**1. CS-1, CS-2, and Mosha**

The Federal Bureau of Investigation on February 18, 2018, received an anonymous tip that Russian America, and Mosha specifically, was committing immigration fraud. Greenberg Br., Ex. A, Dkt. No. 115. The FBI engaged CS-1 to meet with Mosha and tell him that CS-1 wanted asylum to stay in the United States and not return to Ukraine. Greenberg Br. at 4.[5] On August 14, 2018, CS-1 met with Mosha, who stated that he and Russian America "do not take any fictious cases." *Id.*, Ex. C at 3. He then "suggest[ed] that [CS-1] start his own blog about the situation in the Ukraine," that Mosha would help promote it, and that CS-1 "pay six thousand [dollars] for the whole case including a lawyer." *Id.* at 3, 5. As Mosha explained, by "writing a blog," CS-1 "will be proving that [he] will be persecuted in the future because they kill bloggers and journalists there for real." *Id.* at 3. He continued: "But it has to be done, you have to work on it, not just for the asylum sake, see? Because your officer will understand if you are not that knowledgeable about the subject, politics, etc." *Id.* at 4.

CS-1 met Mosha again on August 23, 2018, and expressed his lack of direction and unfamiliarity in writing a blog on websites like Live Journal. *Id.*, Ex. D at 5–9. Mosha told CS-1 that he will "have to prove" to the Asylum Officer that he "came to the blog [himself], and it [was his] decision and [he was] not doing it just for a green card," to which CS-1 affirmed, "I

[4] Greenberg does not request an evidentiary hearing on any issue raised in her motion.

[5] Greenberg emphasizes that CS-1 was previously convicted of drug trafficking, conspiracy to commit bank fraud, and aggravated identity theft. Greenberg Br. at 4–5; *see also* Ex. B at 7.

can't say that . . . [Mosha] said to make a blog" and that "it is my decision, of course." *Id.* at 12–13. During this conversation, CS-1 also asked about whether he could choose the lawyer with whom he would work. Mosha said that "they are all good," and that the "function of a lawyer is to check the story, to add some kind of information, and that's their whole function for a case. That is, she doesn't go to the interview with you." *Id.* at 11. CS-1 reiterated that this application was important to him, and Mosha stated he "will give it to [him]." *Id.* But, Mosha said, CS-1 did not need to be in touch with a lawyer "right now." *Id.* at 15.

On September 11, 2018, CS-1 and Mosha again met and CS-1 expressed difficulty in writing the blog. *Id.*, Ex. F at 4. Mosha responded that he could "give [CS-1] a guy" that works in Ukraine that CS-1 would pay "like $50 or $100 a month." *Id.* Mosha explained that the guy, later identified as Defendant Shcherbyna, would "be doing this with [CS-1]," would "discuss this with [CS-1]," and for "additional money . . . can help [CS-1] with technical aspects." *Id.* CS-1 again agreed that the blog had to be his own. *Id.* at 5. Then, following from their prior conversation about an attorney, CS-1 told Mosha that he had "read" and "like[d] this Julia [Greenberg]." *Id.* at 8. Mosha said that she was busy with, "like[,] everyone else." *Id.* In his later report to the FBI, CS-1 said that Mosha said Greenberg was near the Mexican border with another client at the time. *Id.*, Ex. E at 2.[6] Mosha then referred to another, unnamed attorney, who also had a "heavy load" of "many clients," but that "[i]f she will have free time, then we'll call her next week. She'll understand." *Id.*, Ex. F at 8.

On October 11, 2018, CS-1 spoke with Mosha, first asking about how he could pay Mosha. *Id.*, Ex. G at 2–3. CS-1 then told Mosha that he was paying Shcherbyna "$40 per week" and that Shcherbyna "is doing one post per day," which CS-1 "really like[d]." *Id.* at 3. CS-1

[6] As Greenberg notes, this information is not contained in the transcript of Mosha and CS-1's conversation. Greenberg Br. at 6.

continued: "I was just saying that I thought that it would just be some writing and that's it. But he is really like *NBC News*, in short. In other words, there are photos on there, documents, thoughts, analysis." *Id.* Mosha responded that this was "especially good" and to "[l]et it be like this." *Id.* at 3–4. CS-1 then asked about an attorney, to which Mosha said they would "do a meeting with an attorney . . . when the attorney confirms the story." *Id.* at 4.

On November 19, 2018, CS-1 spoke with Lysyuchenko, who was recommended to CS-1 by Mosha to assist with CS-1's asylum affidavit. According to the Government, Mosha had told Lysyuchenko that CS-1 had never been persecuted in Ukraine and that someone else was writing his blog. Gov't Br. at 7, Dkt. No. 126. CS-1 expressed that he had "no time at all to write [his] history" and that he "really [has] nothing to write about." *Id.*, Ex. H at 1 ("I told you that the last time."). Lysyuchenko responded: "I am not allowed to write the history. I can correct it for you. . . . . I just don't know anything about you. I can't write it like that." *Id.* After CS-1 again said that he had told Mosha he had "no history of being pursued," Lysyuchenko stated that she "can't write the story. That's totally forbidden by law." *Id.* 2. When CS-1 offered to "pay [her] extra money," Lysyuchenko again said it was "forbidden by law" for her to write the affidavit. *Id.* Finally, Lysyuchenko agreed to write a "plan" for a statement and agreed to accept "additional payment" for doing so. *Id.* at 3.

After receiving the plan, CS-1 asked Lysyuchenko if he could simply insert his name into it. Greenberg Br. at 7. Lysyuchenko said this would be illegal. *Id.* In a February 22, 2019 phone call, Lysyuchenko said that CS-1's affidavit would be sent to "the lawyer to check," but that the draft of his affidavit did not "really strongly show" a real fear of persecution needed for asylum. *Id.*, Ex. I at 1–2. CS-1 asked if the lawyer would "fill in this picture in such a way that . . . we are discussing now," to which Lysyuchenko said "*No*, she doesn't . . . fill in" but instead

writes "comments." *Id.* at 2. Lysyuchenko asked if the lawyer knew the affidavit was "a product of [his] imagination," to which Lysyuchenko said that was "for [CS-1] to discuss with Aleksey. I don't know what it says in the terms of your contract." *Id.*; *see also id.* at 3 (CS-1 referring to him and Lysyuchenko "invent[ing] everything possible").

The Government on February 15, 2019, asked the FBI to send another cooperating witness, CS-2, to Mosha. *Id.*, Ex. J at 9. CS-1 on June 17, 2019, introduced CS-2 to Mosha, and asked that Mosha introduce CS-2 to Shcherbyna. Greenberg Br. at 8. Mosha told CS-2 that his case for asylum must be real. *Id.* Without CS-1, CS-2 met with Mosha on December 1, 2019, and asked how he could fabricate an asylum case and whether he could use someone else's address in his application. Greenberg Br. at 8. Mosha told CS-2 that these actions were illegal and that he should tell only the truth. *Id.* On December 11, 2019, Russian America terminated its agreement with CS-2 and refunded his payment. *Id.* at 9.

On July 30, 2019, CS-1 and Mosha discussed the answers that CS-1 should give in his upcoming interview. *E.g.*, *id.*, Ex. K at 2–5. CS-1 told Mosha he had "stopped reading" the posts in his blog "because there are many of them," to which Mosha responded that he should read "5–6 topics." *Id.* at 5. Mosha then told CS-1 that he "[doesn't] need a lawyer at the interview" and that "[a] lawyer doesn't do anything." *Id.* at 5–6. Mosha then relented to CS-1's request for a lawyer, telling CS-1 that while Greenberg "is on vacation," he would "ask around if anybody is able to go." *Id.* at 6; *see also* Greenberg Br. at 8 & n.5. CS-1 told the FBI that Mosha stated that Greenberg was his "usual attorney" for asylum interviews but that she was on vacation. *Id.*, Ex. L at 2.[7]

[7] Greenberg correctly notes that this statement is not in the transcript of the conversation supplied by the Government. Greenberg Br. at 8.

After CS-1 rescheduled his interview, with the Government's assistance, Greenberg returned from vacation and Mosha asked her to appear at CS-1's interview. Greenberg Br. at 8. Greenberg agreed to represent CS-1 at the interview for $1,500. *Id.*, Ex. M at 3.

Greenberg met with CS-1 along with an interpreter on September 5, 2019, immediately before his asylum interview. Greenberg told CS-1 that she had read CS-1's affidavit but had not spoken with Mosha about it. *Id.*, Ex. N at 2. She also clarified that her role was to "only speak at the end," not to tell "the officer not to ask a certain question" or to stop CS-1 from saying "anything stupid." *Id.* Over the course of their conversation, CS-1 told Greenberg that he did not write the blog but that another "person wrote the blog for [him]," a person that Mosha "referred." *Id.* at 3; *see also id.* at 6 ("I did not write it at all. Another person is writing it. . . . But in reality, I don't even read it, let alone write it."). He also explained that he had changed the details of an assault that he allegedly suffered in Ukraine after Mosha had told him that prior versions of the story were "not suitable." *Id.* at 2–6 ("I rewrote this backstory five times."). Greenberg asked CS-1 for additional details, including what injuries he had sustained and why he had not gone to a hospital. *Id.* at 5–6. Later in the discussion, in which Greenberg asked CS-1 questions that the Asylum Officer was likely to ask, CS-1 described the alleged assault in significant detail and also went into greater depth his reasons for starting the blog, including that he was "really angry over the level of theft and corruption . . . in Ukraine." *Id.* at 19–22 ("Not because Yuriy Mosha said so.").

CS-1's asylum interview was recorded. At the end, the Asylum Officer noted that he had "credibility concerns" and asked if Greenberg would "address that a little bit." *Id.* at 23. In response, Greenberg referred back to CS-1's story of the assault at a bar that he alleged occurred

because he spoke Russian. *Id.* at 24–27. After they exited the interview, CS-1 paid Greenberg $1,000. *Id.* at 28.

USCIS denied CS-1's asylum application and placed CS-1 into removal proceedings—though he was not in fact eligible for removal—to be overseen by an Immigration Judge in New York. Greenberg Br. at 12; Gov't Br. at 10. Greenberg agreed to represent CS-1 in these proceedings for an additional $6,000 retainer. Gov't Br. at 10–11. A short scheduling hearing was held before the Immigration Judge, without the Judge's knowledge of the FBI's investigation or that CS-1 was not a genuine asylum applicant, at which Greenberg represented CS-1. *Id.* at 11; Greenberg Br. at 12–13. An official from the Office of the Principal Legal Advisor represented to the Immigration Judge that CS-1 was a removable immigrant. Greenberg Br. at 13. A formal immigration hearing was scheduled for November 6, 2023. Gov't Br. at 11.

**2. CS-3 and Danskoi**

CS-3 first met with Danskoi in Russian America's Brooklyn office in August 2019. Greenberg Br. at 13.[8] In that initial conversation, Danskoi suggested different bases on which CS-3 could seek asylum, including for his political opinions. *Id.* In a later conversation, CS-3 paid Danskoi $1,500 to prepare and file his asylum application, *id.*, and Danskoi referred CS-3 to Lysyuchenko, *id.*, Ex. O at 2. Danskoi told CS-3 that CS-3 "should not tell [Lysyuchenko] directly that, 'You know, make everything up for me,'" to which CS-3 responded, "No, I won't." *Id.* at 7.

The FBI directed CS-3 to seek asylum as a gay man. *Id.*, Ex. J. at 9. Danskoi told CS-3 that asylum based on sexual orientation was "the most important one" of the bases they had

[8] CS-3 had previously pled guilty to unlawful possession of a firearm and the FBI agreed to facilitate CS-3's efforts to obtain a green card in exchange for his assistance. Greenberg Br. at 13.

discussed because Asylum Officers "don't even ask for proof, for the analysis of the evidence," as they do for a claim based on political opinion. *Id.*, Ex. P at 1. CS-3 "sarcastically" told Danskoi that he "is clearly not gay." *Id.* at 3. Danskoi told CS-3 to ask Lysyuchenko for examples of asylum affidavits on the basis of sexual orientation, and Danskoi then told CS-3 that he should "[m]aybe wear an earring to the interview." *Id.* at 4.

CS-3 on December 27, 2019, told Danskoi that he wanted to hire a lawyer for an additional fee. Greenberg Br. at 14. Danskoi told him that it was not necessary because an attorney could only observe the interview, but that he would find CS-3 a lawyer if CS-3 really wanted one. *Id.* On January 29, 2020, Danskoi again told CS-3 that he "shouldn't worry about an attorney at this point." *Id.* at 15.

On March 18, 2020, the Government requested that CS-3 be scheduled for an asylum interview to see if he would be assigned an attorney. *Id.*, Ex. Q at 3. Once the interview was scheduled, Danskoi gave Greenberg's phone number to CS-3 and CS-3 called Greenberg to schedule a consultation. Greenberg Br. at 15. During the November 20, 2020 consultation, when Greenberg asked if CS-3 applied for asylum on the basis of sexual orientation, CS-3 said "it's that way according to the story," laughed, and then said, "I wouldn't want that, but he says it's better this way," to which Greenberg said, "Yes." *Id.*, Ex. R at 3. CS-3 asked Greenberg if he should "wear different clothes," and Greenberg said, "Absolutely." *Id.* at 4. Greenberg later told CS-3 that she "wouldn't advise going back" to Ukraine," to which CS-3 said "I won't go there. I'd better not go there at all." *Id.* at 5. CS-3 then asked Greenberg if he will "pass." *Id.* at 7. Greenberg said that, "[t]o tell you the truth, um, you don't . . . you don't look like [UI] gay." *Id.* at 7–8. CS-3 responded, "Yes, I understand." *Id.* at 8. During this consultation, CS-3 did not directly state that he was not gay.

Greenberg and CS-3 met again on December 9, 2020, in advance of CS-3's interview scheduled for December 22, 2020. *Id.*, Ex. S. Greenberg asked CS-3 a series of questions based on his asylum affidavit. When Greenberg asked about an injury that CS-3 sustained while wrestling in college, CS-3 said that "I didn't do wrestling. . . . [S]he wrote it like that. I thought, 'Well, [UI]' Katya came up with that." *Id.* at 3. Near the end of their discussion, Geenberg told CS-3 that she "wanted to tell [him] that both me and the *officer* . . . we roughly understand when a person is lying to us. . . . [T]herefore, there are no *gays* who are embarrassed by their, um—*being gay* . . . . There are no *gays* who can't describe their feelings when they found out about it for the first time, how they were scared by it . . . ." *Id.* at 18 (italics in original). CS-3 said that "[e]verything will be fine." *Id.* He continued that he would "buy clothing before the interview," to which Greenberg responded that he "absolutely must have a scarf" and "must have shoes of some unusual . . . color." *Id.* at 19; *see also id.* at 20 ("We'll pluck the eyebrows and do a manicure.").

**3. Greenberg's post-arrest statement**

Greenberg was arrested by armed federal officers early on February 18, 2021, in Colorado, where she and her family, including two of her three children, were on vacation. Greenberg Br. at 17. The officers arrested Greenberg, placed her in handcuffs, and drove her for approximately 2.5 hours to the U.S. courthouse in Denver. *Id.* at 18. The conversation in the car was recorded. Before a *Miranda* warning was given, Agent Danielle Deboer briefly encouraged Greenberg to cooperate and to "think of [her] future with [her] kids, with [her] husband." Recording at 2:04–3:20. Deboer then administered the *Miranda* warning and Greenberg waived her rights both orally and in writing. Greenberg Br. at 18, Gov't Br. at 50. Greenberg proceeded

to make a series of potentially inculpatory statements over the remainder of the recording, which spans 2 hours and 9 minutes.

**C. Procedural history**

A grand jury returned an indictment, dated February 11, 2021, charging Defendants with one count of conspiracy to commit immigration fraud in violation of 18 U.S.C. § 1546(a) and 18 U.S.C. § 371. Dkt. No. 3. The superseding indictment was filed February 18, 2021. Dkt. No. 12. Greenberg filed this motion on October 15, 2021. Dkt. No. 114. The Government filed its response on November 12, 2021, Dkt. No. 126, and Greenberg filed a reply on November 26, 2021, Greenberg Reply, Dkt. No. 127. Greenberg filed a notice of supplemental authority on February 11, 2022. Dkt. No. 136. A jury trial is tentatively scheduled for June 13, 2022. *See* Dkt. No. 131.

The Court on February 4, 2022, ordered the Government to produce to the Court a flash drive containing the audio recording of Greenberg's post-arrest statement made to law enforcement. Dkt. No. 135. The Court received the recording on February 7, 2022.

## II. Legal standard

Because "federal crimes are solely creatures of statute, a federal indictment can be challenged on the ground that it fails to allege a crime within the terms of the applicable statute." *United States v. Aleynikov*, 676 F.3d 71, 75–76 (2d Cir. 2012) (cleaned up). However, "[a] defendant faces a high standard in seeking to dismiss an indictment, because an indictment need provide the defendant only a plain, concise, and definite written statement of the essential facts constituting the offense charged." *United States v. Post*, 950 F. Supp. 2d 519, 527 (S.D.N.Y. 2013) (cleaned up) (quoting Fed. R. Crim. P. 7(c)(1)); *see also United States v. Smith*, 985 F. Supp. 2d 547, 561 (S.D.N.Y. 2014); *United States v. Stringer*, 730 F.3d 120, 124 (2d Cir. 2013)

(explaining that "an indictment need do little more than to track the language of the statute charged and state the time and place (in approximate terms) of the alleged crime" (cleaned up)).

Generally, "[a] court should not look beyond the face of the indictment and draw inferences as to proof to be adduced at trial, for 'the sufficiency of the evidence is not appropriately addressed on a pretrial motion to dismiss an indictment.'" *United States v. Scully*, 108 F. Supp. 3d 59, 116–17 (E.D.N.Y. 2015) (quoting *United States v. Alfonso*, 143 F.3d 772, 776–77 (2d Cir. 1998)). That is, "although a judge may dismiss a civil complaint pretrial for insufficient evidence, a judge generally cannot do the same for a federal criminal indictment." *United States v. Sampson*, 898 F.3d 270, 280 (2d Cir. 2018). To be clear, this rule does not apply to every claim that a defendant can raise in a pretrial motion. "Judges can, of course, make factual determinations in matters that do not implicate the general issue of a defendant's guilt, such as motions to suppress evidence, selective prosecution objections, and objections concerning discovery. But when a defense raises a factual dispute that is inextricably intertwined with a defendant's potential culpability, a judge cannot resolve that dispute on a Rule 12(b) motion." *Id.* at 281 (citing Fed. R. Crim P. 12(b), 12(b)(3)(A), 12(b)(3)(C), 12(b)(3)(E), and 12(d)). "The Government is entitled to marshal and present its evidence at trial, and the defendant is entitled to challenge the sufficiency of that evidence pursuant to Rule 29 of the Federal Rules of Criminal Procedure." *United States v. Kelly*, 462 F. Supp. 3d 191, 197 (E.D.N.Y. 2020) (citing *United States v. Gambino*, 809 F. Supp. 1061, 1079 (S.D.N.Y. 1992)).[9]

[9] The Second Circuit has acknowledged an "extraordinarily narrow" exception to this general rule that permits the Court to consider the sufficiency of the evidence in a pretrial motion when "'the government has made what can fairly be described as a full proffer of the evidence it intends to present at trial.'" *Sampson*, 898 F.3d at 282 (quoting *Alfonso*, 143 F.3d at 776). But the Court does not follow that exception here. First, Greenberg has not invoked it. Second, the Government cannot fairly be said to have made such a full proffer, as it neither submitted a sworn affidavit nor made a "detailed presentation of the entirety of the evidence" to the Court as would be required. *Id.* at 282–83 (citing *Alfonso*, 143 F.3d at 777, and *United States v. Mennuti*, 639 F.2d 107, 108 & n.1 (2d Cir. 1981)). And third, the Second Circuit has expressed serious

## III. Discussion

Greenberg raises three distinct arguments for dismissal of the indictment against her. First, that the indictment must be dismissed under the outrageous-government-conduct doctrine. Second, that the single count is duplicitous because it inappropriately combines two distinct conspiracies. And third, that the indictment, for several reasons, fails to allege a crime.

In the absence of total dismissal, or in addition to partial dismissal, Greenberg seeks three additional forms of relief. First, she asks that she be severed from the five other Defendants charged in the superseding indictment because their charges are legally and factually distinct. Second, she seeks to suppress post-arrest statements that she made to law enforcement. Last, she requests the production of the minutes of the grand jury proceedings for her own review or for *in camera* review by the Court.

### A. Motion to dismiss for outrageous government conduct

#### 1. Applicable law

The Supreme Court and Second Circuit have long observed that "Government involvement in a crime may in theory become so excessive that it violates due process and requires the dismissal of charges against a defendant even if the defendant was not entrapped." *United States v. Al Kassar*, 660 F.3d 108, 121 (2d Cir. 2011) (citing *United States v. Rahman*, 189 F.3d 88, 131 (2d Cir. 1999); *United States v. Russell*, 411 U.S. 423, 431–32 (1973)).[10] "To

doubts about the exception's constitutionality and its continued vitality in light of intervening decisions of the Supreme Court. *See id.* at 281, 282 n.10 (citing *Kaley v. United States*, 571 U.S. 320 (2014)).

[10] This doctrine differs from that of entrapment in at least two important respects. First, entrapment "focuses on the defendant's predisposition" while the outrageous-government-conduct doctrine "focuses on the conduct of the government agents." *Al Kassar*, 660 F.3d at 121. Second, unlike an entrapment defense presented at trial, "[a] motion to dismiss an indictment on account of outrageous government conduct is directed to the court rather than

establish a due process violation on this ground, a defendant must show that the government's conduct is 'so outrageous that common notions of fairness and decency would be offended were judicial processes invoked to obtain a conviction.'" *Id.* (quoting *United States v. Schmidt*, 105 F.3d 82, 91 (2d Cir. 1997)). Generally, for conduct to be "outrageous," "the government's involvement in a crime must involve either coercion or a violation of the defendant's person." *Id.* It is not enough that "the government created the opportunity for the offense, even if the government's ploy is elaborate and the engagement with the defendant is extensive"; nor is it enough that the government employed "feigned friendship, cash inducement, and coaching in how to commit the crime." *Id.* (citing *Schmidt*, 105 F.3d at 91; and *United States v. Myers*, 692 F.2d 823, 837–39 (2d Cir. 1982)).

The defendant carries the burden of proof. *United States v. Nunez–Rios*, 622 F.2d 1093, 1098 (2d Cir. 1980). That burden is "very heavy" because of courts' "well-established deference to the Government's choice of investigatory methods." *Al Kassar*, 660 F.3d at 121 (quoting *Rahman*, 189 F.3d at 131). Consequently, the Second Circuit has rarely, if ever, held that a government investigation met this high bar. *United States v. Heyward*, No. 10-CR-84 (LTS), 2010 WL 4484642, at *3 (S.D.N.Y. Nov. 9, 2010) ("[T]he Second Circuit has yet to identify a particular set of circumstances in which government investigative conduct was so egregious that it shocked the conscience and violated fundamental guarantees of due process."); *United States v. Gomez*, 83 F. Supp. 3d 489, 492 (S.D.N.Y. 2014) (explaining that the Second Circuit "has never found a violation of due process based on the government's outrageous conduct" (citing *Schmidt*, 105 F.3d at 91)); *United States v. Cromitie*, 781 F. Supp. 2d 211, 222–23 (S.D.N.Y.

jury." *Regan*, 103 F.3d at 1082. Thus, a defendant may prove a defense of entrapment without proving outrageous government conduct and vice versa. *Cuervelo*, 949 F.2d at 565.

2011), *aff'd*, 727 F.3d 194 (2d Cir. 2013) (identifying *United States v. Twigg*, 588 F.2d 373 (3d Cir. 1978), as the only circuit case in which an outrageous-government-conduct claim prevailed).[11]

**2. Analysis**

Greenberg identifies four aspects of the Government's conduct here that, she says, constituted outrageous conduct warranting dismissal of the indictment. First, she claims that the Government "manufactured" the alleged fraud, pointing to a number of statements in which the Defendants, for example, insisted that they take only genuine asylum claims, refused to fabricate stories for the cooperating witnesses, and, in the case of CS-2, terminated their representation once CS-2's intent to file a false asylum claim became clear. Greenberg Br. at 23–25. Second, Greenberg argues that the FBI improperly used other government entities, notably including the Immigration Court without its knowledge, to further its investigation. *Id.* a 26–27. Third, she states that the Government's investigation preyed on her duty of loyalty to her clients, making her an unknowing participant to fraud. *Id.* at 27–29. And fourth, Greenberg argues that the Government violated due process by obtaining her statements in CS-1's and CS-3's civil asylum proceedings. *Id.* at 29–30.

The Court addresses first Greenberg's argument that the fraud was manufactured because the Defendants expressly refused to engage in fraud. As an initial matter, this argument rests on Greenberg's own interpretation of the incomplete record presented, an interpretation that differs markedly from the Government's reading of these transcripts. It is not the Court's role to now decide whether there is sufficient evidence of the Defendants' intent to conspire to commit

[11] Greenberg disputes whether the Second Circuit has ever found a violation of the outrageous-government-conduct doctrine, citing dicta in *United States v. Archer*, 486 F.2d 670, 676–77 (2d Cir. 1973). Greenberg Reply at 24. Regardless, it is indisputable that any such case is "rare." *Schmidt*, 105 F.3d at 91.

immigration fraud. *See Sampson*, 898 F.3d at 280. But the Court concludes that, at this time, Greenberg has not demonstrated that the crimes alleged were merely the product of the Government's "own imagination" and "deceit and trickery." Greenberg Br. at 23–24 (citing *United States v. Gardner*, 658 F. Supp. 1573, 1577 (W.D. Pa. 1987) (finding outrageous conduct where the government agent "persisted over a period of time in inducing and p[e]rsuading the Defendant to commit the crime in question with [the] sole motive and intention of overcoming the obvious reluctance of the Defendant")). Greenberg notes, for example, that in Mosha's first meeting with CS-1, Mosha repeatedly stated that he and Russian America "do not take any fictious cases." Greenberg Br., Ex. C at 3. Yet an individual does not have to orally admit to having a fraudulent intent to be guilty of fraud. In that same conversation, Mosha suggested that CS-1 write a blog so that he could develop a basis for asylum. *Id.* at 3–4. When CS-1 later expressed difficulties writing the blog, Mosha referred CS-1 to Shcherbyna. To be sure, Mosha said that CS-1's monthly payments to Shcherbyna were only so that Shcherbyna would "discuss" writing a blog with CS-1. *Id.*, Ex. F at 5. But just one month later, when CS-1 told Mosha that Shcherbyna was writing "one post per day," Mosha responded that it was "especially good" and that CS-1 should "[l]et it be like this." *Id.*, Ex. G at 3–4.

As to CS-3, Danskoi said that it would be illegal for Danskoi to arrange a sham marriage for CS-3. Greenberg Br. at 25. And, as Greenberg quotes, Danskoi told CS-3 not to tell Lysychenko, "make everything up for me." *Id.* (quoting Ex. O at 7). But Danskoi's comments immediately following that statement can reasonably be understood as a suggestion that CS-3 nevertheless should be less than truthful in his asylum affidavit: "Well, I am not urging you to make something up, or lie, but you, if you have some relation to it, you should try to describe it . . . how you feel about it." Ex. O at 7. Moreover, in later conversations, Danskoi noted that one

feature of seeking asylum on the basis of sexual orientation is that the Asylum Officer allegedly won't "even ask for proof." *Id.*, Ex. P. at 1. Upon consideration of both the specific instances identified by Greenberg, and consideration of the available record as a whole, the Court does not find that the cooperating witnesses' requests to Mosha and Danskoi manufactured the Defendants' alleged fraud or constituted outrageous behavior by the Government. *Accord Myers*, 692 F.2d at 843 ("Due process challenges to an undercover agent's encouragement have been rejected when one defendant was solicited twenty times before committing an offense . . . ."); *Cromitie*, 781 F. Supp. 2d at 222–23 (government agent "spent a half a year or more trying to persuade [the defendant] to go forward with a jihadist mission, but there was no coercion of any sort, no suggestion of duress and no physical deprivation"); *Gomez*, 83 F. Supp. 3d at 493 ("[T]he Second Circuit has repeatedly stated that government encouragement, even if extensive, does not amount to outrageous conduct unless it rises to the level of coercion or physical force . . . .").[12]

Next, as to Greenberg's argument that the FBI improperly used USCIS and the Immigration Court in its investigation, the Court finds that this claim, too, does not justify dismissal of the indictment. The Second Circuit has previously upheld even more elaborate sting operations. For example, in *Schmidt*, government agents "posed as hit men, accepted a prisoner's solicitation to murder two government agents during an escape, and then conducted a

[12] Greenberg notes at several points that CS-1 and CS-3 were compensated by the Government for cooperating in the investigation, including that the Government would assist CS-3 in obtaining lawful status in the United States. *E.g.*, Greenberg Br. at 24. But while compensation to undercover informants may be a valid basis for impeachment at trial, even substantial compensation is not a basis for dismissal of charges. *See, e.g.*, *United States v. Myers*, 527 F. Supp. 1206, 1240 (E.D.N.Y. 1981), *aff'd*, 692 F.2d 823 (2d Cir. 1982) (informant was paid approximately $250,000 for undercover operation).

fabricated prison breakout." *United States v. Davis*, 57 F. Supp. 3d 363, 366–68 (S.D.N.Y. 2014) (citing *Schmidt*, 105 F.3d at 91–92). That the FBI here arranged two asylum interviews for fictitious applicants is not more outrageous than the conduct in *Schmidt*. Nor was it a violation of due process for CS-1's case to go before an Immigration Judge in what Greenberg describes as a short "calendar hearing." Greenberg Br. at 12. Simply put, this aspect of the FBI's investigation was not "'so repugnant and excessive' as to shock the conscience." *United States v. Duggan*, 743 F.2d 59, 84 (2d Cir. 1984) (quoting *United States v. Romano*, 706 F.2d 370, 372 (2d Cir. 1983)).

Third, that Greenberg was retained as CS-1's and CS-3's attorney, meaning that Greenberg owed them a duty of loyalty, does not render the Government's investigation outrageous. Greenberg's briefing is not entirely clear on this point. The Court understands Greenberg's argument to be that once Greenberg allegedly learned that CS-1's and CS-3's claims for asylum were fraudulent, she owed a "legal obligation of zealous advocacy and unconflicted loyalty to" them as clients, which included a duty "to protect CS3 and his privileged information." Greenberg Br. at 28. To the extent Greenberg argues she had an obligation to represent CS-1 and CS-3 even after she learned their claims were fraudulent, the Court rejects that argument. "For example, Rule 1.2(d) [of the Model Rules of Professional Conduct] prohibits attorneys from advising clients to commit fraudulent or criminal acts." *Hersh v. U.S. ex rel. Mukasey*, 553 F.3d 743, 756 (5th Cir. 2008); *see also* Model Rules of Pro. Conduct r. 3.3(b) ("A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal."). Similarly, the otherwise-inviolable attorney-client privilege gives way where the

communications made between an attorney and her client were "made for the purpose of getting advice for the commission of a fraud or crime." *United States v. Zolin*, 491 U.S. 554, 563 (1989) (cleaned up); *Clark v. United States*, 289 U.S. 1, 15 (1933) ("There is a privilege protecting communications between attorney and client. The privilege takes flight if the relation is abused. A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law."). Thus, notwithstanding attorneys' obligations to clients, it is unremarkable that the Second Circuit has repeatedly upheld attorneys' convictions for immigration fraud, even though those attorneys had owed a duty of loyalty to their immigration clients. *See, e.g.*, *Dumitru*, 991 F.3d at 429; *United States v. Archer*, 671 F.3d 149 (2d Cir. 2011).[13] Nor is the Court persuaded that CS-1's and CS-3's payments to Greenberg to participate in fraud constituted outrageous conduct. Courts have held, for example, that cash payments as large as $250,000 are not coercive when offered to commit a crime. *See United States v. Cromitie*, 727 F.3d 194, 220–21 (2d Cir. 2013).

Fourth, the Court will not dismiss the indictment on the grounds that the Government obtained statements from Greenberg in the course of civil asylum proceedings that the Government instituted for the purpose of investigating the Defendants. Greenberg does not cite any case in which the use of civil proceedings in an investigation was outrageous conduct that justified dismissal. Rather, she cites three cases in which defendants sought to suppress deposition testimony given in civil enforcement proceedings that paralleled a criminal

[13] Greenberg's position is not aided by her citation to *Arthur Andersen LLP v. United States*, 544 U.S. 696, 704 (2005), for the proposition that attorneys are permitted to advise clients to withhold information from the government. That case does not suggest that attorneys cannot be held criminally liable for their actions in the course of advising clients. Rather, *Arthur Andersen* more narrowly held that the criminal statute at issue—which punished "corrupt[t] persua[sion]" under 18 U.S.C. § 1512(b)—requires that an offending attorney *know* the advice was criminal. *Id.* at 704–06.

investigation, only one of which granted the defendant's motion. Greenberg Br. at 29 (citing *United States v. Kordel*, 397 U.S. 1, 11–12 (1970) (suggesting in dicta that suppression may be warranted "where the Government has brought a civil action solely to obtain evidence for its criminal prosecution"); *United States v. Scrushy*, 366 F. Supp. 2d 1134, 1140 (N.D. Ala. 2005) (in a criminal prosecution, suppressing a civil deposition because "the S.E.C. civil investigation became inescapably intertwined with the criminal investigation"); *United States v. Teyibo*, 877 F. Supp. 846, 856–57 (S.D.N.Y. 1995) (declining to suppress a civil deposition taken by the SEC under subpoena because the government did not pursue the "civil action solely to obtain evidence for a criminal prosecution" and there was no "coercive environment")).[14] Greenberg, in her opening brief, did not make a motion to suppress statements made during these asylum interviews. In her reply brief, she makes the request for the first time in a short paragraph. Greenberg Reply at 19. "It is well-established that arguments raised for the first time in a movant's reply are waived." *Parnass v. Brit. Airways, PLC*, No. 1:19-CV-04555 (MKV), 2021 WL 4311342, at *7 (S.D.N.Y. Sept. 21, 2021). Accordingly, the Court will not now resolve whether suppression of any statements Greenberg made in asylum interviews is justified.[15]

At bottom, the Government's investigation of Greenberg did not approach the kind of outrageous conduct that justifies dismissal of an indictment. The Court therefore rejects this ground for dismissing the indictment.

**B. Motion to dismiss as duplicitous**

[14] In *Scrushy*, the district court dismissed three counts of perjury only because they rested entirely on statements made in the deposition that the court suppressed. 366 F. Supp. 2d at 1140. But here, the immigration-fraud count against Greenberg does not rely entirely on the statements she made during CS-1's and CS-3's asylum interviews.

[15] Moreover, as further explained in Section III.E.3, a motion to suppress must be accompanied by a sworn affidavit, which Greenberg has not supplied here.

Greenberg next argues that the indictment should be dismissed because the single count of conspiracy to commit immigration fraud is duplicitous, charging distinct conspiracies in a single count. Specifically, she argues that the other Defendants' alleged conspiracy had the objective to "assist in preparing and filing asylum applications containing false statements" while her alleged conspiracy had the objective to "conceal [those applicants'] lies during asylum interviews." Greenberg Br. at 31.

**1. Applicable law**

"An indictment is duplicitous if it joins two or more distinct crimes in a single count. A duplicitous indictment, which alleges several offenses in the same count, must be distinguished from 'the allegation in a single count of the commission of a crime by several means.' The latter is not duplicitous." *United States v. Aracri*, 968 F.2d 1512, 1518 (2d Cir. 1992) (citations omitted) (quoting *United States v. Murray*, 618 F.2d 892, 896 (2d Cir. 1980)). "Duplicitous pleading . . . is not presumptively invalid." *United States v. Olmeda*, 461 F.3d 271, 281 (2d Cir. 2006). Rather, duplicitous pleading is prohibited only where it prejudices the defendant. *United States v. Sturdivant*, 244 F.3d 71, 75 & n.3 (2d Cir. 2001). That determination of prejudice is guided by the "policy considerations" that underlie duplicity doctrine, which include:

> avoiding the uncertainty of whether a general verdict of guilty conceals a finding of guilty as to one crime and a finding of not guilty as to another, avoiding the risk that the jurors may not have been unanimous as to any one of the crimes charged, assuring the defendant adequate notice, providing the basis for appropriate sentencing, and protecting against double jeopardy in a subsequent prosecution.

*United States v. Margiotta*, 646 F.2d 729, 733 (2d Cir. 1981) (citing *Murray*, 618 F.2d at 896–97).

"A conspiracy indictment presents 'unique issues' in the duplicity analysis because 'a single agreement may encompass multiple illegal objects.'" *Aracri*, 968 F.2d at 1518 (quoting

*Murray*, 618 F.2d at 896). "In this Circuit it is well established that the allegation in a single count of a conspiracy to commit several crimes is not duplicitous, for the conspiracy is the crime and that is one, however diverse its objects." *Id.* (cleaned up).

In a pretrial motion to dismiss a count as duplicitous, the Court considers only the indictment "on its face." *United States v. Miller*, 26 F. Supp. 2d 415, 422–23 (N.D.N.Y. 1998) (citing *United States v. Reed*, 639 F.2d 896, 904 (2d Cir. 1981)); *see United States v. Walsh*, 194 F.3d 37, 46 (2d Cir. 1999) (explaining that in a *post*-trial motion, a court "may consider the record as a whole in determining whether an indictment is in fact multiplicitous or duplicitous"); *accord United States v. Eufrasio*, 935 F.2d 553, 567 (3d Cir. 1991) ("In determining whether a trial court erred by joining multiple defendants under Rule 8(b), we focus on the indictment, not on the proof subsequently adduced at trial." (cited by Greenberg Br. at 31)). Pretrial dismissal is inappropriate so long as "the Court cannot conclude on the basis of the pleadings alone that there is *no* set of facts . . . that could warrant a reasonable jury in finding a single conspiracy." *United States v. Gabriel*, 920 F. Supp. 498, 505 (S.D.N.Y. 1996), *aff'd*, 125 F.3d 89 (2d Cir. 1997). Otherwise, "[t]he question whether the proof establishes a single or multiple conspiracies is an issue of fact 'singularly well-suited to resolution by the jury.'" *United States v. Potamitis*, 739 F.2d 784, 787 (2d Cir. 1984) (quoting *United States v. McGrath*, 613 F.2d 361, 367 (2d Cir. 1979)).

**2. Analysis**

The Court concludes that the single count is not duplicitous because it alleges a single crime of conspiracy in which all of the Defendants participated. The superseding indictment alleges that Russian America employees Mosha and Danskoi referred clients to non-employees, including Greenberg, to assist in the preparation and submission of fraudulent asylum

applications. S1 Indictment ¶ 2. While other Defendants prepared written applications, Greenberg's alleged role in this conspiracy was to "knowingly prepare[] and encourage[] certain Russian America clients to lie under oath about their fraudulent asylum claims" and to accompany them to their interviews. *Id.* ¶¶ 7, 9. As the alleged facts outlined above reflect, the selected pretrial materials proffered by the parties demonstrate that Mosha and Danskoi knew Greenberg and referred clients to Greenberg, and that Greenberg knew that Mosha and Danskoi, as well as others connected to Russian America, had assisted in the preparation of those clients' asylum applicants. And at the stage of conducting asylum interviews, Russian America provided further assistance, such as supplying translators.

Greenberg argues that the conspiracy in which she was allegedly involved was distinct from that in which the other Defendants were involved. She refers the Court to the *Korfant* factors, which courts in this circuit use to determine whether two conspiracies constitute the same offense for purposes of the Double Jeopardy Clause. Greenberg Br. at 34 (citing *United States v. Korfant*, 771 F.2d 660,662 (2d Cir. 1985)). Those factors include:

> (1) the criminal offenses charged in successive indictments; (2) the overlap of participants; (3) the overlap of time; (4) similarity of operation; (5) the existence of common overt acts; (6) the geographic scope of the alleged conspiracies or location where overt acts occurred; (7) common objectives; and (8) the degree of interdependence between alleged distinct conspiracies.

*United States v. Hernandez*, No. 09 CR 625 (HB), 2009 WL 3169226, at *9 (S.D.N.Y. Oct. 1, 2009) (quoting *United States v. Macchia*, 35 F.3d 662, 668 (2d Cir. 1994)).

Without deciding whether the *Korfant* factors are controlling in a determination of duplicity, the Court considers Greenberg's application of the factors. Greenberg argues, first, that the objective of the other Defendants' conspiracy was to submit a fraudulent Form I-589 while her alleged conspiracy's objective was "for the limited and express purpose of preparing and accompanying the clients to their asylum interviews." Greenberg Br. at 35. She cites

primarily *United States v. Gabriel*, 920 F. Supp. 498 (S.D.N.Y. 1996), which dismissed one of eighteen counts in an indictment on statute-of-limitations grounds because that count alleged a conspiracy distinct from the others alleged. Relevant here, *Gabriel* concluded that one conspiracy was by an airplane parts repairer to defraud its customers by using substandard repair methods while a distinct conspiracy later in time, perpetrated by executives that later joined the repair company, sought to "limit the damage" of subsequent investigations and lawsuits by downplaying the extent to which the fraud was intentional. *Id.* at 503–04.

The Court concludes, however, that the superseding indictment alleges a single objective of the conspiracy: to obtain completed Forms I-94—that is, proof of asylum—for Russian America's clients. That objective required both the written applications in which Mosha, Danskoi, and the other Defendants, were allegedly involved, as well as the in-person interview in which Greenberg was allegedly involved. After all, submitting a Form I-589 is, in itself, insufficient to obtain asylum protection because the applicant must also pass an in-person interview. *See* 8 U.S.C. § 1158(d)(5)(A)(ii); 8 C.F.R. §§ 1208.10, 1208.13(d)(2)(i)(H). Consider, by analogy, a student who submits an application to a college: Her objective is to gain admission, not simply to apply. That is true even if the college further requires that the student pass an in-person interview. In either instance, both actions are necessary steps toward the ultimate objective of gaining admission. This case is therefore unlike *Gabriel*, where the later conspiracy to cover up fraud had a distinct objective from the completed conspiracy to commit the fraud. Further, even if Greenberg's particular objective was distinct from that of the other Defendants, that would not require a conclusion that the count is duplicitous because "a single agreement may encompass multiple illegal objects." *Murray*, 618 F.2d at 896.

Greenberg also argues that the superseding indictment alleges two distinct conspiracies because even if Greenberg made an unlawful agreement, it was only with the Government's cooperating witnesses, which is insufficient to allege a conspiracy. Greenberg Br. at 33; *see, e.g.*, *United States v. Rosenblatt*, 554 F.2d 36, 38 & n.2 (2d Cir. 1977) (holding that there can be no conspiracy with only a "government informant who secretly intends to frustrate the conspiracy" (citing *Sears v. United States*, 343 F.2d 139 (5th Cir. 1965)). As an initial matter, Greenberg's argument requires that the Court look at materials outside the indictment, which it cannot do at this stage as to this claim. But even taking account of additional materials, the Court would still reject Greenberg's claim. Crucially, "[a] conspiracy need not be shown by proof of an explicit agreement but can be established by showing that the parties have a tacit understanding to carry out the prohibited conduct." *United States v. Svoboda*, 347 F.3d 471, 477 (2d Cir. 2003) (quoting *United States v. Samaria*, 239 F.3d 228, 234 (2d Cir. 2001)). And "[a] defendant can conspire with individuals he has never met, so long as he participates and is aware of their assistance in the criminal venture." *United States v. Medina*, 32 F.3d 40, 44 (2d Cir. 1994). Further, though agreement with a government informant alone cannot establish a conspiracy, "a government agent may serve as a 'link' between 'genuine' conspirators," and a conspiracy may exist where one conspirator "communicated solely through" a government agent. *Id.* (cleaned up); *see also United States v. Cordero*, 668 F.2d 32, 43 (1st Cir. 1981) (Breyer, J.). Last, "[t]he defendant's participation in a single transaction can, on an appropriate record, suffice to sustain a charge of knowing participation in an existing conspiracy." *United States v. Santos*, 541 F.3d 63, 73 (2d Cir. 2008) (quoting *United States v. Miranda–Ortiz*, 926 F.2d 172, 176 (2d Cir. 1991)). These principles in mind, the Court finds an adequate basis to permit a reasonable jury to find that Greenberg conspired with the other Defendants, even if that agreement was not

made explicitly, was made using CS-1 and CS-3 as "links," and/or involved only a single transaction.

Greenberg also argues, citing the *Korfant* factors, that the difference in time between her actions and the actions of the other Defendants is too great, disproving that there was a single conspiracy. But courts have declined to dismiss counts as duplicitous even where longer periods of time have passed between alleged coconspirators' actions. *E.g.*, *United States v. Willis*, 475 F. Supp. 2d 269, 273 (W.D.N.Y. 2007) (fifteen-month conspiracy alleged). And in the context of the conspiracy alleged here, a substantial period of time between the submission of an application and an applicant's interview is consistent with the significant wait times that applicants face in the asylum process. *Cf., e.g.*, *Fangfang Xu v. Cissna*, 434 F. Supp. 3d 43, 60 (S.D.N.Y. 2020) ("The swell in asylum applications had produced a rapidly increasing backlog of asylum applications and left the asylum system prone to fraud . . . ."); *Yueliang Zhang v. Wolf*, No. 19-CV-5370 (DLI), 2020 WL 5878255, at *5 (E.D.N.Y. Sept. 30, 2020).

Even if the Court concluded that the single-count indictment alleged two distinct conspiracies such that the count is duplicitous, Greenberg has not demonstrated that the duplicity is prejudicial to her. *See Margiotta*, 646 F.2d at 733. The superseding indictment provides Greenberg adequate notice of the conduct alleged and the timing of that conduct. Further, a general verdict of guilty is unlikely to conceal a finding of not guilty as to one of the crimes. If a jury were to conclude, for instance, that Greenberg did not participate in a conspiracy but that the other Defendants did, then the jury would be required to return a verdict of not guilty as to Greenberg.

The Court therefore denies Greenberg's motion to dismiss the count against her as duplicitous.

**C. Motion to sever Greenberg**

Related to her claim that the count of conspiracy to commit immigration fraud is duplicitous, Greenberg next argues that, at the least, her trial should be severed from that of her co-Defendants.

**1. Applicable law**

Under Federal Rule of Criminal Procedure 8,

> The indictment or information may charge 2 or more defendants if they are alleged to have participated in the same act or transaction, or in the same series of acts or transactions, constituting an offense or offenses. The defendants may be charged in one or more counts together or separately. All defendants need not be charged in each count.

Fed. R. Crim. P. 8(b).

This language means that "joinder of defendants is appropriate where the alleged criminal conduct is 'unified by some substantial identity of facts or participants, or arise out of a common plan or scheme.'" *United States v. Burke*, 789 F. Supp. 2d 395, 398 (E.D.N.Y. 2011) (quoting *United States v. Attanasio*, 870 F.2d 809, 815 (2d Cir. 1989)). Relevant here, joinder may be satisfied "where the Government alleges the existence of an overall conspiracy linking the various substantive crimes charged in an indictment," *United States v. Lech*, 161 F.R.D. 255, 256 (S.D.N.Y. 1995), or where the indictment charges multiple conspiracies that "arise from a common plan or scheme," *United States v. Moon*, No. 88-CR-64, 1988 WL 88056, at *3 (N.D.N.Y. Aug. 23, 1988) (quoting *United States v. Velasquez*, 772 F.2d 1348, 1353 (7th Cir. 1985)), or where multiple conspiracies are otherwise "'intertwined' with each other," *United States v. Tuzman*, 301 F. Supp. 3d 430, 439 (S.D.N.Y. 2017) (quoting *Attanasio*, 870 F.2d at 815).

"There is a preference in the federal system for joint trials of defendants who are indicted together." *United States v. Salameh*, 152 F.3d 88, 115 (2d Cir. 1998) (per curiam) (quoting

*Zafiro v. United States*, 506 U.S. 534, 537 (1993)); *see also Richardson v. Marsh*, 481 U.S. 200, 209–10 (1987) (explaining that "[j]oint trials play a vital role in the criminal justice system"). But if joinder is not permitted under Rule 8(b), then the Court must sever the defendants. *United States v. Lane*, 474 U.S. 438, 449 (1986) ("Rule 8(b), however, requires the granting of a motion for severance unless its standards are met, even in the absence of prejudice . . . ."). Additionally, even if joinder is proper under Rule 8(b), a court may nevertheless grant severance "[i]f the joinder of offenses or defendants in an indictment . . . appears to prejudice a defendant." Fed. R. Crim. P. 14(a). A defendant that seeks severance carries an "extremely difficult burden," *Tuzman*, 301 F. Supp. 3d at 440 (quoting *United States v. Casamento*, 887 F.2d 1141, 1149 (2d Cir. 1989)), as they "must show not simply some prejudice but *substantial* prejudice," *United States v. Sampson*, 385 F.3d 183, 190 (2d Cir. 2004) (quoting *United States v. Werner*, 620 F.2d 922, 928 (2d Cir. 1980)). The Supreme Court has instructed that "when defendants properly have been joined under Rule 8(b), a district court should grant a severance under Rule 14 only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." *Zafiro*, 506 U.S. at 539. Whether to grant severance is reserved "to the district court's sound discretion." *Id.*

**2. Analysis**

The Court concludes, first, that joinder was proper. As explained above, the single count alleges a single conspiracy that includes Greenberg and the other Defendants. That conspiracy is alleged to have the objective of fraudulently obtaining asylum relief for Russian America's clients. Some of the Defendants are alleged to have participated in earlier stages of the asylum-application process, such as assisting in the preparation of the clients' asylum affidavits or by

writing the clients' blogs to provide a basis for asylum. But even if Greenberg was involved only in the clients' later in-person interviews with Asylum Officers, participation in that "single transaction" would be sufficient to sustain a charge of conspiracy, especially because the conspiracy's objective could be obtained only if clients pass those interviews. *Santos*, 541 F.3d at 73.

Greenberg argues again, as she did with regard to duplicity, that the other Defendants engaged in a distinct conspiracy of submitting an asylum application, arguing that the submission of Form I-589 was a "completed 'act or transaction'" in which Greenberg did not participate. Greenberg Br. at 38. But, as explained, this parsing of the indictment is artificial. Submitting a Form I-589 cannot result in the desired Form I-94 without an in-person interview. Greenberg's argument that she and Russian America must have been involved in separate conspiracies because Russian America was not a law firm does not change this calculus. Rather, a jury could find that Greenberg's role within the alleged conspiracy, as a licensed immigration attorney, was to provide those services that Russian America was legally barred from providing, such as appearing at an asylum interview. *See* 8 C.F.R. § 292.4 (providing that an appearance in an asylum proceeding may be filed only by an "attorney or accredited representative"); *see also* Greenberg Br., Ex. N at 9 (Greenberg told CS-1, "You cannot say at all that [Mosha] is an attorney or provides legal services. . . . He fills out documents and does translations. He has no right to give you legal *advice* or anything like that."). Similarly, Greenberg's observation that the other Defendants allegedly completed the substantive offense of immigration fraud before Greenberg assisted CS-1 and CS-3 in their interviews, Greenberg Br. at 44, is irrelevant to whether the Defendants entered into a conspiracy to commit immigration fraud.

Greenberg also reiterates that the superseding indictment alleges distinct conspiracies because the conspiracies "took place at a much different time, in different places, during different states of asylum process, and had different participants." Greenberg Br. at 41. These differences in the Defendants' roles, however, are not sufficient to conclude that Greenberg was misjoined. Greenberg's role, as alleged, took place at a different time at a later stage in the asylum process, but her role was nevertheless necessary to achieve the conspiracy's objective. And while Greenberg is not alleged to have been in Russian America's offices with Mosha and Danskoi, the conduct alleged in the superseding indictment is centered on the same geographic location of New York City.

Greenberg likens her case to *United States v. Kouzmine*, 921 F. Supp. 1131 (S.D.N.Y. 1996), which found that distinct conspiracies to commit immigration fraud were misjoined. But there, the court found, and the government acknowledged, that defendants involved in an earlier conspiracy did not have "any knowledge whatever of the latter offenses," and that there was "no colorable argument . . . that both conspiracies alleged . . . were part of a single overarching scheme." *Id.* at 1133. Here, by contrast, the superseding indictment expressly alleges that all six Defendants entered a single conspiracy to submit fraudulent asylum applications. S1 Indictment ¶ 2. And, further unlike *Kouzmine*, the Defendants are alleged to have been aware of each others' roles, as Mosha and Danskoi "connected" and "referred" clients to Greenberg. *Id.* ¶¶ 7, 9.

For similar reasons, Greenberg's citation to *United States v. Lech*, 161 F.R.D. 255 (S.D.N.Y. 1995), is unavailing. There, a seven-count indictment alleged three separate schemes to fraudulently obtain construction permits from the New York City Board of Education. *Id.* at 255–56. As with *Kouzmine*, the government conceded that the participants in each scheme "did

not participate in, or have specific knowledge of, the [other] schemes," requiring severance. *Id.* at 256–57. Again, those facts are distinguishable from the present case where the superseding indictment alleges a single conspiracy in which all Defendants participated.

Greenberg further argues that she had no knowledge, at the time that CS-1's and CS-3's asylum applications were submitted, that the applications were fraudulent. Greenberg Br. 43–44. Whether Greenberg had adequate knowledge of the conspiracy raises a question of the sufficiency of the evidence and so is properly a question for the jury. However, the Court notes that "[a] defendant need not have joined a conspiracy at its inception in order to incur liability for the unlawful acts of the conspiracy committed both before and after he or she became a member." *Santos*, 541 F.3d at 73 (quoting *United States v. Rea*, 958 F.2d 1206, 1214 (2d Cir. 1992)).

Having concluded that joinder was proper, the Court further concludes that Greenberg has not carried her burden of making a substantial showing of prejudice as would justify severance. She points first to the risk of prejudice that evidence of Russian America's actions will be improperly considered by the jury as proof of Greenberg's guilt. Greenberg Br. at 45–46 (citing *Zafiro*, 506 U.S. at 539). But where the Government has alleged a single conspiracy, as here, "all the evidence admitted to prove that conspiracy, even evidence relating to acts committed by co-defendants, is admissible against the defendant." *United States v. Salameh,* 152 F.3d 88, 111 (2d Cir. 1998). Further, juror confusion can be addressed with "less drastic measures, such as limiting instructions." *Zafiro,* 506 U.S. at 539.

Greenberg also claims that as an attorney, she may raise additional defenses that are unavailable to her non-attorney co-Defendants. Greenberg Br. at 46. But "it is well settled that defendants are not entitled to severance merely because they may have a better chance of

acquittal in separate trials." *Zafiro*, 506 U.S. at 540. Further, that defendants have distinct defense theories is not a sufficient basis for severance. Indeed, the Supreme Court has held that even when defendants have "conflicting" or "[m]utually antagonistic defenses," that is "not prejudicial *per se*." *Id.* at 538; *see also United States v. Stein*, 428 F. Supp. 2d 138, 144 (S.D.N.Y. 2006).

Even if Greenberg did identify prejudice, it would not reach the high bar required by Rule 14. That is especially so because the prejudice to Greenberg is not "sufficiently severe to outweigh the judicial economy that would be realized by avoiding lengthy multiple trials." *United States v. Lanza*, 790 F.2d 1015, 1019 (2d Cir. 1986) (quoting *United States v. Panza*, 750 F.2d 1141, 1149 (2d Cir. 1984)); *see Stein*, 428 F. Supp. 2d at 145 (listing as efficiencies "the risk of inconsistent verdicts, the burden on the court and the prosecution of trying the defendants or several groups of defendants *seriatim*, and the need for defense counsel to cover repeatedly on cross-examination in successive trials material that could be covered but once in a joint trial").

The Court therefore denies Greenberg's claim of misjoinder and, further, denies her request to be severed from the other Defendants.

**D. Motion to dismiss for failure to state a crime**

Greenberg next raises a series of argument as to why the superseding indictment does not allege a crime. In evaluating these claims, the Court may not "look beyond the face of the indictment and draw inferences as to proof to be adduced at trial, for 'the sufficiency of the evidence is not appropriately addressed on a pretrial motion to dismiss an indictment.'" *Scully*, 108 F. Supp. 3d at 116–17; *see also Sampson*, 898 F.3d at 280.

Greenberg was charged with a single count of conspiracy to commit immigration fraud under both 18 U.S.C. § 371 and 18 U.S.C. § 1546(a). She argues that the count cannot stand

under § 1546(a) because that provision criminalizes only the possession of a fraudulent proof of lawful immigration status—here, a completed Form I-94—which is not the conduct in which she allegedly engaged. Nor can the count stand under § 371, she continues, because she had no duty to disclose the truth to USCIS and so did not defraud any U.S. agency. Last, she argues that her alleged conduct of advising her clients—even advising them to lie to USCIS—is protected by the First Amendment.

The Court addresses first Greenberg's arguments under § 1546(a) because, Greenberg claims, the § 371 charge depends at least in part on the validity of the § 1546(a) charge.

**1. The superseding indictment is sufficiently pled**

As an initial matter, to be legally sufficient, "an indictment need do little more than to track the language of the statute charged and state the time and place (in approximate terms) of the alleged crime." *Stringer*, 730 F.3d at 124. Consequently, "[c]ourts have repeatedly refused, in the absence of prejudice, to dismiss counts of indictments for lack of specificity '[w]hen the charges in an indictment have stated the elements of the offense and provided even minimal protection against double jeopardy.'" *United States v. Nejad*, No. 18-CR-224 (AJN), 2019 WL 6702361, at *15 (S.D.N.Y. Dec. 6, 2019) (quoting *Stringer*, 730 F.3d at 124).

The superseding indictment exceeds these baseline requirements. In addition to reciting the elements of the charged statutes, *e.g.*, S1 Indictment ¶¶ 18–19, it states the approximate time period of the conspiracy (August 2018 to February 2021), and the approximate locations (namely, the Southern District of New York, Manhattan, and Brooklyn), *id.* ¶¶ 1, 17. Further, the superseding indictment lists seven overt acts that make up the conspiracy, and for each identifies an approximate time and place. *Id.* ¶ 20. No more is required. *See Scully*, 108 F.

Supp. 3d at 116. Nevertheless, the Court will additionally address Greenberg's particular arguments as to why the superseding indictment is facially insufficient.

**2. Whether § 1546 covers the alleged crime**

Section 1546(a) of title 18 contains four paragraphs. The Government's brief argues only that Greenberg can be convicted under the first paragraph of these paragraphs, and the Court therefore considers only whether Greenberg's alleged conduct is prohibited under the first paragraph.[16] That paragraph states in full:

> Whoever knowingly forges, counterfeits, alters, or falsely makes any immigrant or nonimmigrant visa, permit, border crossing card, alien registration receipt card, or other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States, or utters, uses, attempts to use, possesses, obtains, accepts, or receives any such visa, permit, border crossing card, alien registration receipt card, or other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States, knowing it to be forged, counterfeited, altered, or falsely made, or to have been procured by means of any false claim or statement, or to have been otherwise procured by fraud or unlawfully obtained;

18 U.S.C. § 1546(a) ¶ 1.

In interpreting criminal statutes, the Court is mindful that it must "construe criminal statutes narrowly." *United States v. Valle*, 807 F.3d 508, 528 (2d Cir. 2015) (quoting *United States v. Nosal*, 676 F.3d 854, 863 (9th Cir. 2012)). The Supreme Court instructed as much when interpreting the same statute at issue here. *United States v. Campos-Serrano*, 404 U.S. 293, 297 (1971) ("It has long been settled that penal statutes are to be construed strictly, and that one is not to be subjected to a penalty unless the words of the statute plainly impose it." (cleaned up)). But that instruction "does not mean that every criminal statute must be given the narrowest

[16] The Government does not contest Greenberg's claim that the fourth paragraph of § 1546(a) does not cover Greenberg's allegedly false statements that she made orally to USCIS. *See* Greenberg Br. at 59; Greenberg Reply at 16 (citing *United States v. Jabateh*, 974 F.3d 281, 297 (3d Cir. 2020) (interpreting the fourth paragraph to apply only to written false statements, not "false statements made orally under oath")).

possible meaning in complete disregard of the purpose of the legislature." *Moskal v. United States*, 498 U.S. 103, 113 (1990) (quoting *McElroy v. United States*, 455 U.S. 642, 658 (1982)). Greenberg raises three basic arguments for why her conduct alleged in the superseding indictment is not punishable under the terms of § 1546(a)'s first paragraph. For the reasons following, the Court disagrees.

*First*, Greenberg argues that a Form I-589 is not covered by § 1546(a) because it is only an application for asylum protection and not itself a "document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States." Greenberg Br. at 54–56 (citing *United States v. Phillips*, 543 F.3d 1197 (10th Cir. 2008)). Rather, she continues, her conduct is covered by the statute only if she conspired to possess a completed Form I-94, which actually authorizes an asylee's entry into, or stay in, the United States. Greenberg Reply at 10–11. Whether Greenberg's interpretation of the statute is correct remains an open question in this circuit. *United States v. Christo*, 413 F. App'x 375, 376 (2d Cir. 2011) (summary order) (citing *Phillips* but concluding that the court "need not reach the question of whether a Form I-589 is a document required for entry into this country"); *see also United States v. Ryan-Webster*, 353 F.3d 353, 357 (4th Cir. 2003) (applying § 1546(a) to the forgery of application materials). The Government, however, does not contest Greenberg's reading. Instead, it argues that the superseding indictment alleges that Greenberg conspired to "obtain[]" a "document" that "would result from a successful asylum application," namely, a completed Form I-94. Gov't Br. at 45–46. The Court therefore assumes without deciding that § 1546(a) covers Greenberg's conduct only if the object of her conspiracy was to obtain a completed Form I-94.

*Second*, Greenberg argues that the first paragraph of § 1546(a) "does not apply to authentic documents" but punishes only "the forging, counterfeiting, altering or falsely making

of certain immigration documents or their use, possession, or receipt." Greenberg Reply at 9; Greenberg Br. at 57. The possession of an *authentic* immigration document that was obtained by submitting "false statements in support of an I-589 application," she claims, is punished only by § 1546(a)'s fourth paragraph, which the Government has abandoned. Greenberg Reply at 10.

This interpretation defies the text of the paragraph. Greenberg emphasizes the first half of the paragraph—which does proscribe "forg[ing], counterfeit[ing], alter[ing], or falsely mak[ing]" an immigration document—but ignores the second half that punishes whoever "possesses, obtains, accepts, or receives any such . . . other document . . . knowing it to be forged, counterfeited, altered, or falsely made, *or to have been procured by means of any false claim or statement, or to have been otherwise procured by fraud or unlawfully obtained*." 18 U.S.C. § 1546(a) (emphasis added). This "clear and definite" language, *Campos-Serrano*, 404 U.S. at 298, proscribes not only the knowing possession of a forged or counterfeited document but also the possession of an authentic document that one knows to have been procured by a false claim or statement. This latter prohibition covers the allegations in the superseding complaint that Greenberg conspired to procure an authentic Form I-94 for asylum applicants by means of false asylum claims.

That conclusion is consistent, as far as this Court is aware, with the conclusion of every court to consider the question. *See United States v. Krstic*, 558 F.3d 1010, 1017 (9th Cir. 2009) (concluding, after exhaustively considering the statute's text, history, and purpose, that it "prohibits possessing an otherwise authentic document that one knows has been procured by means of a false claim or statement"); *United States v. Kouevi*, 698 F.3d 126, 139 (3d Cir. 2012) ("The plain language of the statute reveals that the first paragraph of § 1546(a) must be read to prohibit the possession or use of authentic immigration documents which are obtained by

fraud."); *see also United States v. Kantengwa*, No. CRIM.A. 08-10385-RGS, 2012 WL 4591891, at *2 n.5 (D. Mass. Oct. 3, 2012), *aff'd*, 781 F.3d 545 (1st Cir. 2015) (citing *Krstic*); *United States v. Cvijanovic*, No. 10-CR-280, 2011 WL 1498599, at *2 (E.D. Wis. Feb. 8, 2011), *report and recommendation adopted*, 2011 WL 1498595 (E.D. Wis. Apr. 19, 2011) (observing that Congress "criminaliz[ed] not merely the making of a false statement on an immigration forms, but also the possession of immigration documents obtained as a result of those false statements"); *United States v. Jakisa*, No. 14-CR-119 SRN/SER, 2015 WL 520618, at *5 (D. Minn. Feb. 9, 2015) (citing *Cvijanovic*).

Greenberg dismisses this straightforward reading of the statute in two ways. First, she argues, the Supreme Court has "literally opined" on this issue and agreed that the first paragraph of § 1546(a) is only a counterfeiting prohibition, Greenberg Reply at 9–10, quoting dicta that appears in a footnote in *Campos-Serrano*: "The prohibition of counterfeiting in § 1546 is contained in the first paragraph of that section. The prohibition of fraud in the acquisition of documents is contained in the third paragraph of § 1546." 404 U.S. at 301 n.13 (cleaned up). But "*Campos–Serrano* cannot support the weight [Greenberg] places upon it." *Krstic*, 558 F.3d at 1014. At issue in *Campos-Serrano* was the distinct question of whether the statute covered the act of counterfeiting an alien registration receipt card, and the Court held it did not. *Id.* at 300–01. The Supreme Court had no reason to consider whether the first paragraph also covered an authentic document that was procured by fraud. The opinion's "one-line description" of the statute "revises (for easier reading) the statute's own" language—it does not purport to be comprehensive or binding. *Borden v. United States*, 141 S. Ct. 1817, 1833 n.9 (2021); *see Krstic*, 558 F. 3d at 1014 (explaining that this language in *Campos-Serrano* "merely serves as

general background information about the statute; it does not purport to be a comprehensive catalog of all conduct prohibited by the statute").[17]

Second, Greenberg argues that interpreting the first paragraph to cover both authentic and inauthentic documents must be rejected because it would render superfluous § 1546(a)'s fourth paragraph. Greenberg Reply at 11, 14. The Court disagrees. Each paragraph still has independent effect. The fourth paragraph prohibits the act of making a false statement under oath "in any application, affidavit, or other document required by the immigration laws." 18 U.S.C. § 1546(a). Only the first paragraph covers "*possession* of an immigration document that was fraudulently obtained." *Krstic*, 558 F.3d at 1017. Moreover, Greenberg's interpretation creates its own surplusage problem, as it gives no effect to the first paragraph's proscription of possessing a document knowing it "to have been procured by means of any false claim or statement, or to have been otherwise procured by fraud or unlawfully obtained." *Id.*; *see Kouevi*, 698 F.3d at 133–34 (rejecting Greenberg's interpretation because otherwise "the last clause . . . is transformed into surplusage; it would add absolutely nothing to what comes before it"). Last, though courts should minimize surplus text in a statute, "[t]he canon against surplusage is not an absolute rule." *Panjiva, Inc. v. U.S. Customs & Border Prot.*, 975 F.3d 171, 179 (2d Cir. 2020) (quoting *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 385 (2013)).

[17] Nor is the Court persuaded by language that Greenberg quotes from the United States Attorneys' Manual, Greenberg Br. at 57, which states that "[t]he first paragraph of 18 U.S.C. § 1546(a) proscribes the forging, counterfeiting, altering or falsely making of certain immigration documents or their use, possession, or receipt." U.S. Dep't of Just., Just. Manual § 9-73.000. That language refers to one application of § 1546(a), but it does not exclude the interpretation the Court adopts here; moreover, it cannot bind this Court. *See Kouevi*, 698 F.3d at 137–38 (rejecting this same argument).

The Court therefore interprets the first paragraph of § 1546(a) to cover authentic immigration documents—including Form I-94—that were "procured by means of any false claim or statement, or to have been otherwise procured by fraud or unlawfully obtained."

*Third*, Greenberg asserts that even if § 1546(a) is interpreted to cover an authentic Form I-94, she "couldn't have conspired to obtain an I-94 card." Greenberg Reply at 11. Greenberg's precise claim is unclear, but it appears to rest on two premises. First, she asserts that the word "obtain" in § 1546(a) means "simply 'taking possession'" and so "does not extend to the process of unlawfully applying for an immigration document." *Id.* at 11. In other words, she says, the second half of the first paragraph punishes only "the literal knowing possession of fraudulently made or obtained documents." *Id.* at 12. As with her prior argument, she claims that only the fourth paragraph "punish[es] the effort of obtaining . . . authentic immigration documents." *Id.* at 13. Second, she argues, the Defendants could not have conspired to obtain a Form I-94 because submitting an application and appearing at an interview before an Asylum Officer "*does not*, in and of itself, result in the issuance of an I-94," noting that "only 29.8% of asylum applications" get approved. *Id.* at 13–14; *see also id.* at 13 n.4 (arguing that the Government's theory of the case "could only actually work if the Government also theorized and established that the Defendants were in collaboration with a corrupt actor at USCIS, who was going to help them assuredly 'obtain' these fraudulently emitted I-94s").

Neither of these premises withstands scrutiny. Greenberg's unsourced definition of the term "obtain" as synonymous with "possess" fails to give the terms independent effect. Rather, obtain is better defined to mean "to procure, esp[ecially] through effort" or "[t]o succeed either in accomplishing (something) or in having it be accomplished; to attain by effort," such as "to obtain a loan." *Obtain*, Black's Law Dictionary (11th ed. 2019); *see also Obtain*, Merriam-

Webster Dictionary, https://www.merriam-webster.com/dictionary/obtain (accessed March 7, 2022) (defining obtain as "to gain or attain usually by planned action or effort"); *Honeycutt v. United States*, 137 S. Ct. 1626, 1632–33 (2017) (similarly defining "obtain" in 18 U.S.C. § 853(a)(1)). Here, Greenberg allegedly conspired to obtain—that is, to procure or accomplish through effort—a completed Form I-94.[18] The fact that her effort was not guaranteed to achieve the object of the conspiracy because the ultimate decision to issue a Form I-94 rests with USCIS is irrelevant. Any criminal enterprise entails the risk of failure. It is established that because the crime of conspiracy requires only an unlawful agreement, "to be actionable, a conspiracy need not be carried to a successful conclusion." *United States v. Rosengarten*, 857 F.2d 76, 79 (2d Cir. 1988); *see Christo*, 413 F. App'x at 376 ("Given this, the failure of defendants to finalize and file the Form I–589 does not require the conspiracy conviction be overturned.").[19]

The Court therefore concludes that the first paragraph of 18 U.S.C. § 1546(a) covers Greenberg's conduct alleged in the superseding indictment. In the language of the statute, the Government has adequately alleged that Greenberg and the other Defendants conspired to "obtain[] . . a[] . . . document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States, knowing it . . . to have been procured by

[18] Greenberg's citations to cases that describe § 1546(a) as a "possessory offense" are inapposite. *E.g.*, Greenberg Reply at 12 (citing *Krstic*, 558 F.3d at 1015). The issue in those cases was whether the offense was completed when the false statement was made or whether it continued throughout the defendant's possession of the document—a distinction with significant implications for the statute of limitations. That determination of the statute of limitations did not purport to hold that § 1546(a) punishes *only* possession.

[19] Greenberg again argues that the superseding indictment alleges only that she entered an agreement with government agents, CS-1 and CS-3, which is inadequate to allege a conspiracy. Greenberg Reply at 17–19. As explained above, the superseding indictment alleges that Greenberg conspired with the other five Defendants and that to the extent CS-1 and CS-3 acted as links between Defendants, that is sufficient to allege a conspiracy. *See Medina*, 32 F.3d at 44. Greenberg also argues that the Government has not proffered adequate evidence of an agreement. Greenberg Reply at 19. The Court cannot resolve this sufficiency-of-the-evidence claim at this juncture.

means of any false claim or statement, or to have been otherwise procured by fraud or unlawfully obtained." 18 U.S.C. § 1546(a).

**3. Whether § 371 covers the alleged crime**

Section 371, which is titled "Conspiracy to commit offense or to defraud United States," imposes punishment,

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy . . . .

18 U.S.C. § 371 ¶ 1.

Thus, "§ 371 is divisible into two clauses: the 'offense clause' and the 'defraud clause.'" *Rodden v. Wilkinson*, 845 F. App'x 25, 27 (2d Cir. 2021) (summary order). "The 'offense clause' makes it unlawful to conspire 'to commit any offense against the United States,' while the 'defraud clause' prohibits conspiracies 'to defraud the United States, or any agency thereof in any manner or for any purpose.'" *United States v. Atilla*, 966 F.3d 118, 130 (2d Cir. 2020). "To prove a conspiracy under the 'defraud clause,' the government must establish (1) that the defendant entered into an agreement (2) to obstruct a lawful function of the government (3) by deceitful or dishonest means and (4) at least one overt act in furtherance of the conspiracy." *Id.* (cleaned up) (quoting *United States v. Ballistrea*, 101 F.3d 827, 832 (2d Cir. 1996)). Obstruction requires only that the Government show that the alleged act "'interfere[s] with or obstruct[s] one of [the United States'] lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest,' even if the Government is not 'subjected to property or pecuniary loss by the fraud.'" *Ballistrea*, 101 F.3d at 831–32 (quoting *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924)).

Greenberg argues that the superseding indictment does not allege a violation of the defraud clause. First, she flatly asserts that the "[f]iling of or presenting false statements in an [asylum] application is not" obstruction of the lawful function of a U.S. agency. Greenberg Br. at 51. But the "broad text" of the defraud clause "has been applied to conspiracies to obstruct the functions of a variety of government agencies," *Atilla*, 966 F.3d at 130, including the federal immigration agency, *Lutwak v. United States*, 344 U.S. 604, 605 (1953). The Court concludes that a conspiracy to obtain asylum protection by submitting false statements to USCIS alleges obstruction of a lawful government function.

Second, Greenberg argues that she did not "defraud" because she did not "owe an independent duty to disclose the client's falsities or forego his representation." Greenberg Br. at 52 (citing *Chiarella v. United States*, 445 U.S. 222, 235 (1980) (defining fraud under Section 10(b) of the Securities Exchange Act of 1934)). This argument misapprehends the superseding indictment, which alleges that Greenberg and her co-Defendants conspired to submit "materially false information" in asylum applications to USCIS and that Greenberg in particular prepared clients to make false statements at interviews, "during which clients and/or GREENBERG made claims that GREENBERG understood were false." S1 Indictment ¶¶ 1, 7. Thus, the allegation against Greenberg is not a mere failure to disclose. Moreover, Greenberg's attempt to narrow the meaning of "defraud" in § 371 by reference to other statutes is unavailing, as it is "well established that the term 'defraud' as used in section 371 'is interpreted much more broadly than when it is used in the mail and wire fraud statutes,'" *Ballistrea*, 101 F.3d at 831 (quoting *United States v. Rosengarten*, 857 F.2d 76, 78 (2d Cir. 1988), and than how it was defined at common law, *United States v. Coplan*, 703 F.3d 46, 61 (2d Cir. 2012).

Last, Greenberg suggests that because § 371 is ambiguous, it should be construed narrowly in accordance with the rule of lenity. Greenberg Br. at 50 (citing *Lander v. United States*, 358 U.S. 169 (1958)). But Greenberg has identified no "grievous ambiguity" necessary to invoke lenity. *Chapman v. United States*, 500 U.S. 453, 463 (1991).

The Court therefore rejects Greenberg's motion to dismiss any charge under 18 U.S.C. § 371.

**4. Whether Greenberg's conduct is protected by the First Amendment**

Greenberg argues that because her advocacy on behalf of her clients, CS-1 and CS-3, was "intended to affect the outcome of a proceeding," it is "protected by the First Amendment. Greenberg Br. at 66 (citing *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 511 (1972)). It would not be a crime, she says, if her "purpose may have been to make it more difficult for the USCIS to discover that her clients had perjured themselves." *Id.* at 66–67.

The contours of Greenberg's First Amendment claim are unclear. In any event, her argument proves far too much. Two basic principles of First Amendment doctrine bar Greenberg's challenge. First, "it has long been established that the First Amendment does not shield knowingly false statements made as part of a scheme to defraud." *United States v. Konstantakakos*, 121 F. App'x 902, 905 (2d Cir. 2005) (summary order) (citing *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 611 (2003)); *see, e.g.*, *United States v. Rowlee*, 899 F.2d 1275, 1279 (2d Cir. 1990) ("The consensus of this and every other circuit is that liability for a false or fraudulent tax return cannot be avoided by evoking the First Amendment."); *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 496 (1982) (holding that the government may "regulate or ban entirely" speech "proposing an illegal transaction"). Second, the government may regulate attorneys' "speech as well as their conduct"

in furtherance of a substantial interest, including "to protect the integrity and fairness of a [government's] judicial system." *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1075 (1991); *see also Hersch*, 553 F.3d at 756 ("The ability of the government to regulate the speech of attorneys is also made evident by [the] Model Rules of Professional Conduct."). In fact, contrary to Greenberg's assertions, "the speech of lawyers representing clients in pending cases may be regulated under a *less* demanding standard" because "[l]awyers representing clients in pending cases are key participants in the criminal justice system." *Gentile*, 501 at 1075 (emphasis added).[20]

Following the above law, the Second Circuit has previously rejected First Amendment challenges raised by defendants convicted under the statutes at issue, 18 U.S.C. § 1546 and 18 U.S.C. § 371. *Konstantakakos*, 121 F. App'x at 905 (holding that "§ 1546, on its face, applies only to knowing falsehoods material to the immigration submission at issue, and . . . such deliberate falsehoods enjoy no First Amendment protection"); *see also United States v. Daly*, 756 F.2d 1076, 1082 (5th Cir. 1985) (§ 371 "punish[es] actions, not speech. . . . [A]n illegal course of conduct is not protected by the First Amendment merely because the conduct was in part initiated, evidenced, or carried out by means of language"). And courts in this circuit have repeatedly upheld convictions of attorneys convicted for immigration fraud under the statutes. *See, e.g.*, *Dumitru*, 991 F.3d 427; *Archer*, 671 F.3d 149; *United States v. You*, No. 12-CR-690 (JMF), Dkt. No. 36 (S.D.N.Y. Feb. 5, 2015) (immigration attorney convicted under 18 U.S.C.

[20] In a footnote, Greenberg attempts to narrow her objection, stating that she "doesn't argue that any advice by a lawyer is shielded by the First Amendment. Instead, a restriction on the content of an attorney's advice must be prohibited by a criminal statute to be constitutional." Greenberg Reply Br. at 20 n.6. But this clarification is question begging. The statutes at issue expressly criminalize certain types of speech when made to the United States. Namely, as explained, 18 U.S.C. § 1546(a) proscribes the act of obtaining an immigration document that was "procured by means of any false claim or statement."

§§ 371, 1546(a)); *United States v. Philwin*, No. 11-CR-424-13 (NRB), Dkt. No. 255 (S.D.N.Y. May 10, 2013) (immigration attorney convicted under 18 U.S.C. § 371).

Greenberg's cited case law does not require a contrary conclusion. She cites initially to *California Motor Transport*, but there, in rejecting a First Amendment defense to an alleged antitrust violation, the Supreme Court stated that "[i]t is well settled that First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute." 404 U.S. at 514; *see also id.* at 515 ("First Amendment rights may not be used as the means or the pretext for achieving 'substantive evils' which the legislature has the power to control." (citation omitted)).

Second, Greenberg cites to a concurring opinion in *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002), where the Ninth Circuit upheld, on First Amendment grounds, a permanent injunction that prevented the federal government from investigating any physician or revoking any physician's license solely because that physician recommended medical marijuana to their patients. That holding was justified, in part, by the protections traditionally afforded to the doctor-patient relationship and to commercial speech. *Id.* at 636–37. A concurrence quoted by Greenberg explained that "the fulcrum of this dispute is not the First Amendment right of the doctors" but instead the disparity between the minimal benefit that doctors derived from giving such advice to their patients and the immense burden that they faced by giving the advice—namely, the potential loss of their licenses and livelihoods. *Id.* at 639–40 (Kozinski, J., concurring). This reasoning, which is not binding on this Court, is distinguishable. The speech alleged here was the knowing submission of false statements to a federal agency, and such fraudulent statements, unlike commercial speech or speech made in private by a doctor to a patient, are not protected by the First Amendment. *Konstantakakos*, 121 F. App'x at 905.

Moreover, the federal government has a far more "immediate[]" and "direct[]" interest in preventing the obstruction of an agency's lawful functions than it did in preventing doctors' encouragement of marijuana usage in *Conant*. 309 F.3d at 640 (Kozinski, J., concurring). And last, the Court notes that unlike the physicians in *Conant*, Greenberg here is alleged to have received direct financial compensation for her advice to clients and statements to USCIS.

Finally, Greenberg on February 11, 2022, filed a letter notifying the Court of the Ninth Circuit's decision in *United States v. Hansen*, --- F.4th ---, No. 17-10548, 2022 WL 402897 (9th Cir. Feb. 10, 2022). That decision held that 8 U.S.C. § 1324(a)(1)(A)(iv)—which punishes any person who "encourages or induces an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law"—is facially overbroad under the First Amendment because it "encompasses a vast amount of protected speech related to immigration, including general immigration advocacy" while the government has an interest only in a "narrow prohibition on speech integral to criminal conduct." *Id.* at *3.

The Court rejects Greenberg's reliance on *Hansen* because Greenberg did not raise an overbreadth challenge in her prior briefing to the Court. *See* Greenberg Br. at 66–67; Greenberg Reply at 19–21. The argument, whatever its merits, is therefore waived. *Parnass*, 2021 WL 4311342, at *7.[21] Even if the Court considered the merits of *Hansen*, the Court finds its

[21] In fact, *Hansen*'s procedural history tells a cautionary tale. The Ninth Circuit had held § 1324(a)(1)(A)(iv) unconstitutionally overbroad in a prior opinion, *United States v. Sineneng-Smith*, 910 F.3d 461, 485 (9th Cir. 2018), but the Supreme Court vacated the decision because the defendant had argued only that the statute was unconstitutional as to her and the Ninth Circuit abused its discretion in reaching to find the statute unconstitutionally overbroad, *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1578 (2020). The Court will not accept Greenberg's invitation to commit a similar error here.

reasoning distinguishable.[22] Unlike the provision at issue in *Hansen*, the Second Circuit has concluded that § 1546(a) "applies only to knowing falsehoods material to the immigration submission at issue," which "enjoy no First Amendment protection." *Konstantakakos*, 121 F. App'x at 905.

Accordingly, Greenberg has not made an adequate showing that the conduct alleged in the superseding indictment is protected by the First Amendment.[23]

**E. Motion to suppress**

Greenberg next argues that the statements she made to officers shortly after her arrest in Colorado without the presence of counsel must be suppressed as obtained in violation of the Fifth Amendment because, she claims, the Government "coerced Greenberg to provide statements against her interests after she was arrested." Greenberg Br. at 68. At the Court's order, the Government supplied an audio recording of the complete statement. Though the parties disagree about whether the statement is voluntary as a matter of law, Greenberg accepts the veracity of the recording and relies on it in her own briefing. The Court therefore finds that it can resolve Greenberg's motion without an evidentiary hearing. *See United States v. Cobb*, 544 F. Supp. 3d 310, 339–40 (W.D.N.Y. 2021).

[22] The precise question decided in *Hansen* remains an open one in this circuit, though other courts in the circuit have expressed sympathy for the claim as to § 1324. *United States v. Raniere*, 384 F. Supp. 3d 282, 309 (E.D.N.Y. 2019).

[23] Greenberg also argues that the superseding indictment effectively imposed on her a duty to investigate and report her clients, citing in support cases including *U.S. ex rel. Wilcox v. Johnson*, 555 F.2d 115, 121–22 (3d Cir. 1977), for the proposition that attorneys have an obligation not to investigate their clients. Greenberg Br. at 67–68. This argument, for the reasons explained above, is unpersuasive. The Government can punish attorneys' knowingly false statements made to the Government. The dicta that Greenberg quotes from *Wilcox* is not binding and, in any event, distinct from this circumstance, stating that if an attorney "were in fact to discuss with the Trial Judge his belief that his client intended to perjure himself, without possessing a firm factual basis for that belief, he would be violating the duty imposed upon him as defense counsel." 555 F.2d at 121–22.

**1. Applicable facts**

In the portion of the recording of the post-arrest statement that Greenberg quotes in her brief, Deboer stated:

> So, I want to be transparent with you, Julia. I want your cooperation. I am not going to sweet talk to you or anything. I am going to tell you a lot of stuff that I learned, . . . I could dice this around. I could give you statutes, I could give you max and min, it is not worth it, if you know this game. How long have you been an attorney? 15 years. I know you were born in Belarus, I know you came over here and you started Zontlaw. So I want you to think of your future with your kids, with your husband, and you are maybe in the position to help yourself. What does that mean? Basically, there are other people in this conspiracy that you will be able to provide information on, and you can talk–we are not even out of the area here. People that have a lot less than you and I know you have a lot of info on them, from what I have seen. We will just take it from there.

Recording at 2:04–3:20.

Deboer then administered the *Miranda* warning and Greenberg waived her rights both orally and in writing. Greenberg Br. at 18, Gov't Br. at 50. At this point, and throughout the interview, Greenberg appears to understand the warnings, to be alert, and to be responsive to questions. After Greenberg waived *Miranda*, Deboer showed Greenberg the warrant and the indictment and read the charges against her, which Greenberg said she understood. Recording at 6:50–7:16. Greenberg then proceeded, over the course of the remaining two-hour interrogation on the drive to Denver, to make potentially inculpatory statements, including that she knew Mosha filled out the Form I-589 for clients and that she knew CS-1 and CS-3 did not have truthful asylum claims. During this time, Deboer and the driver offered to adjust the temperature for Greenberg and offered her food and water.

**2. Applicable law**

When an individual is subject to a custodial interrogation, as Greenberg was here, the accused individual must be advised of her rights in the form of a *Miranda* warning. *See Thompson v. Keohane*, 516 U.S. 99, 102 (1995). "If a suspect invokes his *Miranda* rights, . . .

'interrogation must stop and the invocation must be scrupulously honored." *United States v. Gomez*, No. 17-CR-602 (JMF), 2018 WL 501607, at *1 (S.D.N.Y. Jan. 19, 2018) (quoting *United States v. Gonzalez*, 764 F.3d 159, 165 (2d Cir. 2014)). To prove a valid waiver of *Miranda*, "the government must show (1) that relinquishment of the defendant's rights was voluntary, and (2) that the defendant had a full awareness of the right being waived and of the consequences of waiving that right." *Arevalo v. Artus*, 104 F. Supp. 3d 257, 268–69 (E.D.N.Y. 2015) (quoting *United States v. Jaswal*, 47 F.3d 539, 542 (2d Cir. 1995)).

"Even where an accused has waived his *Miranda* rights, due process prohibits the prosecution from using (at least in its case in chief) statements not made voluntarily to law enforcement. A statement is involuntary if it is obtained 'under circumstances in which the suspect clearly had no opportunity to exercise a free and unconstrained will.'" *Gomez*, 2018 WL 501607, at *2 (citation omitted) (quoting *Oregon v. Elstad*, 470 U.S. 298, 304 (1985)). Whether waiver or statements made subsequent to waiver were voluntary depends on a totality-of-the-circumstances analysis, which generally includes "(1) the characteristics of the accused, (2) the conditions of interrogation, and (3) the conduct of law enforcement officials." *United States v. Haak*, 884 F.3d 400, 409 (2d Cir. 2018) (quoting *Green v. Scully*, 850 F.2d 894, 901–02 (2d Cir. 1988)). Specifically, courts consider "the accused's age, his lack of education or low intelligence, the failure to give *Miranda* warnings, the length of detention, the nature of the interrogation, and any use of physical punishment." *United States v. Siddiqui*, 699 F.3d 690, 707 (2d Cir. 2012) (quoting *Campaneria v. Reid*, 891 F.2d 1014, 1020 (2d Cir. 1989)). "Compliance with the dictates of *Miranda* is, as discussed, not dispositive—but it is a significant factor weighing in favor of a finding of voluntariness." *Gomez*, 2018 WL 501607, at *2 (citing *Berkemer v. McCarty*, 468 U.S. 420, 433 n.20 (1984)).

**3. Analysis**

The Court denies Greenberg's motion to suppress the post-arrest statements. *First*, motions to suppress evidence must be "accompanied by affidavits describing the facts giving rise to a claim of inadmissibility"; generally, "an attorney's affidavit is insufficient for this purpose." *United States v. Santiago*, 174 F. Supp. 2d 16, 26 (S.D.N.Y. 2001) (citing *United States v. Gillette*, 383 F.2d 843, 848 (2d Cir. 1967)); *see also United States v. Ray*, 541 F. Supp. 3d 355, 379–80 (S.D.N.Y. 2021) (explaining that on a motion to suppress, the defendant's "burden ordinarily is carried by the submission of sworn declarations"). That "affidavit must contain allegations that are 'definite, specific, detailed and nonconjectural.'" *Cobb*, 544 F. Supp. 3d at 339 (quoting *United States v. Longo*, 70 F. Supp. 2d 225, 248 (W.D.N.Y. 1999)). Greenberg's failure to submit a sworn affidavit is a sufficient basis to deny her motion to suppress. *United States v. Rodriguez*, No. S2 03-CR-1122 (DC), 2004 WL 2049235, at *2–3 (S.D.N.Y. Sept. 13, 2004) (Chin, J.) (denying the defendant's motion to suppress post-arrest statements allegedly obtained in violation of *Miranda* because the defendant "failed to submit a sworn affidavit").

*Second*, even if the Court considered the merits, it would deny Greenberg's motion to suppress because Deboer properly advised Greenberg of her *Miranda* rights and Greenberg expressed an intent to waive those rights both orally and in writing. The Court finds that waiver and her subsequent statements were made voluntarily. First, there is no dispute that Deboer advised Greenberg of her *Miranda* rights, which "in and of itself, is highly probative of voluntariness." *Berry v. Marchinkowski*, 137 F. Supp. 3d 495, 528 (S.D.N.Y. 2015) (citing *Missouri v. Seibert*, 542 U.S. 600, 608–09 (2004)). Second, Greenberg is a highly educated and mature adult who has practiced as a licensed attorney for 15 years. *Cf. Siddiqui*, 699 F.3d at 707 (finding a statement voluntary where the accused was "highly educated, having earned her

undergraduate degree from Massachusetts Institute of Technology and a doctorate from Brandeis University"). In fact, when Deboer initially struggled to find her written copy of the *Miranda* warnings to read, Greenberg began to recite the warnings out loud from memory. Recording at 4:00–4:04. Third, in expressing her waiver and throughout the interview, Greenberg spoke and "answer[ed] questions articulately and intelligently." *Ray*, 537 F. Supp. 3d at 581; *see also Gomez*, 2018 WL 501607, at *2 (finding that in a recorded confession, the defendant showed "no visible signs of distress or lack of understanding" and that "his demeanor, tone of voice, and coherent answers to the agents' questions" all supported voluntariness). Fourth, Deboer behaved in a professional manner throughout and offered Greenberg accommodations such as adjusting the temperature in the vehicle and food, both of which Greenberg declined. *Gomez*, 2018 WL 501607, at *2. And finally, the interview, which spanned just over two hours and ended when Greenberg arrived in Denver, was not so long as to be coercive. *E.g.*, *id.* (interview "just under three hours"); *Ray*, 537 F. Supp. 3d at 581 ("interview lasted one hour and a half").

Greenberg's claim of involuntariness rests almost entirely on the brief remarks that Deboer made before Greenberg effectuated her waiver, namely her statement that Greenberg should "think of [her] future with [her] kids, with [her] husband," which Greenberg claims was both coercive and deceptive. Greenberg Br. at 71 (citing, e.g., *Lynumn v. Illinois*, 372 U.S. 528, 534 (1963) (finding a statement involuntary because it was made "made only after the police had told her that state financial aid for her infant children would be cut off, and her children taken from her, if she did not 'cooperate'")). The Court cannot agree with this characterization of Deboer's statement. Deboer mentioned Greenberg's family only once and did so to truthfully identify a potential benefit to Greenberg should she choose to cooperate. The statement is not reasonably understood as a threat to seize Greenberg's children or to ensure that she will never

see them again. An interrogating officer is permitted to mention that charges carry serious consequences and to explain that cooperation could have benefits. *See United States v. Bye*, 919 F.2d 6, 9–10 (2d Cir. 1990) (collecting cases); *United States v. Corbett*, 750 F.3d 245, 253 (2d Cir. 2014). Nor is it accurate to say that Deboer "conveniently hid from Greenberg[] the statutory maximum sentence." Greenberg Br. at 71. Before reading Greenberg her *Miranda* rights, Deboer offered to provide Greenberg the particular statutes charged and the maximum and minimum sentence associated with each, but Greenberg audibly declined. And after Greenberg waived her *Miranda* rights, she was shown the arrest warrant and the indictment against her. Once she was fully appraised of the charges against her, Greenberg could have invoked her right to remain silent, but she did not. The Court therefore finds, accounting for the totality of the circumstances, that her subsequent statements were voluntary.

Accordingly, Greenberg's motion to suppress her post-arrest statements is denied.

**F. Grand jury proceedings**

Last, Greenberg request the minutes of the grand jury proceedings to further support her motion to dismiss the indictment. Greenberg Br. at 74. The Court denies this request.

Under Federal Rule of Criminal Procedure 6, grand jury minutes are to be kept secret. Fed. R. Crim. P. 6(e)(2). That presumption of secrecy can be overcome under limited circumstances. *E.g.*, Fed. R. Crim. P. 6(e)(3)(E)(ii) (permitting disclosure "at the request of a defendant who shows that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury"). But "[t]he party seeking disclosure must show a particularized need that outweighs the need for secrecy." *In re United States for Material Witness Warrant*, 436 F. Supp. 3d 768, 770 (S.D.N.Y. 2020) (quoting *United States v. Ulbricht*, 858 F.3d 71, 107 (2d Cir. 2017)). Because of the significant interests advanced by grand jury secrecy, this is a

relatively demanding standard to satisfy, and one reserved to the Court's discretion. *See Ulbricht*, 858 F.3d at 106–07 (citing *In re Grand Jury Subpoena*, 103 F.3d 234, 237 (2d Cir. 1996)).

Greenberg's sole argument for why this demanding standard is satisfied is that because "no evidence exists of Greenberg's participation in the conspiracy alleged in the indictment, the only possible explanation as to why the Grand Jury found probable cause to indict Greenberg was that either [the] Government's witnesses provided perjured testimony or that the Government misstated the law to the jurors on the essential elements of conspiracy." Greenberg Br. at 74. As the foregoing Opinion demonstrates, the Court disagrees with this characterization of the record presented. Greenberg may well have a meritorious argument that there is insufficient evidence to prove her guilt beyond a reasonable doubt. But that argument must be directed to the jury at trial and, at the appropriate time, to the Court in a Rule 29 motion.

The Court concludes that Greenberg has not made a showing of particularized need for the grand jury minutes that would outweigh the interests in secrecy. Her request is therefore denied.

## IV. Conclusion

For the foregoing reasons, the Court DENIES Greenberg's motion. This resolves docket number 114.

The Court in a prior order set a pretrial schedule. Dkt. No. 90. Pursuant to that order, a final pretrial conference is scheduled for June 6, 2022, at 2:00 p.m. in Courtroom 906 of the Thurgood Marshall United States Courthouse, 40 Centre Street, New York, New York. Further, any Rule 404(b) motions and motions in limine shall be filed by May 4, 2022.

SO ORDERED.

Dated: March 9, 2022
New York, New York

ALISON J. NATHAN
United States District Judge

Court Exhibit 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-v-

ULADZIMIR DANSKOI and
JULIA GREENBERG,

Defendants.

S1 21 Cr. 92 (JPO)

**JURY CHARGE**

understandingly made. I instruct you that you are to give the statements such weight as you find they deserve in light of all the evidence.

**Y. Excerpts**

Some of the exhibits admitted into evidence consist of excerpts of longer documents that were not admitted into evidence in their entirety. These excerpts are simply the portions of the underlying documents considered to be most relevant to the case by the party introducing them. There is nothing unusual or improper about the use of such excerpts, and you are not to speculate from the use of such excerpts that any relevant portion of a document has been omitted.

**Now I am going to turn to the substantive instructions.**

**SUBSTANTIVE INSTRUCTIONS**

**A. Meaning and Summary of the Indictment**

Let us first turn to the charge against the Defendants as contained in the Indictment. The Defendants, Uladzimir Danskoi and Julia Greenberg, are formally charged in a one-count Indictment. As I instructed you at the outset of this case, the Indictment is a charge or accusation. It is not evidence. I will not read the entire Indictment to you at this time. Rather, I will first summarize the offense charged in the Indictment and then explain in detail the elements of that offense.

The Indictment contains a total of one count, or charge.

That count charges that Uladzimir Danskoi and Julia Greenberg participated in a conspiracy to commit one or more of three crimes. In particular, the sole count of the indictment charges that Danskoi and Greenberg participated in a conspiracy from at least in or about August 2018 up to and

including at least in or about February 2021 to: *first*, defraud the United States and one of its agencies, United States Citizenship and Immigration Services or USCIS, which is within the Department of Homeland Security; *second*, commit immigration fraud by obtaining an immigrant or nonimmigrant visa, such as an L-1 visa, or a Form I-94, which is a document prescribed by statute or regulation which provides evidence of authorized stay and employment in the United States; or, *third*, commit immigration fraud by swearing to material false statements in applications, affidavits, and other documents required by the immigration laws and regulations prescribed thereunder or knowingly presenting any such application, affidavit, or other document which contains any such false statement.

**B. Use of the Conjunctive in the Indictment**

You will note that the word "and" is used between charging words in the Indictment. For example, the Indictment charges that the Defendants agreed to defraud the United States and USCIS for the purpose of "impeding, impairing, obstructing, *and* defeating" USCIS's lawful governmental functions.

You should treat the conjunctive "and" as it appears in the Indictment as being a disjunctive "or." Thus, it is enough, for example, that the proofs show that the Defendants agreed to defraud the United States and USCIS for the purpose of impeding, impairing, obstructing, *or* defeating USCIS's lawful governmental functions.

**C. Conspiracy to Defraud the United States and USCIS and to Commit Immigration Fraud (General Conspiracy Instructions)**

Count One charges Uladzimir Danskoi and Julia Greenberg with violating Title 18, United States Code, Section 371 by participating in a conspiracy to defraud the United States and one of its agencies, USCIS, and to commit immigration fraud, in violation of Title 18, United States Code, Sections 371 and 1546(a), paragraphs 1 and 4, respectively. I will discuss the elements of each of those crimes later on.

Before I give you more specific instructions about Count One, let me explain generally about the crime of conspiracy. A conspiracy is a criminal partnership—a combination or agreement of two or more persons to join together to accomplish some unlawful purpose.

Conspiracy simply means agreement, and the crime of conspiracy to violate a federal law is an independent offense, separate and distinct from the actual violation of any specific federal laws. Thus, if a conspiracy exists, it is still punishable as a crime, even it if should fail to achieve its purpose. Consequently, for a defendant to be guilty of conspiracy, there is no need for the Government to prove that he, she, or any other conspirator were actually successful in their criminal goals. You may thus find a Defendant guilty of the crime of conspiracy even if you find that the substantive crimes that were the objects of the conspiracy were never actually committed.

Each member of a conspiracy may perform separate and individual acts. Some conspirators play major roles, while others play minor roles in the scheme. An equal role is not what the law requires. When people enter into a conspiracy to accomplish an unlawful end, they become agents and partners of one another in carrying out the conspiracy. In fact, even a single act may be sufficient to draw a defendant within the scope of a conspiracy.

Importantly, an agent of the government cannot be a co-conspirator. I instruct you that

Oliynyk and Petrushyn are government agents.

**D. Conspiracy to Defraud the United States and USCIS and to Commit Immigration Fraud (Elements)**

In order to find Uladzimir Danskoi and Julia Greenberg guilty on Count One, the Government must prove beyond a reasonable doubt the following three elements:

*First*, that the conspiracy charged in Count One existed. In other words, that from at least in or about August 2018 up to and including at least in or about February 2021, or any portion of that time period, there was an agreement or understanding among two or more persons to violate one or more of those provisions of the law which make it illegal to:

(a) defraud the United States and one of its agencies, USCIS;

(b) commit immigration fraud by obtaining an immigrant or nonimmigrant visa, such as an L-1 visa, a permit, a border crossing card, an alien registration receipt card, or a Form I-94, which is a document prescribed by statute or regulation which provides evidence of authorized stay and employment in the United States; or

(c) commit immigration fraud by swearing to material false statements in applications, affidavits, and other documents required by the immigration laws and regulations prescribed thereunder, and knowingly presenting any such application, affidavit, or other document which contains any such false statement.

Therefore, the first question for you on Count One is: Did the conspiracy alleged in Count One of the Indictment exist?

*Second*, that the Defendant you are considering knowingly and willfully became a member of the conspiracy, with intent to further its illegal purpose—that is, with the intent to achieve the illegal object of the charged conspiracy; and

*Third*, that one of the members of the conspiracy knowingly committed at least one overt act in furtherance of the conspiracy.

Now, let us separately consider the three elements.

**E. Conspiracy to Defraud the United States and USCIS and to Commit Immigration Fraud (First Element – Existence of the Conspiracy)**

The first element that the Government must prove beyond a reasonable doubt is that the conspiracy existed.

What is a conspiracy? Simply defined, a conspiracy is an agreement by two or more persons to violate the law. Count One of the Indictment alleges that the unlawful purposes of the conspiracy were to defraud the United States and one of its agencies, USCIS, and to commit immigration fraud.

The essence of the crime of conspiracy is the unlawful agreement to violate the law. It is not necessary that a conspiracy actually succeed in its purpose for you to conclude that it existed. Indeed, you may find the Defendants guilty of conspiracy despite the fact that it was factually impossible for the Defendants to commit the substantive crime or goal of the conspiracy. This is because the success or failure of a conspiracy is not material to the question of guilt or innocence of the conspirator. The crime of conspiracy is complete once the unlawful agreement is made and an act is taken in furtherance of that agreement.

To establish a conspiracy, the Government is not required to show that two or more persons sat around a table and entered into a solemn compact, orally or in writing, stating that they have formed a conspiracy to violate the law and setting forth details of the plans and the means by which the unlawful project is to be carried out or the part to be played by each conspirator. Indeed, it would be extraordinary if there were such a formal document or specific oral agreement.

Your common sense will tell you that when people in fact undertake to enter into a criminal conspiracy, much is left to unexpressed understanding. Conspirators do not usually reduce their agreements to writing or acknowledge them before a notary public, nor do they publicly broadcast their plans. From its very nature, a conspiracy is almost invariably secret in its origin and execution. I remind you that a conspiracy must include two or more persons, not including government agents.

It is sufficient if two or more persons in any way, either explicitly or implicitly, come to a common understanding to violate the law. Express language or specific words are not required to indicate assent or attachment to a conspiracy. Nor is it required that you find that any particular number of alleged co-conspirators joined in the conspiracy in order to find that a conspiracy existed. You need only find two or more persons entered into the unlawful agreement alleged in the Indictment and that an act was committed in furtherance of that agreement in order to find that a conspiracy existed.

In determining whether there has been an unlawful agreement, you may judge acts and conduct of the alleged co-conspirators that are done to carry out an apparent criminal purpose. The adage "actions speak louder than words" is applicable here. In this regard, you may, in determining whether an agreement existed here, consider the actions and statements of all of those you find to

be participants as proof that a common design existed on the part of the persons charged to act together to accomplish an unlawful purpose.

Often, the only evidence of a conspiracy available is that of disconnected acts that, when taken together and considered as a whole, show a conspiracy or agreement to secure a particular result as satisfactorily and conclusively as more direct proof, such as evidence of an express agreement.

Of course, proof concerning the accomplishment of the object or objects of the conspiracy may be the most persuasive evidence of the existence of the conspiracy itself. But it is not necessary that the conspiracy actually succeed in its purpose in order for you to conclude that the conspiracy existed.

In considering whether a conspiracy existed, you should consider all of the evidence that has been admitted with respect to the conduct and statements of each alleged co-conspirator and any inferences that may reasonably be drawn from that conduct and those statements.

It is sufficient to establish the existence of the conspiracy if, after considering all of the relevant evidence, you find beyond a reasonable doubt that the minds of at least two alleged conspirators agreed, as I have explained, to work together in furtherance of one or more of the objects alleged in Count One of the Indictment, and that an act was taken to further that agreement. To find that the Government has established the existence of the alleged conspiracy beyond a reasonable doubt, you must find unanimously that the Government has proven that the conspiracy had as its objective or objectives one or more of conspiracy to defraud the United States and one of its agencies, USCIS, and to commit immigration fraud under either or both of two theories, which I will describe in greater detail later. That is, it is not enough if some of you agree that the

conspiracy had as an object a conspiracy to defraud the United States and one of its agencies, USCIS, and others agree that the conspiracy had as an object conspiracy to commit immigration fraud under either or both of two theories, which I will describe in greater detail later. Rather, you must all agree on one or more objects of the conspiracy.

**F. Conspiracy to Defraud the United States and USCIS and to Commit Immigration Fraud (First Element – Objectives of the Conspiracy)**

In this case, Count One of the Indictment charges that there were three objectives of the conspiracy:

*One*, to defraud the United States and one of its agencies, USCIS, in violation of Title 18, United States Code, Section 371;

*Two*, to commit immigration fraud by obtaining an immigrant or nonimmigrant visa, such as an L-1 visa, or a Form I-94, which is a document prescribed by statute or regulation which provides evidence of authorized stay and employment in the United States, in violation of Title 18, United States Code, Section 1546(a), paragraph 1; and

*Three*, to commit immigration fraud by swearing to material false statements in applications, affidavits, and other documents required by the immigration laws and regulations prescribed thereunder, and knowingly presenting any such application, affidavit, or other document which contains any such false statement, in violation of Title 18, United States Code, Section 1546(a), paragraph 4.

Later on, I will instruct you about the elements of each of these object crimes.

If you find that the conspirators agreed to accomplish any one or more of these three objectives, then the illegal purpose element will be satisfied. In other words, you need not find that the conspirators agreed to accomplish all of these three objectives. An agreement to accomplish any one or more of the objectives is sufficient.

However, you must be unanimous as to that objective or those objectives. That is, you must all be in agreement with respect to *at least one* of the three alleged objectives of the conspiracy.

I want to emphasize that last point: It isn't enough that one group of you finds, for example, that there was an agreement to defraud the United States and another group of you believes that there was an agreement to commit immigration fraud. You all have to be in agreement on the specific object of the conspiracy that you find to exist before you can find the conspiracy charged in the Indictment existed.

**G. Conspiracy to Defraud the United States and USCIS and to Commit Immigration Fraud (Second Element – Membership in the Conspiracy)**

The Government must also prove beyond a reasonable doubt that the Defendants unlawfully, willfully, and knowingly entered into the conspiracy, that is, that the Defendants agreed to take part in the conspiracy with knowledge of its unlawful purposes and in furtherance of its unlawful objectives.

The Government must prove beyond a reasonable doubt that the Defendant you are considering knowingly and intentionally entered into the conspiracy with criminal intent—that is, with a purpose to violate the law—and agreed to take part in the conspiracy to promote and cooperate in its unlawful objectives.

"Unlawfully" simply means contrary to law. A defendant need not have known that he or she was breaking any particular law or any particular rule, but he or she must have been aware of the generally unlawful nature of his or her acts.

An act is done "knowingly" and "willfully" if it is done deliberately and purposefully; that is, a defendant's acts must have been the product of his or her conscious objective, rather than the product of mistake, accident, mere negligence, or some other innocent reason.

Now, knowledge is a matter of inference from the proven facts. Science has not yet devised a manner of looking into a person's mind and knowing what that person is thinking. However, you do have before you the evidence of certain acts and conversations alleged to have taken place involving the Defendants or in their presence. You may consider this evidence in determining whether the Government has proven beyond a reasonable doubt the Defendants' knowledge of the unlawful purposes of the conspiracy.

It is not necessary for the Government to show that a Defendant was fully informed as to all the details of the conspiracy in order for you to infer knowledge on his or her part. To have guilty knowledge, a defendant need not have known the full extent of the conspiracy or all of the activities of all of its participants. It is not even necessary for a defendant to know every other member of the conspiracy. I instruct you that to become a member of the conspiracy, a defendant need not have known the identities of each and every other member, nor need he or she have been apprised of all of their activities. Furthermore, a defendant need not have joined in all of the conspiracy's unlawful objectives.

Nor is it necessary that the defendants received any monetary benefit from their participation in the conspiracy, or had a financial stake in the outcome. However, although proof

of a financial interest in the outcome of a scheme is not essential or determinative, if you find that a defendant had a financial or other interest, that is a factor you may properly consider in determining whether the defendants were a member of the conspiracy.

The duration and extent of each defendant's participation has no bearing on the issue of his or her guilt. He or she need not have joined the conspiracy at the outset and need not have received any benefit in return. A defendant may have joined it for any purpose at any time in its progress, and he or she will be held responsible for all that was done before he or she joined and all that was done during the conspiracy's existence while he or she was a member, if those acts were reasonably foreseeable and within the scope of that Defendant's agreement.

Each member of a conspiracy may perform separate and distinct acts and may perform them at different times. Some conspirators may play major roles, while others play minor roles in the scheme. One participating in a conspiracy is no less liable because his or her part is minor and subordinate. An equal role or an important role is not what the law requires. In fact, even a single act can be sufficient to make a defendant a participant in an illegal conspiracy.

A person's mere association with a member of the conspiracy does not make that person a member of the conspiracy, even when that association is coupled with knowledge that a conspiracy is taking place. Mere presence at the scene of a crime, even coupled with knowledge that a crime is taking place, is not sufficient to support a conviction. In other words, knowledge without agreement and participation is not sufficient. What is necessary is that a defendant participate in the conspiracy with knowledge of its unlawful purposes, and with an intent to aid in the accomplishment of its unlawful objectives.

In sum, a defendant, with an understanding of the unlawful nature of the conspiracy, may

have intentionally engaged, advised, or assisted in the conspiracy for the purpose of furthering an illegal undertaking. That defendant thereby becomes a knowing and willing participant in the unlawful agreement—that is to say, he or she becomes a conspirator.

A conspiracy once formed is presumed to continue until its objective is accomplished or until there is some affirmative act of termination by its members. So too, once a person is found to be a participant in the conspiracy, that person is presumed to continue being a participant in the venture until the venture is terminated, unless it is shown by some affirmative proof that the person withdrew and dissociated himself or herself from it.

It is not essential that the Government prove that a particular conspiracy alleged in the Indictment started or ended on any of the specific dates described for that conspiracy. It is sufficient if you find that the conspiracy was formed and that it existed for some time around or within the dates set forth in the Indictment.

**H. Conspiracy to Defraud the United States and USCIS and to Commit Immigration Fraud (Third Element – Overt Act)**

Let me now turn to the third element of the conspiracy alleged in Count One, the requirement of an overt act.

The last element the Government must prove beyond a reasonable doubt is that at least one overt act was knowingly committed by at least one of the co-conspirators in furtherance of the conspiracy. An overt act is an independent act that tends to carry out the conspiracy but need not necessarily be the object of the crime. The function of the overt act requirement is simply to manifest that the conspiracy is at work.

You need not find that either of the Defendants in this case committed the overt act. It is

sufficient if you find that at least one overt act was in fact performed by at least one co-conspirator, whether a Defendant or another co-conspirator, to further the conspiracy within the time frame of the conspiracy. Remember that the act of any member of the conspiracy done in furtherance of the conspiracy becomes the act of all of the members. Nor is it necessary for the Defendant you are considering to commit an overt act in order to be a member of the conspiracy. An overt act must have been knowingly and willfully done by at least one co-conspirator in furtherance of the object or purpose of a conspiracy that is charged in the Indictment.

In this regard, you should bear in mind that the overt act, standing alone, may be an innocent, lawful act. Frequently, however, an apparently innocent act sheds its harmless character if it is a step in carrying out, promoting, aiding, or assisting the conspiratorial scheme. You are therefore instructed that the overt act does not have to be an act which in and of itself is criminal or constitutes an objective of the conspiracy. It must be an act that furthers the object of the conspiracy. It is an element of the crime that the Government must prove beyond a reasonable doubt.

The Indictment charges that a number of particular overt acts were committed in furtherance of the conspiracy. It is not necessary for the Government to prove that any of the specified overt acts charged in the Indictment were committed. Rather, the Government can prove any overt act, even one that is not listed in the Indictment, provided that the overt act is committed by one of the co-conspirators and is done to further the object of the conspiracy. It is sufficient if you find beyond a reasonable doubt that any one overt act occurred while the conspiracy was still in existence.

Nor is it necessary for you to reach unanimous agreement on whether a particular overt act

was committed in furtherance of the conspiracy; you just need to all agree that at least one overt act was so committed.

**I. Conspiracy to Defraud the United States and USCIS and to Commit Immigration Fraud (Liability for Acts and Declarations of Co-Conspirators)**

You may consider as evidence against a Defendant the acts and statements of those who were co-conspirators of that Defendant. The reason for this rule has to do with the nature of the crime of conspiracy. A conspiracy is often referred to as a partnership in crime. Thus, as in other types of partnerships, when people enter into a conspiracy to accomplish an unlawful end, each member becomes an agent for the other conspirators in carrying out the conspiracy. Accordingly, the reasonably foreseeable acts, declarations, statements, and omissions of any member of the conspiracy in furtherance of the common purpose of the conspiracy are deemed, under the law, to be the acts of all of the members, and all of the members are responsible for such acts, declarations, statements, and omissions.

In determining the factual issues before you, you may consider against the Defendants any acts or statements made by any of the people who you find, under the standards I have already described, to have been their co-conspirators, even though such acts or statements were not made in their presence, or were made without their knowledge.

**J. First Objective - Conspiracy to Defraud the United States (Elements of the Offense)**

The first alleged objective of the conspiracy in Count One is to defraud the United States and one of its agencies, USCIS, in violation of Title 18, United States Code, Section 371.

The elements of this object of the alleged conspiracy are:

*First*, that the conspiracy charged in Count One existed. In other words, that there was an agreement or understanding between two or more people to impede, impair, obstruct, or defeat the lawful governmental functions of USCIS in processing, reviewing, and deciding upon applications for asylum.

*Second*, as previously explained, that the Defendant you are considering knowingly and willfully became a member of the conspiracy, with intent to further its illegal purpose—that is, with the intent to achieve the illegal object of the charged conspiracy; and

*Third*, as previously explained, that one of the members of the conspiracy knowingly committed at least one overt act in furtherance of the conspiracy.

Here, of course, since the Indictment alleges that defrauding the United States and one of its agencies, USCIS, is merely an object of the charged conspiracy, what the Government must prove beyond a reasonable doubt is that the conspirators agreed that the elements of this object would be satisfied, and not that the object itself actually occurred or was completed.

Let me now instruct you in more detail about the first object alleged in the conspiracy charged in Count One of the Indictment, specifically, that the conspiracy was designed to defraud the United States. In this instance, the unlawful purposes alleged to have been the object of the conspiracy charged in Count One was to impede, impair, obstruct, or defeat the lawful governmental functions of USCIS in processing, reviewing, and deciding upon applications for asylum by deceit, craft or trickery, or means that are dishonest.

A conspiracy to defraud the United States need not involve cheating the government out of money or property. The statute also includes conspiracies to interfere with, or obstruct, any

lawful government function by fraud, deceit, or any dishonest means. I instruct you that United States Citizenship and Immigration Services, commonly known as USCIS, is an agency of the United States Government. USCIS is the government agency that oversees lawful immigration to the United States. As part of those efforts, USCIS requires that applicants, attorneys, and parties appearing before it provide truthful and honest information. Thus, the phrase "conspiracy to defraud the United States" in the Indictment means that the Defendants and their co-conspirators allegedly conspired to impede, impair, obstruct, or defeat the lawful governmental functions of USCIS in processing, reviewing, and deciding upon applications for asylum.

It is not necessary that the Government or USCIS actually suffer a financial loss from the scheme or that they actually considered granting or actually granted asylum to any of the fraudulent applications. Nor is it necessary for you to find that in any particular instance the conspirators' conduct was actually reviewed by USCIS. A conspiracy to defraud exists simply when there is an agreement, if you so find, to impede, impair, obstruct, or defeat a lawful governmental function of USCIS. It is unlawful to use deception and dishonest means—such as submitting fraudulent or misleading documents to USCIS, making false statements to USCIS, or concealing information from USCIS—to impede, impair, obstruct, or defeat USCIS.

Before I turn to the second alleged objective of the conspiracy, I want to explain certain professional duties of lawyers that you may consider as you determine whether the charged conspiracy existed and whether Greenberg knowingly and willfully became a member of the conspiracy to impede, impair, obstruct, or defeat the lawful governmental functions of USCIS in processing, reviewing, and deciding upon applications for asylum. As you know, during the time

period relevant to this case, Greenberg served as an attorney and was a member of the New York Bar and therefore, under New York law, owed certain duties and professional obligations that you may consider.

You should keep in mind that proof that Greenberg violated one or more of her professional duties under New York law does not, without more, mean that she committed the charged conspiracy. Nevertheless, such proof may be considered by you in determining whether the defendant engaged in the charged conspiracy and whether she did so with knowledge and an intent to achieve the illegal object of the charged conspiracy.

The New York Rules of Professional Conduct impose certain obligations on all New York attorneys who practice law within the state which, at all times relevant to this case, has included Greenberg. These rules impose a set of requirements that regulate the conduct of lawyers in order to protect the public, clients, and the administration of justice, while promoting respect and confidence in the legal profession. A lawyer who violates the New York Rules of Professional Conduct may be subject to discipline imposed by the Court or a Court Committee.

Under New York professional conduct rules, a lawyer is prohibited from counseling or assisting a client as to conduct that the lawyer knows is illegal or fraudulent. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. If the client fails to take necessary corrective action and the lawyer's continued representation would assist client conduct that is illegal or fraudulent, the lawyer is required to withdraw. In some circumstances, withdrawal alone might be insufficient. In those cases, the lawyer may be required

to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like.

Likewise, under New York professional conduct rules, a lawyer shall not knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer. A lawyer also shall not knowingly offer or use evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer who represents a client before a tribunal and who knows that a person intends to engage, is engaging, or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. In the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person. I instruct you that a USCIS agent conducting an asylum interview qualifies as a "tribunal."

Further, under New York professional conduct rules, a lawyer shall not: engage in illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness, or fitness as a lawyer; engage in conduct involving dishonesty, fraud, deceit, or misrepresentation; or engage in conduct that is prejudicial to the administration of justice.

Although an attorney must use all reasonable lawful means to attain the objectives of the client, counsel is precluded from taking steps or in any way assisting the client in presenting false evidence or otherwise violating the law. The legal profession has accepted that an attorney's

ethical duty to advance the interests of her client is limited by an equally solemn duty to comply with the law and standards of professional conduct; it specifically ensures that the client may not use false evidence. The special duty of an attorney to prevent and disclose frauds upon a tribunal derives from the recognition that perjury is a crime, and undermines the administration of justice. Under no circumstance may a lawyer either advocate or passively tolerate a client's giving false testimony. A lawyer is prohibited from being a party to or in any way giving aid to presenting known perjury.

During this trial you received evidence that, when representing certain clients, Greenberg signed and submitted to USCIS a document known as a "Form G-28," commonly known as a "Notice of Entry of Appearance as Attorney or Accredited Representation." Among other things, that form requires the signatory to affirm that he or she has read and understood the regulations governing appearances and representation before DHS or the Department of Homeland Security. I will now instruct you regarding relevant portions of these regulations governing appearances and representation before DHS, as set forth in the Form G-28.

An attorney appearing before the Board of Immigration Appeals and Immigration Courts shall be subject to disciplinary sanctions in the public interest if she knowingly or with reckless disregard makes a false statement of material fact or law, or willfully misleads, misinforms, threatens, or deceives any person (including a party to a case or an officer or employee of the Department of Justice), concerning any material and relevant matter relating to a case, including knowingly or with reckless disregard offering false evidence. If a practitioner has offered material evidence and comes to know of its falsity, the practitioner shall take appropriate remedial measures.

An attorney appearing before the Board of Immigration Appeals and Immigration Courts shall further be subject to disciplinary sanctions in the public interest if she engages in conduct that is prejudicial to the administration of justice or undermines the integrity of the adjudicative process. Conduct that will generally be subject to sanctions under this ground includes any action or inaction that seriously impairs or interferes with the adjudicative process when the practitioner should have reasonably known to avoid such conduct.

Let me stress again: Proof that Greenberg violated one or more of her professional duties does not, without more, mean that she is guilty of any crime. That is, a lawyer can violate her ethical duties under New York law and Board of Immigration Appeals and Immigration Court disciplinary rules without having the intent required to commit a crime. You must decide whether Greenberg engaged in the charged conspiracy and whether she did so with knowledge and an intent to achieve the illegal object of the charged conspiracy—not whether she violated her ethical obligations.

**K. Second Objective - Conspiracy to Commit Immigration Fraud, First Paragraph (Documents) (Elements of the Offense)**

The second alleged objective of the conspiracy in Count One is to commit immigration fraud by obtaining an immigrant or nonimmigrant visa, such as an L-1 visa, a permit, a border crossing card, an alien registration receipt card, or a Form I-94, which is a document prescribed by statute or regulation which provides evidence of authorized stay and employment in the United States, in violation of Title 18, United States Code, Section 1546(a), paragraph 1.

The elements of this object of the alleged conspiracy are:

*First*, that the defendant obtained or used or attempted to use or uttered or possessed or

accepted or received a falsely made document;

*Second*, that the document in question was a visa, Form I-94, or other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States; and

*Third*, the defendant knew at the time the document was obtained or used or attempted to be used or uttered or possessed or accepted or received, that the document was falsely made, or to have been procured by means of any false claim or statement, or to have been otherwise procured by fraud or unlawfully obtained.

Here, of course, since the Indictment alleges that committing immigration fraud in this manner is merely an object of the charged conspiracy, what the Government must prove beyond a reasonable doubt is that the conspirators agreed that the elements of committing immigration fraud in this manner would be satisfied, and not that the completed crime of immigration fraud itself actually occurred.

The first element that the government must prove beyond a reasonable doubt is that the Defendant obtained or used or attempted to use or uttered or possessed or accepted or received a falsely made document.

The second element the government must prove beyond a reasonable doubt is that the document in question was a visa, such as an L-1 visa, or permit, or border crossing card, or alien registration receipt card, or another document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States, such as a Form I-94.

The third element that the government must prove beyond a reasonable doubt is that at the time the document was obtained or used or attempted to be used or uttered or possessed or accepted

or received, that the document was falsely made, or to have been procured by means of any false claim or statement, or to have been otherwise procured by fraud or unlawfully obtained, the defendant knew that the document was falsely made, or to have been procured by means of any false claim or statement, or to have been otherwise procured by fraud or unlawfully obtained.

To act knowingly means to act intentionally and voluntarily, and not because of accident or mistake. In this regard, an attorney is held to no higher and no lower standard than anyone else to verify independently the truth of the information provided by a client.

Because I have already instructed you as to certain professional duties of lawyers that you may consider as you determine whether the charged conspiracy existed, whether Greenberg engaged in the charged conspiracy, and whether she did so with knowledge and an intent to achieve the first illegal object of the charged conspiracy, I will not instruct you again on those duties; rather, you should rely on the instructions I gave you earlier and apply them to the second alleged objective of the conspiracy, as well.

**L. Third Objective - Conspiracy to Commit Immigration Fraud, Fourth Paragraph (False Statements) (Elements of the Offense)**

The third alleged objective of the conspiracy in Count One is to commit immigration fraud by swearing to materially false statements in applications, affidavits, and other documents required by the immigration laws and regulations prescribed thereunder, and knowingly presenting any such application, affidavit, or other document which contains any such false statement, in violation of Title 18, United States Code, Section 1546(a), paragraph 4.

The elements of this object of the alleged conspiracy are:

*First*, that a false statement was made;

*Second*, that the statement was made in a document required by the immigration laws or regulations;

*Third*, that the statement was made under oath or penalty of perjury;

*Fourth*, that the statement was false as to a material fact; and

*Fifth*, that the Defendant knew the statement was false when made or presented.

Here, again, since the Indictment alleges that committing immigration fraud in this manner is merely an object of the charged conspiracy, what the Government must prove beyond a reasonable doubt is that the conspirators agreed that the elements of committing immigration fraud in this manner would be satisfied, and not that the completed crime of immigration fraud itself actually occurred.

The first element that the Government must prove beyond a reasonable doubt is that a false statement was made.

A statement is "false" if it was untrue when made. The concealment or omission of material facts may also constitute false statements under the statute.

The second element that the Government must prove beyond a reasonable doubt is that the statement was made in a document required by the immigration laws or regulations.

The statement may have been made in an official form, but that is not required. It is also sufficient if the false statement was included in any affidavit or other document required to be attached to an application or other official form.

The third element that the Government must prove beyond a reasonable doubt is that the statement was made under oath. To satisfy this burden, the Government must prove that the

declarant was under penalty of perjury when he or she subscribed as true written information submitted to USCIS.

The fourth element that the Government must prove beyond a reasonable doubt is that the false statement related to a material fact.

For purposes of this charge, a fact is material if it was capable of influencing the government's decisions or activities. However, proof that the government actually relied on the statement is not required.

The fifth element that the Government must prove beyond a reasonable doubt is that the Defendant knew the statement was false when made or presented.

To act knowingly means to act intentionally and voluntarily, as opposed to mistakenly or accidently. In this regard, an attorney is held to no higher and no lower standard than anyone else to verify independently the truth of the information provided by a client.

Because I have already instructed you as to certain professional duties of lawyers that you may consider as you determine whether the charged conspiracy existed, whether Greenberg engaged in the charged conspiracy, and whether she did so with knowledge and an intent to achieve the first and second illegal objects of the charged conspiracy, I will not instruct you again on those duties; rather, you should rely on the instructions I gave you earlier and apply them to the third alleged objective of the conspiracy, as well.

**M. Conscious Avoidance**

As I explained, the Government is required to prove that the Defendants acted knowingly, as I have already defined that term. In addition to a person actually being aware of a fact, the law