No. 17-1289

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

v.

BARRY BEKKEDAM,

Appellant.

Appeal from the United States District Court for the Eastern District of Pennsylvania, The Honorable C. Darnell Jones II
No. 14-cr-00548

MOTION FOR RELEASE PENDING APPEAL

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Date: February 10, 2017

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Pursuant 18 U.S.C. § 3143(b), Federal Rule of Appellate Procedure 9 and Local Appellate Rule 9.1, Appellant Barry Bekkedam respectfully requests that he remain released on bail pending resolution of his appeal from his conviction and sentence entered in the United States District Court for the Eastern District of Pennsylvania on January 23, 2017 (modified January 30, 2017), No. 14-cr-00548 (Jones, J.). It is undisputed that Mr. Bekkedam is neither a flight risk nor a violent offender. Mr. Bekkedam's appeal raises substantial questions of law that, if resolved in his favor, would require reversal of his convictions or a substantial reduction in his sentence. Absent release pending appeal, Mr. Bekkedam risks serving his entire eleven-month sentence of incarceration before this Court has an opportunity to decide this case on its merits.

INTRODUCTION

This case concerns an application by NOVA Financial Holdings, the parent of NOVA Bank, for funds from the United States Troubled Asset Relief Program ("TARP"). The application was denied, and the government lost no money. Despite this, years after the application was denied, the appellant (an outside investment advisor who referred two investors to the bank) and his co-defendant (Brian Hartline, the bank's CEO) were indicted for alleged misrepresentations that

NOVA Bank made to the Treasury Department concerning the TARP application.[1] In short, the government claimed Mr. Hartline misled bank regulators into believing the bank was stronger than it was by identifying investments in the holding company by three investors as "capital," but without disclosing that the funds those investors used came from loans from the bank.[2] Mr. Bekkedam was charged under *Pinkerton* conspiracy and aiding and abetting theories of liability.

On April 27, 2016, after an eleven-day trial, a jury convicted Mr. Bekkedam of four counts: conspiracy to defraud (18 U.S.C. § 371, Count I), aiding and abetting TARP fraud (18 U.S.C. §§ 1031 and 2, Count II), and aiding and abetting two false statements made by the bank to TARP (18 U.S.C. §§ 1001 and 2, Counts III and IV). (Dkt.202.) The jury acquitted Mr. Bekkedam of wire fraud (18 U.S.C. § 1343, Count V) and bank fraud (18 U.S.C. § 1344, Count VII). (*Id*.) The district court dismissed Count VI (wire fraud) for lack of evidence. (Dkt.281.)

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[1] Mr. Bekkedam was the Chairman of NOVA Bank's board from 2002-2005, but had no position at NOVA Bank during the relevant timeframe (May 2009-January 2010).

[2] TARP cases are rare. The only similar TARP fraud case is *United States v. Litvak*, 30 F. Supp. 3d 143 (D. Conn. 2014), *rev'd*, 808 F.3d 160 (2d Cir. 2015). Litvak was released on bail pending appeal and his conviction was reversed.

Mr. Hartline was sentenced on November 14, 2016, and Mr. Bekkedam was sentenced on January 23, 2017.[3] At both sentencings, the district court correctly determined that the actual and intended loss under the Sentencing Guidelines was zero. At both sentencings, the government sought an upward variance, claiming a loss of zero understated the risk of loss. The district court rejected the government's motion at Mr. Hartline's sentencing (Ex.B at 110:25-111:11), but surprisingly and erroneously granted the same motion at Mr. Bekkedam's sentencing, increasing Mr. Bekkedam's Guideline score from eight to ten. (Ex.A at 54:19-55:6.) That change was significant, as a score of eight may result in a within-Guideline sentence of no imprisonment (0-6 months), while a ten yields a range of 6-12 months. Mr. Bekkedam was sentenced to eleven months' imprisonment (with a surrender date of March 23, 2017). (Dkt.281, 283.) Mr. Bekkedam orally moved for bail pending appeal at his sentencing, which was denied. (Ex.A at 75:21-76:15.)

Release pending appeal is warranted where (1) the defendant is not likely to flee or pose a danger if released; (2) the appeal is not for purpose of delay; (3) the appeal raises a substantial question of law or fact; and (4) a favorable

[3] The transcript of Mr. Bekkedam's Sentencing Hearing is attached as Exhibit A. Relevant excerpts of Mr. Hartline's Sentencing Hearing are attached as Exhibit B.

determination on appeal is likely to result in a reversal, a sentence that does not include imprisonment, or a reduced sentence that may expire prior to completion of the appeal. 18 U.S.C. § 3143(b)(1)(B); *United States v. Miller*, 753 F.2d 19, 24 (3d Cir. 1985). It is uncontested that Mr. Bekkedam is neither a flight risk nor a violent offender, and this appeal is not being filed for the purpose of delay.

Mr. Bekkedam's appeal will raise substantial questions that, if granted, will likely result in reversal, a sentence of probation, or a reduced sentence that may expire prior to completion of the appeal. Absent the requested relief, it is almost certain that Mr. Bekkedam will serve the majority (if not all) of his eleven-month sentence before this Court has an opportunity to decide his appeal on the merits.

FACTUAL BACKGROUND

The jury convicted Mr. Bekkedam of four counts relating to the alleged TARP application fraud. Many facts were undisputed. In 2008, NOVA Financial Holdings, the parent of NOVA Bank, applied for TARP funds. In 2009, the government determined that approval would be contingent on raising additional capital. During 2009, NOVA Bank loaned money to three investors in the amounts of $5 million, $4.5 million and $500,000, respectively. Mr. Bekkedam, an independent financial advisor with no role at the bank, introduced two of the three investors. They invested some or all of the amounts loaned into NOVA Financial. NOVA Bank CFO Jeff Hanuscin recorded those investments on the balance sheet

as capital increases, and testified that both at the time and at trial he believed those investments constitute capital. (Ex.C at 27:8-23.) The bank told the FDIC during the application process that NOVA Financial had raised additional capital based on these investments. (Dkt.250 at 4.)[4] NOVA's application was ultimately denied for reasons having nothing to do with raising additional capital.

The government alleged that it was fraud to represent these investments in NOVA Financial as "new capital" because they were funded by loans from NOVA Bank. (Dkt.250 at 19.) Mr. Bekkedam contended both during and after trial that the government's proof was insufficient to prove beyond a reasonable doubt that he knew it would be wrong to represent these investments as "capital" or that he conspired with or aided Mr. Hartline in making false statements to that effect.[5]

Importantly, it is uncontested that Mr. Bekkedam did not communicate with the Treasury or any of the bank's regulators concerning the TARP application. Each government witness testified that they never discussed the TARP application with Mr. Bekkedam, and many testified that they either never met him or did not

[4] (*See also* Dkt.191 at 3-4.)

[5] The government also alleged that Defendants defrauded NOVA Bank by persuading it to lend money to three high net worth loan applicants who did not deserve loans, and that Mr. Bekkedam defrauded two of those investors by encouraging them to invest in NOVA Financial while believing any investment would be lost. The jury acquitted on those counts. (Dkt.202.)

even know his name. (Dkt.276 at 8.) The government conceded, "[t]here's no evidence that Mr. Bekkedam had any direct contact with anyone at the Treasury, with anyone at the FDIC, or any other bank regulator." (Ex.A at 26:2-5.) Rather, the government pursued a *Pinkerton* conspiracy and aiding and abetting theory against Mr. Bekkedam with respect to Mr. Hartline's alleged representations about the "capital" raised.

ARGUMENT

I. MR. BEKKEDAM IS NOT A FLIGHT RISK OR A DANGER TO THE COMMUNITY

There is no dispute that Mr. Bekkedam is neither a flight risk nor dangerous. He has complied fully with all release conditions. (Dkt.16.) This is Mr. Bekkedam's first offense, for a non-violent, zero-loss fraud that occurred over seven years ago.

II. MR. BEKKEDAM'S APPEAL RAISES SUBSTANTIAL QUESTIONS OF LAW THAT, IF RESOLVED IN HIS FAVOR, ARE LIKELY TO RESULT IN REVERSAL OR A SENTENCE REDUCTION

On a motion for release pending appeal, a "substantial" question is one that is "significant in addition to being novel, not governed by controlling precedent or fairly doubtful." *United States v. Smith*, 793 F.2d 85, 88 (3d Cir. 1986). "Where there is any doubt as to significance," this Court treats a question as substantial if it is "debatable among jurists of reason" or "adequate to deserve encouragement to proceed further." *Id.* at 89-90 (citation omitted) (rejecting a more demanding

"close question" standard); *see also United States v. Messerlian*, 793 F.2d 94, 96 (3d Cir. 1986) (applying a "fairly debatable" standard).

If a question is "substantial," the Court must determine whether that issue is "so integral to the merits of the conviction on which defendant is to be imprisoned that a contrary appellate holding is likely to require" reversal or a reduced sentence. *Miller*, 753 F.2d at 23. The movant does not need to establish he actually will prevail on the merits. *Id*.

Mr. Bekkedam's appeal raises several substantial issues, three of which are discussed below: insufficiency of the evidence, constructive amendment of the Indictment, and the creation of a sentencing disparity.

A. The Evidence in Support of the Convictions Was Insufficient

Mr. Bekkedam moved the district court for a judgment of acquittal under Federal Rule of Criminal Procedure 29, contending that the evidence was insufficient. (Dkt.191.) The denial of that motion was error. In reviewing an appeal based on insufficiency of proof, this Court should overturn the verdict where there is insufficient evidence, viewed in the light most favorable to the government. *United States v. Brodie*, 403 F.3d 123, 133 (3d Cir. 2005).

The government contended at trial that Defendants fraudulently caused the bank to represent to the Treasury that it had raised "capital" when the investors had used loan proceeds from the bank itself to make their investments. (Dkt.1 ¶12.)

To sustain a conviction on any of the counts of convictions, the government was required to prove that Mr. Bekkedam knew the fraudulent nature of the scheme and the false statements being made. *See United States v. Pearlstein*, 576 F.2d 531, 541 (3d Cir. 1978); *United States v. Klein*, 515 F.2d 751, 753 (3d Cir. 1975).[6] It was not enough that Mr. Bekkedam knew of and assisted Mr. Hartline in obtaining legitimate investments in NOVA Financial through legitimate loans provided by NOVA Bank. That is not illegal. *See id*. Rather, the government had to prove beyond a reasonable doubt that Mr. Bekkedam knew of and assisted Mr. Hartline in representing to regulators that these investments were "capital" to secure TARP funding, and that Mr. Bekkedam knew those representations were false. (*See, e.g.*, Dkt.250 at 9 (quoting *Brodie*, 403 F.3d at 147).) In the absence of such proof, the guilty verdict cannot be sustained.

Even when viewed in the light most favorable to the government, there was insufficient evidence to establish that (1) the statements made to the government

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[6] To prove a conspiracy, the government must show: (1) the existence of an agreement to achieve an unlawful objective; (2) the defendant's knowing and voluntary participation in the conspiracy; and (3) the commission of an overt act in furtherance of the conspiracy." *United States v. Rigas*, 605 F.3d 194, 206 (3d Cir. 2010) (*en banc*). In the context of a challenge to the sufficiency of the evidence, "the government must prove that the defendant had knowledge of the facts that constitute the offense and of the illicit purpose of the conspiracy." *Brodie*, 403 F.3d at 148.

about the "capital" were false, or (2) that Mr. Bekkedam knew, agreed or intended that Mr. Hartline would make any false representation to the Treasury.

1. The Government Failed To Prove Objective Falsity of the False Statements

The Indictment identified two specific allegedly false statements in support of the false statement counts: that Mr. Hartline told the Treasury that NOVA Financial raised $5 million of "new capital" through an investment by "G.L.," and raised another $10 million of "new capital" in part through a $2.5 million investment by "A.B." and a $500,000 investment by "C.G." (Dkt.1 at 12.) These were the same false representations that the government argued in support of the conspiracy and fraud counts.

The government was therefore required to prove that these statements (what the Section 1031 charge calls "false representations") were objectively false, and that Defendants acted with knowledge that the statements were false.[7] *See, e.g.*, *United States v. Curran*, 20 F.3d 560, 566-67 (3d Cir. 1994); *United States v. Frankel*, 721 F.2d 917, 921 (3d Cir. 1983). The government claimed at trial that the statements were false because the investments could not count as "new capital"

[7] The district court held Counts I and II only required proof of a scheme to defraud, and not proof of an objectively false statement. (Dkt.250 at 14.) In this case though, the alleged scheme to defraud depended entirely on these false statements, so it was essential for the government to prove they were false.

because they were derived from NOVA Bank loans. (Dkt.250 at 19; Dkt.242 at 25.) As a result, the government had to prove beyond a reasonable doubt that the definition of "capital" in this particular context excluded investments funded by NOVA Bank loans – and that Defendants knew as much.

When, as here, a claim of falsity arises in a specialized context, the proof must establish that specialized meaning. In *United States v. Stacks*, 821 F.3d 1038, 1044 (8th Cir. 2016), for example, the government alleged that the defendant made a false statement on a SBA loan application when he claimed that all his existing loans were "current" and not "delinquent." The Eighth Circuit upheld a judgment of acquittal on this charge, noting that the terms "current" and "delinquent" were not defined on the relevant loan forms, and the evidence at trial established that there was no consistent definition in the banking industry as to what makes a loan "current" versus "delinquent." *Id.* Without proof of a definition, "no reasonable jury could find beyond a reasonable doubt" that the defendant knowingly made a false statement. *Id.*

Similarly, this Court in *United States v. Syme*, 276 F.3d 131, 142 (3d Cir. 2002), considered a False Claims Act conviction in the Medicare fraud context based on the allegation that an ambulance company falsely identified the location of its "home station" to obtain higher reimbursement rates. This Court held that "the government needed to demonstrate that a definition of the term 'home station'

existed, and that Syme was aware of the meaning" of that term when he submitted the allegedly false bills. 276 F.3d at 146. This Court stated that the government need not necessarily point to a definition in the relevant regulations, but it must still establish that a definition existed and the defendant knew it. *Id.* at 146-47.

Following *Stacks* and *Syme*, there is a substantial issue as to whether acquittal is required here based on insufficient proof of any objectively false statement or misrepresentation to the Treasury. Like the terms "current" and "delinquent" in *Stacks* and "home station" in *Syme*, the term "capital" does not carry a non-technical meaning, and its definition in this specific banking context had to be established for the jury. The evidence at trial failed to establish an objective definition, and failed to establish Defendants were in any way informed that the term "capital" excluded investments derived from NOVA Bank funded parties.[8]

The government relied at trial on Allen Shubin – an external auditor who audited the bank in 2010, five months *after* NOVA Bank's TARP application was

[8] The Indictment alleges Defendants falsely represented that NOVA Financial obtained "new capital," but as the district court noted, there was no evidence at trial where Mr. Hartline described the capital as "new." (Dkt.250 at 19.)

denied in December 2009[9] – who testified that he told Mr. Hartline that the three investments were improperly categorized by NOVA Bank as "capital" in accordance with accounting guidance EITF 85-1. (Dkt.191 at 13-14.) There was no evidence, though, that at the time the alleged statements were made Mr. Bekkedam was aware of this guidance, and the testimony of the bank's CFO was that he disagreed with Shubin's conclusions. (*See* Ex.C.) Indeed, the district court found post-trial that "EITF 85-1 involves the application of discretion in a manner *that makes it nearly impossible to determine whether or not it applies . . . .*" (Dkt.250 at 17 (emphasis added).)

While the district court went on to conclude that circumstantial evidence of Mr. Hartline's conduct otherwise demonstrated his knowledge that "his conduct was generally unlawful in that it would deceive the Government" (*id.*), without proof that either defendant made an objectively false statement, this conclusion cannot be sustained. The government cannot prove that a defendant intended to deceive unless it can show that he made (or agreed to make) some sort of actually false representation. *See Curran*, 20 F.3d at 566-67; *see also United States v. Castro*, 704 F.3d 125, 139 (3d Cir. 2013).

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[9] (Ex.C at 65:2-4.)

2. The Government Failed To Prove Mr. Bekkedam Agreed or Intended To Defraud the Government

The evidence of Mr. Bekkedam's conduct shows only that Mr. Bekkedam worked with Mr. Hartline to identify investors for the bank and helped procure perfectly legal loans and perfectly legal investments. The circumstantial evidence relied upon by the government failed to establish that Mr. Bekkedam had any knowledge of what representations were being made by the bank to the Treasury, or that he knew those investments could not be treated as "capital" for accounting purposes. The government attempted to prove Mr. Bekkedam's requisite knowledge through documents showing that Mr. Hartline kept Mr. Bekkedam informed about the status of the TARP application, and that Mr. Bekkedam knew regulators wanted the bank to raise more capital. (Dkt.242 at 13, 24.) But again, none of this evidence shows Mr. Bekkedam had any knowledge the investments should not be treated as "capital," if the money used came from loans from this bank (as opposed to other funds, or even loans from another bank).

The government also attempted to prove Mr. Bekkedam's requisite knowledge by showing Mr. Hartline knew that categorizing the three investments as "capital" was contrary to accounting guidance. As noted above, the government relied at trial on the testimony of Shubin, the auditor who informed Mr. Hartline months *after* the alleged false statements that the investments were previously improperly categorized as "capital." But regardless of what Mr. Hartline may have

been told five months *after* the TARP application was denied, there is no evidence Mr. Bekkedam (let alone Mr. Hartline) had this knowledge when the TARP representations were made. Moreover, had Mr. Bekkedam asked anyone whether the investments were properly recorded as capital at the time (and there is no evidence he did), it would have been Mr. Hanuscin, NOVA Bank's CFO, who recorded the investments as capital, and he testified that he disagreed with Mr. Shubin and still believes it was accurate to do so. (Ex.C.)

The district court's denial of the Defendants' motions for a new trial cites no evidence from which a jury could have found that Mr. Bekkedam's conduct demonstrated knowledge of wrongfulness. (Dkt.250 at 8-9, 11-18.) In fact, there is no evidence – *none* – that Mr. Bekkedam had any reason to know there would be anything wrong with representing those investments as capital. The record shows Mr. Bekkedam did not directly communicate with TARP, and fails to even establish that he knew how the investments were recorded by NOVA Bank at the time, or even knew of the bank accounting principles for "capital." Nor would there have been any reason for him to know, as he held no official position at the bank.

Given that the *only* alleged misrepresentations made to the government were that the three investments qualified as "capital," and there is no evidence from which the jury could have reasonably concluded that Mr. Bekkedam knew, agreed,

or intended to make any misrepresentation as required by *Pearlstein*, there is a substantial issue on appeal whether all counts of conviction should be reversed.

B. The Government Constructively Amended the Indictment

Whether the government constructively amended the Indictment against Mr. Bekkedam is another substantial issue on appeal. The Indictment charged Defendants with making specific "materially false, fictitious, and fraudulent statements" to Treasury when Mr. Hartline represented to Treasury that NOVA Bank had raised "new capital." (Dkt.1 at 12.) At trial, no witness used the words "new capital," and the proof the government introduced did not contain the words "new capital."[10] Therefore, the government pivoted to proving an omission-theory case and argued: "The question is, did they omit a material fact to the Treasury […] by failing to disclose to the Treasury that $8 million in this new capital was money that the bank had loaned." (Ex.D, Apr. 13, 2016 Tr. at 113:14-22).[11]

"An indictment is constructively amended when evidence, arguments, or the district court's jury instructions effectively amend[s] the indictment by broadening the possible bases for conviction from that which appeared in the indictment." *United States v. McKee*, 506 F.3d 225, 229 (3d Cir. 2007) (citation and quotations

[10] (Dkt.250 at 19.)

[11] (Ex.D; *see also* Dkt.231 at 49-65.)

omitted). If proven, a constructive amendment is a *per se* violation of a defendant's Fifth Amendment right and requires a new trial. *McKee*, 506 F.3d at 232; *Syme*, 276 F.3d at 154-56.

In two similar cases, this Court has held that permitting a jury to convict a defendant for a theory of fraud that was not charged in the Indictment is a constructive amendment requiring reversal. *See McKee* 506 F.3d at 224-31 (constructive amendment occurred where the indictment only charged submitting false or fraudulent tax returns, but the court instructed the jury they could also convict for failure to report *omitted* information); *Syme*, 276 F.3d at 150 (constructive amendment occurred where three different theories of liability were charged in the indictment, but the jury convicted defendant on an uncharged fourth theory). The Court should do the same here.

The Indictment did not charge Defendants with making false statements by way of concealment or omission. And the jury was never instructed on the law applicable to a concealment case for Counts III and IV, over Mr. Bekkedam's objection. (Dkt.231 at 63-65; 244 at 10 n.14.) Unlike a Section 1001 false statements charge, a Section 1001 concealment charge requires the government to prove "a defendant had a legal duty to disclose the facts at the time he was alleged

to have concealed them." *Curran*, 20 F.3d at 566.[12] Therefore, at trial, the government's shift to proving a concealment case in addition to a false statements case expanded the "possible bases for conviction from that which appeared in the indictment." *McKee*, 506 F.3d at 229. This was plainly erroneous and requires reversal. *Id*. at 232; *Syme*, 276 F.3d at 156.

C. Mr. Bekkedam's Sentence Is Unreasonable and an Abuse of Discretion

The district court created an unwarranted sentencing disparity by granting the government's motion for an upward variance against Mr. Bekkedam after it refused the government's exact same request to impose the exact same variance against co-defendant Hartline based on the exact same facts. This was an abuse of discretion and raises a substantial issue on appeal.

At Mr. Hartline's sentencing, the government asked the district court to find an intended loss based on the amount of TARP funds sought, but alternatively asked for an upward variance if the district court found no intended loss (as seemed likely with no actual loss, and the jury's acquittal on bank fraud and investor fraud suggested Defendants did not believe any investment in the bank

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[12] *See also United States v. Gimbel*, 830 F.2d 621, 627 (7th Cir. 1987) (no duty to disclose reports; therefore, defendant "cannot be held criminally liable for causing the bank to fail to disclose a material fact").

would lose money). The government argued an upward variance "would be appropriate because the loss amount would significantly understate the seriousness of the offense" because Mr. Hartline "exposed the government to a very significant loss." (Dkt.262 at 11-12.) The government claimed a loss of "zero … would significantly understate the seriousness of this offense." (Ex.B at 28:8-13.) The district court rejected "the government's motion for upward variance." (*Id.* at 110:25-111:5.) With Mr. Hartline's total offense level of twelve (based on an obstruction of justice and abuse of position of trust enhancement that are not applicable to Mr. Bekkedam), the district court had a Guideline recommendation of 10-16 months and imposed a *within*-Guideline sentence of fourteen months. (*Id.* at 111:12-112:22.)

Given that the district court rejected the intended loss enhancement against Mr. Hartline, the government agreed "the Court should not apply this enhancement to only one of two similarly situated co-defendants." (Dkt.277 at 5.) Nevertheless, the government invited the district court to create a disparity between the "two similarly situated co-defendants" by seeking the same upward variance based on a risk of loss against Mr. Bekkedam that the district court had declined to impose against Mr. Hartline. The government again argued "the loss amount of 0 significantly understates the seriousness of the offense, making an upward departure appropriate" against Mr. Bekkedam. (*Id.*) It again claimed "the

Defendant's conduct here put the taxpayers at risk, a significant risk of losing $13½ million" and claimed an upward variance is needed "to reflect the seriousness of this offense." (Ex.A at 55:12-24.)

Importantly, the upward variance was sought solely based on the nature of the offense (not any difference in the nature of the two offenders) such that the defendants who committed the same offense should have received the same enhancement. If any difference between the Defendants was warranted, it would seem that Mr. Hartline as the CEO of the bank and the one charged with directly committing the offense should face a harsher consequence than Mr. Bekkedam, who found himself responsible for Mr. Hartline's actions under more indirect *Pinkerton* and aiding and abetting theories.

Mr. Bekkedam objected to the disparity an upward variance would produce. (*Id*. at 49:7-11.) Nevertheless, without addressing the disparity being created, the district court concluded that this case "merits an upward enhancement by variance, and therefore the Court is going to grant the Government's motion for a variance upward, up two levels which takes us to 10." (*Id*. at 54:19-55:10.) That was error.

The Supreme Court has held that this Court must "consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard," including whether the sentence avoided "unwarranted sentence disparities." *Gall v. United States*, 552 U.S. 38, 51, 54 (2007) (last quoting 18 U.S.C. § 3553(a)(6)).

"The touchstone of 'reasonableness' is whether the record as a whole reflects rational and meaningful consideration" of the Section 3553(a) sentencing factors. *United States v. Ausburn*, 502 F.3d 313, 321 (3d Cir. 2007). When "an outside-Guidelines sentence" is imposed, the district court should provide a "justification [that] is sufficiently compelling to support the degree of the variance," so that there may be "meaningful appellate review and to promote the perception of fair sentencing." *Gall*, 552 U.S. at 50; *see United States v. Smalley*, 517 F.3d 208, 215 (3d Cir. 2008) (reversing sentence where district court failed to justify an upward variance); *Ausburn*, 502 F.3d at 329-31 (reversing sentence for failure to address an apparent sentencing disparity).

The district court's decision to vary upward was unreasonable. There is no rational justification for an upward variance due to the risk of loss in the case of Mr. Bekkedam, but not Mr. Hartline, as the offense and associated risk of loss is exactly the same. If anything, Mr. Bekkedam's conduct on this issues is more removed than Mr. Hartline's. The situation is similar to *United States v. Williams*, 894 F.2d 208 (6th Cir. 1990), where the Sixth Circuit reversed a sentence for "inconsistent application of the weapons possession enhancement with regard to co-conspirators." *Id.* at 213. There, a defendant who was at a drug sale where a weapon was present did not receive the weapon enhancement, but two defendants who were not present and who were convicted under *Pinkerton* liability did receive

that enhancement. *Id.* at 212-13. The Sixth Circuit appropriately found that "inequitable," that it "violates the spirit of the Guidelines," and "created the type of disparity which the Guidelines seek to avoid." *Id.* The same is true here.

Without this upward variance, Mr. Bekkedam's *within* Guideline sentencing range would be cut in half (Level 8 corresponding to 0-6 months versus Level 10 corresponding to 6-12 months), and move him into Zone A where he could receive a probationary sentence with *no* incarceration. Consequently, there is a very good chance that Mr. Bekkedam would improperly be denied his liberty absent a stay pending appeal, and he may even complete his eleven-month sentence before this Court has the opportunity to rule on the merits.[13]

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[13] Although Mr. Bekkedam has lived in the United States since he was 16, is married to an American citizen and his children are American citizens, Mr. Bekkedam is a Canadian citizen who never applied for U.S. citizenship. Consequently, Mr. Bekkedam may be treated as a deportable alien, which complicates his incarceration. He is ineligible for a minimum security facility and may be subject to an immigration detainer at the end of his sentence. Mr. Bekkedam also has the right under a prisoner transfer treaty to seek a transfer to Canada to complete his sentence, but he would have to abandon his appellate rights to do so. (Dkt.276 at 36-39.) Thus, incarceration may be more punitive for him than others, and incarceration while an appeal is pending may compromise his ability and the ability of the Canadian government to exercise their prisoner transfer treaty rights.

CONCLUSION

For the foregoing reasons, this Court should grant Mr. Bekkedam's motion for release pending appeal.

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/s/ Abbe David Lowell
Abbe David Lowell

Certificate of Service

I certify that on February 10, 2017, I caused a copy of this motion to be served on all counsel of record through the Court's electronic filing system, including

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Exhibit A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

The United States of America,	.	**Docket #CR-14-548-2 (CDJ)**
Plaintiff,	.	
	.	**United States Courthouse**
vs.	.	**Philadelphia, PA**
	.	**January 23, 2017**
Barry Bekkedam,	.	**9:12 a.m.**
Defendant.	.	

TRANSCRIPT OF SENTENCING
BEFORE THE HONORABLE C. DARNELL JONES, II
UNITED STATES DISTRICT COURT JUDGE

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THE CLERK: All rise. Court is now in session, the Honorable C. Darnell Jones II presiding.

THE COURT: Good morning, good morning you may be seated.

ALL: Good morning, Your Honor.

THE COURT: Formally, good morning. This is the matter of The United States of America v. Barry Bekkedam, criminal #14-548. Counsel, would you identify yourselves for the record, please.

MR. IGNALL: Good morning, Your Honor, David Ignall for the United States, and with me at counsel table is Special Agent Tyler Boyer with the IRS.

THE COURT: Good morning.

MR. MAN: Good morning, Your Honor. My name's Chris Man. I'm here for the defendant Barry Bekkedam, who's with me to my left. I'm looking at Mr. Engle, and this is --

MR. ROSEN: Good morning, Your Honor.

MR. MAN: -- Keith Rosen, who's my partner.

MR. ROSEN: Good morning, Your Honor .

THE COURT: And, counsel, would you say your name again for the record, please?

MR. MAN: It's Christopher Man.

THE COURT: Mr. Man, will you be lead counsel today, since --

MR. MAN: I will be, Your Honor.

THE COURT: All right. I would ask that the Court Room Deputy administer the oath to all those who will testify today.

BARRY BEKKEDAM, DEFENDANT, SWORN

THE CLERK: Could I have a representative from Probation stand please? State your full name for the record.

MS. MEIR: Megan Meir, M-E-I-E-R.

MEGAN MEIER, PROBATION, SWORN

THE COURT: As this court does, as a matter of policy, I direct that a portion of this record be sealed, as I do in all sentencing cases, regardless of whether or not a defendant in any particular case has been a, {quote}{unquote} "cooperator," and this is done whether or not an individual has cooperated with the government. For the record, on October 2nd of 2014, a grand jury in the Eastern District of Pennsylvania returned a seven count indictment charging Brian Bekkedam and Barry -- excuse me, it's Barry Bekkedam with one count of conspiracy to defraud the United States in violation of 18 United States Code, Section 371 -- that would be Brian Hartline -- that would be count one; one count of Troubled Asset Relief Program, fraud and aiding and abetting in violation of Title 18 of United States Code Sections 1031 and 2, that being count two; two counts of false statements to the federal government and aiding and abetting in violation of Title 18 of the United States Code Sections 1001 and 2, that

being counts three and four; two counts of wire fraud in violation of Title 18 of the United States Code Section 1343, counts five and six; and one account of bank fraud and aiding and abetting in violation of Title 18 of the United States Code Section 1344 and 2, count seven. Specifically, Mr. Bekkedam was named in counts one through seven. On April 27th of 2016, the defendant appeared before this court by a way of jury trial and was found guilty by the jury as to counts one through four of the indictment. The jury found the defendant not guilty as to counts five and seven, and on April 20th of 2016, this court dismissed count six. For the record, there is no plea agreement in this case. Pretrial Service's records indicate that the defendant has complied with all court ordered conditions of release. The instant occurred from May of 2009 to January of 2010, therefore both the Sentencing Reform Act of 1984 and the Antiterrorism and Effective Death Penalty Act of 1996 imply. The addition of the sentencing guidelines manual used by Ms. Meir to calculate the guidelines in this report is that incorporated amendments, effective November 1, 2016 as there are ex post facto issues. There is a pre-sentence investigation report to which I have referred, prepared by Senior United States Probation Officer Megan Meier on August 2nd of 2016, and subsequently revised on January 9th of 2017. The court notes that per the referenced pre-sentence investigation report, there are no objections thereto by the

government, is that correct?

MR. IGNALL: It's correct, Your Honor.

THE COURT: Mr. Bekkedam, have you read the report?

MR. BEKKEDAM: Yes, I have.

THE COURT: And, sir, have you discussed it with your attorneys?

MR. BEKKEDAM: Yes, I have.

THE COURT: Now, Mr. Bekkedam, in that regard, are you satisfied with the representation your attorneys have provided you up to this point in time?

MR. BEKKEDAM: Yes.

THE COURT: Is there anything that they did not do that you wanted done prior to the day?

MR. BEKKEDAM: No, sir.

THE COURT: Now, sir, regarding the pre-sentence investigation report, the court notes of record that there are a number of objections lodged to the pre-sentence investigation report, and I will go through those at this time. Filed by the defendant, objection number one, paragraph 8 of the pre-sentence investigation report, {quote}, "defense counsel objects to the following statement" -- {quote within quote}, "(in an attempt to seek funding from the Troubled Asset Relief Program, the defendant's misrepresented of the financial or condition of the bank to make it appear healthier than it was)", {end quote within quote}. Defense counsel

asserts that, {quote}, "Nova Bank personnel and the NFH Chairman testified that Mr. Bekkedam had no involvement or influence regarding the calculation or presentation of Nova and NFH, Nova Financial Holding's financial information. Each of the federal and state regulators who testified indicated that they never interacted with Mr. Bekkedam in any way. Therefore, it inaccurate to imply that Mr. Bekkedam represented the financial condition of the bank", {end quote}. The response by the United States Probation Officer is as follows, "In the instant offense, a jury convicted the defendant of conspiracy to defraud the United States, count one; Troubled Asset Relief Program fraud and aiding and abetting, count two; and false statements to federal government and aiding and abetting, count three. To establish a violation of conspiracy to defraud the United States, under Title 18, Section 371 in count one, the government must prove the following beyond a reasonable doubt: that two or more persons agreed to defraud the United States or to commit an offense against the United States, specifically major fraud against the United States as charged in the indictment; that the defendant was a party to or a member of that agreement, that the defendant joined the agreement or conspiracy, knowing of its objective, and intending to join together with at least one other alleged conspirator to achieve that objective, and that at some time during the existence of the agreement or

conspiracy, at least one of its members performed an overt act in order to further the objective of the agreement. As the defendant was convicted of count one, it is proved beyond a reasonable doubt that Mr. Bekkedam conspired with Brian Hartline to defraud the United States. During the conspiracy, or during the course of that conspiracy, the defendant has misrepresented the financial condition of Nova Bank. I'll hear argument thereon. Counsel, you may proceed.

MR. MAN: Thank you, Your Honor. From here?

THE COURT: Whatever's convenient for you, sir.

MR. MAN: Your Honor, we can largely stand on our pleadings with respect of this, but it -- I think the central crux of the argument is that it was Mr. Hartline who made the misrepresentations to the Treasury to an extent that the jury found there were any. Mr. Bekkedam was not a party to that, and while he was found guilty of aiding and abetting and helping to further the conspiracy, that he was aware of an overarching goal, and he may have done other things, he was not involved in making any misrepresentations about the financial security that was (indiscern.) in the case.

THE COURT: Thank you. Mr. Ignall?

MR. IGNALL: Your Honor, from the totality of the offense, conduct is recited in the pre-sentence investigation report, I think it's clear what each defendant's role was and I think it's certainly accurate to say that the defendant, as

part of this conspiracy misrepresented, the financial condition of Nova Bank. There's no need to amend or change paragraph 8.

THE COURT: Thank you. This court's independent review of the record and your verdict as to the charge of conspiracy require that the defendant's objection be overruled. As to objection number 2, paragraph 46, defense council objects to the two point enhancement pursuant to the United States sentencing guidelines, Section 3(b)(1.3) for abusing a position of public or private trust. Further, defense counsel asserts that the defendant should receive a downward adjustment for being a minor participant in the offense. The response by the United States Probation Office is as follows, {quote}, "the defendant was the original chairman of the board of both Nova Bank and Nova Financial Holdings, or NHF - NFH. Mr. Bekkedam served as the chairman of Nova until 2005 and chairman of Nova Financial Holdings until 2007. During the conspiracy, Mr. Bekkedam also owned and operated Ballamor Capital Management which offered financial advice and services to high net-worth individuals. Because of his role as ex-chairman of Nova and because of his client's own -- because his clients owned a substantial portion of the bank, Bekkedam wilded substantial control over Nova and was able to influence Nova to make large loans to Ballamor, Ballamor's clients and to Bekkedam in very

favorable terms. Application Note One of United States sentencing guidelines, Section 3(b)(1.3) defines", {quote within quote}, "public or private trust", {end quote within quote}, "as a position of public or private trust characterized by professional or managerial discretion", {in parenthesis{, "i.e. substantial discretionary judgment that is ordinarily given considerable deference", {end of parenthesis}. "Persons holding such positions ordinarily are subject to significantly less supervision than if employees whose responsibilities are primarily non-discretionary in nature. For this adjustment to apply, the position or private trust must have contributed in some significant way to facilitating the commission or concealment of the offense. The defendant's position, as founder and chairman of a board of directors of Nova Bank and owner of Ballamor, directly contributed to the commission of the instant offense. It was the enormous deference granted to one in such a position that afforded the defendants the ability to structure the complex and bogus transactions designed to defraud the Troubled Asset Relief Program of $13.5 million. Mr. Bekkedam's role in this conspiracy was critical to the execution of the defrauding of the United States. In no way was he a minimal participant or minor participant. His conduct was not", "quote} {end quote}, "substantially less culpable", {end quote within quote}, "than Hartline's." Application Note 3© of Section

3(b)(1.2) presents factors that should be considered by the court when determining if a mitigating role adjustment applies. None of these factors suggest that Bekkendam should be treated as a minimal or minor participant. He certainly understood the scope and structure of the criminal activity and was equally involved in the planning and organization -- organizing of the criminal activity. From April to October of 2009, Bekkedam agreed with George Levin -- Levin or Levin?

MR. IGNALL: I believe he's -- he pronounces it Levin.

THE COURT: Thank you. "To direct Ballamor clients to invest than $30 million in Banyon. In exchange, Levin agreed to invest in Ballamor and provided Bekkedam and Ballamor a $5 million line of credit. In October 2009, Bekkedam solicited Ballamor client AB to invest $4.5 million in Nova and Banyon, Bekkedam told AB who would direct Nova to loan AB the money to make these two investments. This is conduct that speaks directly to the abuse of position of trust enhancement and against any minor role adjustments. This conduct demonstrates upper level decision making authority and significant discretion, both factors must be considered in making role determinations", {end quote}. I'll hear argument thereon, counsel?

MR. MAN: Thank you, Your Honor. I'll address the abuse of trust enhancement first and then go and discuss the

mitigating role. Section 3(b)(1.3) of the guidelines has an abuse of trust position, but it only applies, {quote{, "if the defendant abused a position of public or private trust in a manner that significantly facilitated the commission or concealment of defense", {end quote}. Mr. Bekkedam did not hold such a position and he certainly did not abuse such a position in a way that significantly facilitated the fraud on the TARP. We thought this was a simple factual mistake that was going to be corrected in the PSR. The original draft PSR identified the position of trust that Mr. Bekkedam held at the position of president and CEO of the bank and of the holding company, and we corrected that to note that he had never held either of the those positions. The original PSR also noted Mr. Bekkedam was a chairman of the bank's board, which true at one point in time, but we noted that that hadn't been the case for several years. This court issued a prior opinion summarizing the facts and noted that Bekkedam had, {quote{, "no official role", {end quote}, at the bank at the time of the offense. We hope that when the facts were changed, would change the outcome. The PSR did change those facts, but did not change the outcome, and that's inconsistent with the Third Circuit's law. The leading case, identifying the factors within the Third Circuit to consider is U.S. v. Pardo, P-A-R-D-O. It asked the court to consider first, whether the position allows the defendant to commit it

difficult to detect wrong, and secondly, the degree of authority which that position vests in the defendant vis-a-vis the object of the wrongful act, and here that is a obtaining TARP funds from the Treasury, and third, whether there's been reliance on the integrity of the person occupying that position. With respect to the TARP fraud, that simply didn't occur. I think the confusion that the government and the PSR have, is that they are mixing up the separate charges in the case. This government -- the government's case at trial was that Mr. Hardline had taken the effort and tried to defraud the Treasury. He was the one interacting with them, he was the one engaging them. The PSR continues to talk about how Mr. Bekkedam had influence in his investors, which he didn't. They talk about his role with respect to the bank, but Mr. Bekkedam was acquitted of bank fraud. He was acquitted of defrauding his investors. So that's not really the main focus. It doesn't matter that he had a position of trust relative to someone. It matters that he had a position of trust relative to the victim, here the Treasury, and he certainly did not. Remember also, at to Mr. Hardline's sentencing, Mr. Ignall emphasized that this enhancement applies to Mr. Hartline, because he was in the, {quote} {unquote}, "unique position of being the CEO of the bank", and he explained to Your Honor, at length that as the CEO of the bank, he was in a position to tell the bank what

to do, he was in the position to represent what the bank thought to the Treasury, and the Treasury wasn't going to naturally believe him when he represented the bank's finances, because who would know better than the bank's CEO. That is not the position that Mr. Bekkedam stands in. The Treasury officials and bank regulators called by the government testified that they never talked to Mr. Bekkedam about the TARP application. They didn't rely upon him in any way. Many of them testified they never met him or didn't even know his name. At this point, though, the government and the PSR don't really contend otherwise. Nobody is telling you that the Treasury relied on upon any -- anything that Mr. Bekkedam said. This wasn't a matter of a trust being abused. They didn't consider the application based on Barry saying this is a good idea. Instead, they had the wrong focus. They want to talk about the influence that Mr. Bekkedam had over the bank. It's (indiscern.), it was legally not the right focus, but as a factual matter, it's also not appropriate. The government makes much of the fact that Mr. Bekkedam helped to refer Mr. Levin and Mr. Bonomo to the bank, but those loans that were issued then, but not issued by the bank because Mr. Bekkedam told them to do that. There was an independent evaluation by the bank as to whether or to approve those loans and they did. And that was not surprising, these are high network individuals conducting a

normal vetting process in being approved. And I want you to look back at the trial record because the government cites a lot of -- they argue a lot of points, but they don't cite a lot of -- lot of the record in their sentencing memorandum. Mark Polinsky was a chief credit officer of the bank, and he testified that he vetted Levin and Bonomo loans. He testified specifically that Barry Bekkedam made no effort to try to influence him with respect to that decision. It was his April 5th testimony, at pages 45 to 46. Well, (indiscern.) better is on page 49, where he is asked and he agrees, {quote}, "nobody, including Mr. Bekkedam or any of his Ballamor clients, received any special treatment", {end quote}. And the court also heard from Mary Rutkowski, R-U-T-K-O-W-S-K-I, of the Pennsylvania Department of Banking and from Harry Zentler, the FDIC examiner. Both of them examined the bank and conducted audits. They interviewed a number of people. They spent days there and they found no indication that Mr. Bekkedam had any special influence over the bank, and nor did Mr. Bekkedam have any special position of trust with respect to Mr. Hartline. Remember, the government's argument here is not that Barry Bekkedam told Mr. Hartline that what he was saying was okay, and then Mr. Hartline was duped by Mr. Bekkedam in any way. They argued that Mr. Hartline deliberately and intentionally made false statements to the government. That's not because of any abuse of trust.

Well, the jury may have found that Mr. Bekkedam had encouraged this in somewhat -- this scheme in some way, but there was no abuse of trust. No one was placing false reliance upon Barry Bekkedam in the commission of the Treasury -- of the Treasury issues. I also want to remind the court that nobody at the bank was looking to Barry Bekkedam for accounting advice. He is not an accountant. The issue here -- the central issue really is whether the investments in the bank that are secured with a loan from the bank, count as bank capital. That's a technical banking issue. No one looked to Mr. Bekkedam. Who did they look to? Mr. Hanuscin is the CFO of the bank. He said he made that determination on his own. He testified under oath that Barry Bekkedam had no discussions with him about what to do with that, and he believed it was the right call. Now, the government went through a long process of did you know about the loans, did you know about this, did you know about that, and he ultimately comes to the conclusion that says when I knew everything, when I knew all the facts -- even when KPMG did the audit and they came back and said what, "you did was wrong, that's not the appropriate accounting," Mr. Hanuscin says he still believes his accounting was correct. Now he doesn't do that because -- of any abuse of trust Mr. Bekkedam. He didn't rely on Mr. Bekkedam. That was a conclusion that he reached on his own. And I also want to

emphasize that often at sentencing, the government wants to treat the guidelines as some sort of Christmas tree, where you keep pinning the enhancements on and they want to pretend that if the enhancements are not applied, that the defendant is getting off scott-free, but that's not the way it works. There's a basis -- based -- a based punishment is assigned to the base value under the guidelines. An enhancement is something extra. They have to prove that something extra. And with respect to the abuse of trust, we don't believe the Government has proved that that enhancement is warranted. Would you like to take break, Your Honor, or should I go on to the minor trust issue?

THE COURT: Go right ahead.

MR. MAN: All right. The minor role issue is somewhat different --

THE COURT: Thank you for the offer.

(Laughter)

MR. MAN: Well, I just want -- I don't want to hog all of the time. But the minor role issue is somewhat different. It's under 3(b)(1.2), where if there is mitigating role. If it's a minimal role, the court can reduce the sentencing guidelines by up to 4. If it's a minor -- if it's a mere minor role, the court could take 2 points off, court can strike a balance and build with a -3. We believe a minus 2 is appropriate. I think you have to look

at the relative role and all the various defendants in the scheme. Mr. Bekkedam's role is much more compartmentalize. His role was in bringing investors to the bank, and was not in what the bank did internally in terms of how these loans and how the investments were recorded. It was not in terms of what was being communicated to the Treasury Department. His role was much more a subset of what the overall scheme was about. The alleged crime he was committing fraud on the Treasury by making false statements by omissions, and as we set forth and we just discussed, everyone from the Treasury can testify that didn't happen. We also emphasize that the bank made their own decisions about how these loans would be recorded. The government sentencing memorandum actually surprised me in a way, and I think in every case there's always something that the other side will say that'll get under your skin, and I'm gonna kind of confess that my pet peeve in this case hearing the government refer to, as they did multiple times in the sentencing memorandum, as Mr. Bekkedam as having been the architect of this scheme, or they talk about him being some sort of a mastermind. And it bothers me because it's just so very wrong. And it was one of the things that I went through is, to look at all the various decision points in this case, all these great ideas that went into this scheme, and realize that Mr. Bekkedam wasn't a pivotal part of any one. At the outset, I think it

should be noted that he had no motive to do this. The government's sentencing memorandum noted that Mr. Bekkedam was managing about $2 billion, with a B, worth of funds. And so that's a lot of money, and while it's true that he had investors and some of his investors had invested in the bank, that is less than 1 percent of the money that he was managing. This was not a make-or-break investment for him. There was no reason for him to have go above and beyond, and the money that was being sought was money for the bank. This was not going to be money to put in pockets. Granted, he wants to make his clients happy, that would also work to his benefit, but to swing 1 percent of his -- of the portfolio he's managing, it just wouldn't make sense to go out on any limbs and engage in any criminal activity. But let's go to the key aspects of the scheme that were not Mr. Bekkedam's idea. Ultimately, this is a scheme to defraud TARP. It's a scheme to get TARP money, so whose idea was it to go after the TARP money? It was not Berry Bekkedam's. You heard the testimony from Jeff Hanuscin, H-A-N-U-S-C-I-N, who was a CFO of the bank. He testified that it was he that learned about the TARP program and recommended that the bank follow it. The court also heard the testimony from the chairman of the bank, Mr. Dimarcantonio who testified it was decision along with the board, to apply for the bank, and I think the time line is full. The TARP application occurred in October of

2008 at the time the bank was well capitalized, and that's important, because the bank did not fall below well capitalized until June of 2009, eight months later. And that's the only point where Mr. Bekkedam comes relevant. They needed to get their capitalization up to get back to well capitalized, but for the first eight months of the TARP application, there is no reason for Mr. Bekkedam to have been involved. And I also want to address the point that the PSR makes about George Levin. And I think the government wants to sort of suggest that it was when the bank fell below well-capitalized in June of 2009 that there was this big scramble to get capital in the bank, and that's what sent Barry out looking for George Levin. But again, the time line has that wrong. Mr. Levin testified that he met Barry Bekkedam in early 2009. He'd agreed to invest $18 million in the bank, I believe around April of 2009, well before the bank had fallen below well-capitalized. The reason Barry Bekkedam sought Mr. Levin out, the reasons for Levin agreed to invest, is they -- it had reasons -- nothing to do with TARP. They believed it was a great investment because the bank was looking at taking over an insurance company, it was looking acquiring other banks. That's why they did it. And how did all of this come about, this idea that Barry -- Mr. Levin would invest in the bank? Even that, it wasn't -- was not Mr. Bekkedam's idea. Mr. Dimarcantonio testified that he was having a conversation

with Barry. Barry said that he had met Mr. Levin, that Mr. Levin was a wealthy guy, and Mr. Bekkedam wanted him to come on board as one of his clients. So Bekkedam mentioned that Mr. Levin had a lot of cash down in Florida, not Pennsylvania, but down in Florida -- and was looking to open -- to acquire a bank there. It was -- Mr. Dimarcantonio who, and I -- certainly from his testimony, it's on April 11th on page 90, he said, {quote}, "I had -- had introduced the idea to Mr. Levin," (end quote}. Mr. Dimarcantonio said look, if this guy want to get a bank and our bank is looking to expand, why aren't we expanding to Florida? So that was Mr. Dimarcantonio's idea. It wasn't Barry Bekkendam's. And so at the point of April 2009, everyone seemed to be happy. The bank wanted investors, Barry Bekkedam had found an investor in Mr. Levin, Mr. Levin wanted to invest in the bank so that it could expand. And so who decided what money Mr. Levin was going to invest in the bank? Mr. Levin did. It was Mr. Levin's money. It would've been easier to Barry Bekkendam, it would've been easier for everyone in the world if Mr. Levin would've just written a check. They had no reason to want this to be done by loan. Mr. Levin wanted it done by a loan, and he testified why. He said that he was investing at that time in the Rothstein Fund and he believed that he was making good money there. He thought he was making 30 percent returns on his cash, and so rather than take that money out

and lose 30 percent gain, he'd rather pay a less -- he'd rather take out a loan to pay a smaller interest rate. That was Mr. Levin's choice. That was not Mr. Bekkedam's, and it was up to the bank to approve that loan, and they did. So -- Mr. Bekkendam hasn't been the mastermind of any part of this story, but let's think specifically about whether or not whose idea was that the bank could issue a loan to an investor, who would then take that loan, invest it back in the bank and have it count as capital? It's not Mr. Bekkendam. The bank did that on its own without Barry Bekkendam in September of 2008. Remember there's two sets of transactions with Charles Gallub. Charles Gallub testified that he was approached in 2008 by Hal Schaeffer at Nova Bank about doing an investment. Mr. Gallub said that sounds like a great idea, I'm happy to invest, but I don't have any money. And so they -- Mr. Schaeffer helped him to obtain a loan from the bank. Mr. Gallub testified that he knew who Mr. Bekkendam was, that they had done business in the past, but he was very specific that Mr. Bekkendam had nothing to do with this loan. They never even discussed it. So this shows that the bank was aware of how to do exactly what the government now charged that was wrong well before Barry Bekkendam entered the picture. And remember, the government's claim, they're focusing on Mr. Hartline largely on the TARP fraud, was that there were three bad invest --

bad investors were investors that were involved in this. Two of them were referred by Mr. Bekkendam, but this third, Mr. Gallub was not and he -- Mr. Bekkendam had nothing to do with it. Mr. Gallub testified that it was back in 2009 that Mr. Hartline directly goes to Mr. Gallub and asks him to take out another loan to invest back into the bank. Mr. Gallub again testified, page 98 of his April 28th -- of his April 12th testimony that Mr. Bekkendam had nothing to do with it. Mr. Dimarcantonio also testified Mr. Gallub's, {quote}, "loan related to investment in Nova had no referral from Mr. Bekkedam and no connection to Mr. Bekkedam," {end quote}, that's April 11th on page 30. And again another part of this critical -- are -- critical part of this architecture of this scheme is whether or not these investments count as capital, and agin, that was Mr. Hanuscin's decision. As we have already gone through, even when Mr. Hanuscin had heard from actual experts at KPMG, we still disagreed with their opinion, which is his right. That's what happens in these more arcane aspects of accounting principles. It was not Mr. Bekkedam. And when Todd Howard came forward Howard came and said he had an issue with this, Mr. Bekkedam said hey, "I'm not the expert, it looks okay to me, but go talk to the lawyers, go talk to the banks." If he had thought that there was something wrong, he certainly would've stood up and said, "no, let's not do this." So remember, Mr. Bekkedam is not an

accountant. He's not the logical guy that can be architecturer of this scheme. The government really doesn't cite to anything that shows where he's the idea man. He's the helper man. This idea of going for TARP funds was up to the bank, it was up to Mr. Hartline. He's the one making representations. They reach out to their old friend Barry Bekkendam to say, "we need more capital, do you know investors," he says, "sure that's who I work with everyday." He directs them to the bank. That's all he really did. That's a fairly minor role in this scheme as a whole, and he certainly didn't abuse anyone's trust in the process of doing it. Thank you, Your Honor.

THE COURT: Thank you.

MR. IGNALL: Your Honor, let me address this in reverse order, start with the minor role. There are two people who are involved in this conspiracy, they were both convicted by the jury. It was Mr. Hartline and Mr. Bekkendam. The idea that Mr. Bekkendam played only minor role, I really don't follow that because the crime here is in deceiving the Treasury as to the financial condition of the bank in order to receive the TARP funding. It may not have been Mr. Bekkedam's idea initially to get the TARP funding. The question is who was involved in the fraud, and the fraud here involves creating a transaction at the interest of Mr. Levin, where the bank's own money is loaned to Mr. Levin, an

hour later it circles back to the bank. So Mr. Hartline, and we're not going to dispute what Mr. Man said. There's no evidence that Mr. Bekkendam had any direct contact with anyone at the Treasury, with anyone at the FDIC, or any other bank regulator. There's no dispute about that. There's no evidence in the record to suggest that. That doesn't mean he didn't play a key and perhaps, vital role in this fraud. If Mr. Levin had decided you know what, "I'm just gonna take $5 million out of wherever he might've had $5 million," and there's some question about how liquid he was. He certainly believed he had a lot of money at the time, but whether he could've easily accessed $5 million, we don't know. But let's assume that he could've accessed it from where else. Let's assume he actually got approved by another bank to borrow the money. He then invests in Nova Bank -- we don't have a fraud. The fraud is representing that Nova Bank is indeed in a healthier condition than it was before because of Mr. Levin's investment, without disclosing to the Treasury or any bank regulator that Nova Bank now has added a $5 million unsecured loan to Mr. Levin, a loan that the court knows now, Mr. Levin never paid back. This time line comes up because Nova's application is languishing down in Washington, D.C. It gets referred to the CPP Council and we had a couple members of the council testify. Because Nova was in that -- it wasn't a definite yes, but it wasn't quite a definite no.

So Mr. Hartline was hoping to try and get -- maybe to turn into a yes. So he suggests that what if we get this new investor. The investor was brought in by Mr. Bekkendam to invest up to $15 million in Nova Bank. That turns maybe into yes at the CPP Council. The problem is Mr. Levin either doesn't have the money or simply doesn't want to try to get his own money to invest in the bank. That's why on June 29th, we cite the email where Mr. Bekkendam suggests, "we just need Nova to loan the money to him. Is this the plan?" It's not an email that comes from a minor role or minor participant in the fraud. This isn't someone who's in a drug conspiracy who, you know, takes drugs from point A to point B on one occasion. This is someone who was intimately involved in it, and from the text and email, appears to be indeed the architect of it. Is he more culpable than Mr. Hartline? That's certainly an inference the court could draw from the evidence we introduced at trial, but he's certainly at least equally culpable with Mr. Hartline. They're in this together. They're the ones who put this deal together to create a situation in which the Treasury can be deceived into thinking that Nova Bank is healthier than it really is. We heard a little bit about what is Mr. Bekkedam's motive. Well, certainly the motive is to keep the bank afloat. He has clients who are invested in the bank, his plans were borrowing from the bank. Now, maybe this only 1 percent of

the assets under management that his clients are invested in with the bank, but we saw email after email after email at trial where Mr. Bekkendam talked about how crucial this TARP funding was, how crucial it was to get information to the Treasury in order to get this approved. We heard about the conversations that Mr. Bekkendam had by email with Mr. Levin and, more notably, Mr. Preve, who worked for Mr. Levin, about trying to get as much information they could to the Treasury to try and get this approved. This isn't someone who's engaged in an isolated or minor role in this conspiracy. He is an equal, if not more culpable, participant than Mr. Hardline. So there's no basis on which to give him a minor role adjustment. That then segues back into the abuse of trust. I agree again with Mr. Man, there is no evidence that Mr. Bekkendam was an officer or director of either the bank or the holding company at the time of this offense. But the Third Circuit has made clear that that enhancement does not apply solely to employees. We have the three-part test and part of it is cited again in Hart, does his position allow him to commit it difficult to detect wrong. This is -- for the degree of authority was the position vest in defendant, vis-a-vis the object of the wrongful act and whether there has been reliance on the integrity of the person occupying the position. We saw that Mr. Bekkendam has significant influence over the bank, over this whole process. When we

look back at the George Levin loan, we look at the emails right before the loan as the loan is being approved, we see that Mr. Bekkendam is involved in emails not just with Mr. Hartline, but with other people who worked at the bank, including Mr. Patterson. We know that Mr. Levin's loan was turned around in one day. We heard from Mr. Maniani, the loan officer who was reviewing it, that not only it's the day's loan he remembered approving or seeing come through, but it's the only loan that he could remember of any size like that where it was approve without him getting all the background documentation that he was looking for to determine the creditworthiness of Mr. Levin. That goes to show that Mr. Bekkedam occupied a unique role with respect to the bank which then leads to his role with respect to the object of this offense, the ability to make the bank appear stronger than it was, so the Treasury would be more likely to approve $13½ million of public funding, going to invest in this bank. So, therefore when the court exercises its discretion and reviews all of the factors under Hart and Pardo, even though Mr. Bekkedam was not an employee of the bank, the abuse of enhancement still applies.

THE COURT: Thank you.

MR. IGNALL: Thank you.

MR. MAN: If I can just have a moment, Your Honor. On the abuse of trust enhancement, there's a lot said but

nothing that really goes very far. Again, think the government is conflating the arguments it was making at trial with the arguments that would be relevant at sentencing. The government is wanting to talk about of influence Barry Bekkedam had over the bank, an argument that he abused this position of trust with respect to the bank in order to get these loans out and have them be processed quickly and so forth. But that's irrelevant because Barry Bekkedam was acquitted of bank fraud, which necessarily a finding that the bank issued these loans because they had merit. They did them for the right reasons, there was no fraud. If the -- jury had concluded that Mr. Bekkedam had abused that position of trust, it would have convicted him of bank the fraud. It's pretty
-- it's really no more complicated than that. But even going back through the actual facts that are being alleged here, Mr. Bekkedam had brought -- Mr. Levin in as an investor before there was any issue with the loan. That was between Mr. Levin and the -- and the bank at that point to decide whether or not to approve it. Mr. Levin applied for the loan, he signed on the dotted line, he was legally bound to repaying it the same way any person would obtain a loan would. All the vetting process says that Mr. Bekkedam had nothing to do with it and maybe this loan got turned around fairly quickly but that's not because of Barry Bekkedam.

That may have been that Mr. Hartline, the CEO of the bank was saying, "it's important, let's get it done." But nobody is going to do, under like, Pardo factors, rely upon the integrity of Mr. Bekkedam. Nobody took the oath and said, "I haven't checked anything but you know what? I thought it was okay. Mr. Bekkedam said it was okay. I deferred to him." That kind of testimony wasn't there. So I don't think it's fair to lump them in and say there was an abuse of a position of trust. And it certainly wasn't one that significantly facilitated the TARP fraud. If these loans were going to be issued anyway, whether or not Barry Bekkedam had abused a position of trust, it would not have significantly facilitated the TARP fraud. But in terms of the minor role adjustment, I think it's fairly easy to see that Mr. Bekkedam's role is fairly limited, and it's certainly drawing an investor into the bank. It helped provide capital to the bank. How the bank recorded that on its books, how they represented that to the Treasury, that was up to the bank. That was up to Mr. Hartline and others. On some levels it's kind of like a securities fraud where somebody would say a CEO of a company has misspent the funds. He's redirected corporate funds to his own personal use. That would be bad, but you don't blame the guy who legitimately brings money into the company for it. And that's really what Mr. Bekkedam did. So I think it's pretty clear that his role is much more

limited than Mr. Hartline's was, and I think in a way that it warrants a minor role adjustment. And there is certainly no position of trust that was abused. No one is saying that they relied upon Barry Bekkedam and that that's why anything in this case happened.

THE COURT: Thank you. Anything further on this issue?

MR. IGNALL: No, Your Honor.

THE COURT: The Court concurs with and independently finds support in the record for the response of the United States Probation Department to this objection. However, the defense objection to the two-point enhancement, pursuant to United States Sentencing Guidelines §3B1.3, for abusing a position of public or private trust, is based upon United States v. Pardo. I quote from that case: "Even more clearly lacking in Pardo's case is a requisite degree of authority over the object of his wrong. Unlike the Defendants in every other case considered in this Circuit or those involving non-employment situations cited by the Government, Pardo had no authority over anyone or anything necessary to the commission of his crimes" {end quote}. This Court opines essentially that Mr. Bekkedam, like Mr. Pardo, had what is equivalent to most favored nation status. He was a friend, a friend who was very powerful, very influential, but nonetheless he was a friend. That in and of itself is not a violation of private

trust relative to the Department, specifically Department of the Treasury, the victim in this case. Nor did Mr. Bekkedam hold a position of trust equivalent to that held by the special government agent turned church fiduciary in the case cited by the Government, United States v. Dullum, that being reported at 560 F3d 133, 141, decided by the 3rd Circuit in 2009. In Dullum, church members relied on the integrity of a senior member of the church, who also happened to be a secret service agent. As I read through a page at the -- a page of that case, I noted that that agent took on an additional fiduciary responsibility to essentially be a fiduciary, financial fiduciary, for members of the church, one who, as I recall, was an alcoholic and one, I believe, was a drug addict. The Court declined to afford the Defendant -- the Court declines to rule in this case that Mr. Bekkedam merits the two-level enhancement, and therefore that objection is sustained. It will be stricken. However, the Court does not agree with the Defendant's position that he was a minor participant in the offense, and that -- for the reasons that I previously referenced, so he will not get credit for being a minor participant, but the two-level enhancement for abusing a position of public or private trust, that objection is sustained.

Objection #3, paragraph 43. Defense counsel objects to the two-level enhancement pursuant to United States

Sentencing Guidelines §2B1.1(b)(10)©, because the offense involved sophisticated means. Defense counsel denies the fact that Nova Bank loaned money to be invested back into itself, and also disputes the fact that Mr. Bekkedam intentionally engaged in or caused the conduct constituting sophisticated means. Further, defense counsel argues that the instant offense was not an atypical case and does not qualify for a sophisticated means enhancement because the TARP program did not have a standard application process, thereby making it impossible to distinguish between a {quote} "garden variety" {end quote} and a {quote} "sophisticated" {end quote} TARP fraud. The response by the United States probation officer to objection #3 is as follows: {quote} "Application note 9B of United States Sentencing Guidelines §2B1.1 explains that {quote within quote} 'sophisticated means' {end quote within quote} means especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense" {end quote}. In this case, in an attempt to seek funding from the Troubled Asset Relief Program, the Defendants misrepresented the financial condition of the bank to make it appear healthier than it was. Specifically, the Defendants orchestrated three amount triple loan transactions to supposed investors to make it appear as if Nova had raised new money. In fact, Nova had simply loaned money to be invested back into itself. Because

the Defendants knew that these transactions would not satisfy the financial regulators evaluating the health of the bank, they concealed the nature of the transactions from the regulators. The bogus financial transactions orchestrated by the Defendants to defraud the Troubled Asset Relief Program were clearly complex in nature and support the application of the sophisticated means enhancement. Counsel on the argument.

MR. MAN: Thank you, Your Honor. I think I can be fairly brief with this one. I -- the sophisticated means enhancement is the go-to for the Government. I don't know if the Government has ever uncovered a scheme it did not think was particularly sophisticated. But it should not be applicable here. And it's because Mr. -- while the Court applied it to Mr. Hartline, I don't think it should apply to Mr. Bekkedam. At Mr. Hartline's sentencing, the Government emphasized that Mr. Hartline's effort involved a lot of work on his part to try to conceal the scheme, and they emphasized that there was no reason for the regulators to disbelieve what Mr. Hartline was telling them. They went through the accounting, they talked about how complicated that was. But Mr. Bekkedam didn't do any of those things. He was not involved in concealing anything. He wasn't involved in how these loans or the investments were recorded on the bank's books. He wasn't involved in what was being told to the

Treasury. He had some parts of the process, but he wasn't in the room. And the issue here isn't about an affirmative misstatement, it's about an omission. And he wasn't instructing anyone to omit any particular information. Remember also why Mr. Bekkedam is on the hook here. This is largely Pinkerton liability, or it's aiding and abetting. And it may very well be that even all co-conspirators are guilty whether they were playing a sophisticated or not sophisticated part, but that's liability. Sentencing is different. It is no longer in for a penny, in for a pound, at least not when it comes to the sophisticated means enhancement. The Sentencing Commission made clear that only a Defendant's individual conduct, not the collective conduct of all Defendants, is what is dispositive. The Sentencing Commission's amendments to the guidelines emphasized that this change was intended to have the Court look to the Defendant's own intentional conduct because it better reflects their actual culpability. We've provided lots of authority for this in our sentencing memorandum on page 16, but I thought one of the better cases to illustrate it was in the contents of a conspiracy. It was the Craig case out of the 6th Circuit, where the Court says the sophisticated means enhancement requires the Sentencing Court to look at the actions taken by the individual. A Defendant involved in a complex repetitive tax conspiracy is not automatically given

a sophisticated means enhancement if his or her personal involvement did not constitute sophisticated means. And I think that's the situation we have here. What did Barry Bekkedam do? Certainly the accounting; that would be sophisticated, that would be complicated. But he didn't do that. What Mr. Bekkedam did is what every financial investor in the country does, they refer investors to investment opportunities. That's all that was really -- that really occurred here. He directed two, not three, but two of the investors at issue in the case to the bank, and it was up to the bank to decide whether or not to issue them the loans. It was up to the bank to decide how those would be recorded and how to represent that to the Government. This is not a sophisticated case with respect to Mr. Bekkedam.

MR. IGNALL: Your Honor, it sounds like the defense is making a similar argument as they were making for the minor role adjustment, that Mr. Bekkedam had almost no role in this conspiracy, that all he did was identify somebody who might want to invest in the bank. If that were true, then not -- it wouldn't just be a minor role; he wouldn't be guilty at all. The jury found him guilty of conspiracy to defraud the TARP program. The jury found him guilty of major fraud against the United States, as well as aiding and abetting, or Pinkerton liability, could be either way, the false statements made by Mr. Hartline to the Treasury in

furtherance of this scheme. So the idea that he is somehow in a completely different position than Mr. Hartline does not comport with the record in this case. Mr. Bekkedam didn't simply identify investors. He participated in a scheme to defraud the Treasury by making the bank appear healthier than it was. This scheme, as a whole, the scheme that Mr. Bekkedam knowingly participated in from beginning to end was sophisticated. It wasn't a one-time fraud where we'll simply fill out a form and say, you know, the bank's worth, you know, 50 billion, it's only worth 20 billion. This is something that went on and on and on, to make sure that the Treasury believed that the bank was healthier, and that bank regulators would not find out about the true health of the bank. So when Mr. Bekkedam says things like you have to help me manage Brian who's managing his regulators, we know that Mr. Bekkedam is involved completely and totally in this scheme in terms of making sure that the regulators don't find out the true health of the bank and it gives the bank a chance to get the funding. This isn't a one-time deal. This is something that involved the round-trip loan to George Levin, the round-trip loan to Anthony Bonomo, and the loan to Mr. Gallub, George -- Charles Gallub, that was the last one in December. When we look at the scheme as a whole, the Court was correct in finding that the sophisticated means enhancement applied to Mr. Hartline. There's no reason not

to apply it to Mr. Bekkedam, who was equally culpable in the scheme and is participating on an ongoing basis. It wasn't like he simply suggested let's do a loan to Mr. Levin and then walked away from it. He continued to be participating in the interactions between Mr. Levin and regulators with the Pennsylvania Department of Banking and the Federal Reserve in terms of the change of control. We saw that Mr. Bekkedam continued to be involved when it came to getting a loan from Mr. Bonomo, his client, some of which went into the Banyon/Rothstein scheme, but some of which went right back into the bank. So he is a full participant in a scheme that is more than just a mine-run fraud. It's a sophisticated scheme on the whole. Mr. Bekkedam is responsible for the sophisticated means enhancement because of his role in this scheme.

THE COURT: Thank you. The record --

MR. MAN: You know --

THE COURT: I'm so sorry, counsel. Please, go right ahead. I apologize.

MR. MAN: I'm sorry. I was going to say that -- you know, I can be brief, Your Honor. The test is -- you initially articulated, was the Government has to show that it was especially complicated or especially intricate, and with respect to Mr. Bekkedam, that really isn't the case even as Mr. Ignall explains it. It certainly is true that Mr.

Bekkedam tried to facilitate these loans and stay on top of things. He's a deal guy. In that world, deals fall apart when you have multiple players, and particularly when you have regulators involved and somebody drops the ball. So yes, he was riding people to do their part. But there's no evidence that he had any involvement in deciding how this accounting should take place or how it should be represented. There was no testimony that anyone had explained to Mr. Bekkedam that there was anything wrongful about the way that things were being accounted for. He simply didn't understand these issues. He's not an accountant, and no one presented him any evidence to the contrary. The only person that could have done that would have been the CFO, Mr. Hanuscin, who believed that that part of it was all legal. So yes, he certainly played a role in referring investments to the bank, he certainly wanted to stay on top of people and make sure that people are doing what they needed to do to issue the loans. But what he did himself was not the sophisticated complex part of this case. That fell to other people, including Mr. Hartline, but not Mr. Bekkedam. And so within these conspiracies it's unfair, I think, to say that some parts are sophisticated and others aren't, but we're going to treat everybody the same. That's part of what the base offense is about. That's what Pinkerton is about. That's how Mr. Bekkedam finds himself on the hook to begin with.

But he doesn't get the added two points. He doesn't get the added enhancement for doing something sophisticated or that was especially complex, because he didn't do anything that was especially complex. Thank you, Your Honor.

THE COURT: I was making reference initially to the testimony of Mr. Preve and to George Levin during the course of the testimony, so much so in terms of Mr. Levin early on that I even called counsel to sidebar to speak in terms of the potential privilege, but it became a non-issue in the case. Ultimately the record and the case law merit an overruling of the Defendant's objection to objection number -- - and lodged in objection #3. Therefore the Court will allow that sophisticated means enhancement.

Now as to objection #4, the defense counsel objects to references in the offense conduct pertaining to Scott Rothstein, the Rothstein Ponzi scheme, and related Florida lawsuits. The statement by the Probation Department is as follows: {quote} "Any references to Scott Rothstein or the Ponzi scheme are made to provide background information related to the overall scheme and climate in which it operated. This information is informative to the Court and is appropriately included in the offense conduct section of the pre-sentence report." United States Sentencing Guidelines §1B1.4 directs that {quote} "In determining the sentence to be imposed within the guideline range, or whether

a departure from the guidelines is warranted, the Court may consider without limitation any information concerning the background, character and conduct of the Defendant unless otherwise prohibited by the law" {end quote}. I'm not going to spend a great deal of time on this one. I'm going to sustain the defense objection to this. It was not necessary to and is not necessary to the Court's ultimate imposition of sentence in this case.

THE COURT: Now are there any other objections?

MR. MAN: Your Honor, we have moved for a downward departure on the issue of the alienage, but I don't know if that's something you'd like to address now or later.

THE COURT: Go ahead.

MR. MAN: Okay. As we noted in our sentencing memorandum, on page 36, the 3rd Circuit, every Court of Appeals who have considered the issue have recognized that a deportable alien status can warrant a downward departure, depending on whether it would place a burden on a Defendant that other Defendants wouldn't face. The simple fact is that, like many other things, sometimes convictions carry collateral consequences that impact other -- some Defendants differently than others, and when that occurs, and when a Defendant is going to face those collateral consequences, the Court can factor those in. And if there's -- those are sufficiently punitive, there's no reason for the Court to add

additional punitive measures. The Government's supplemental sentencing memorandum doesn't really take issue with that so much. They note that this is a burden that may not always be so great, which I suppose is true. If someone had crossed the border to commit a felony and they went -- were looking for a free airfare back, that probably wouldn't be a big burden for them. But I don't think there should be any doubt that it is a big burden for Barry Bekkedam. He moved to the United States when he was 16 years old, Your Honor. He spent almost his entire adult life here. He is married to a United States Citizen. He has built his businesses here. He lives here with his wife. He's -- all of his children are U.S. citizens. All of them are being raised here. So consequently, while being deported may not be a big issue for some citizens, it certainly would be for Mr. Bekkedam. The Government also points to one ground of deportability in the sentencing memorandum and suggested it may not be applicable, and suggested Barry Bekkedam may not be deportable. But there are other grounds for deportation, and the Government certainly has a better idea of whether I do or whether or not the Government is going to pursue those avenues. We have confirmed with immigration counsel who says that these are legitimate concerns. I don't know that the Government is in a position to tell this Court that they will not seek to deport Barry Bekkedam. If they do, we will happily withdraw

this argument. But because it is something that will sit over his head, that is a problem. And I want to be candid with the Court. Mr. Bekkedam would intend to fight deportation if it were pursued. He certainly would have strong arguments for a waiver, given the amount of time that he has spent here and his ties to this country. But having to fight that alone is a burden that other Defendants don't share. It's not a fast process, it's not a cheap process, and it is uncertain and stressful. And if Mr. Bekkedam were sentenced to prison, it almost certainly would lead to a detainer being placed upon him. And the reason is the process is fairly mechanical. You deal with New York prisoners more than I do, but my understanding is that if you go in and you check that box that you're an alien and you check that box for a felony, they indicate that you're potentially subject to deportation, and that that would lead to a detainer being placed upon you. In the ordinary course within the prison, this decision about deportability isn't even addressed until you come to the end of your sentence. And once the sentence is near to completion, they then place a detainer upon you while the immigration authorities decide whether or not to deport to you, and they may decide not to deport Barry Bekkedam. But in the process, he may spend several months under a detainer where he's spent more time in prison as a detainee than as a prisoner. And I think that is

an unfair situation for him to find himself in. And, you know, without it, he still has to worry about the process of being deported. It also means that if Mr. Bekkedam were sent to prison, it would be more punitive for him than it would be for other Defendants, including someone like Mr. Hartline. Mr. Hartline would be eligible to go to a camp, but because a deportable alien is deemed more of a potential flight risk, he's automatically assigned to a low facility at the very minimum. He's not eligible for a camp. He also wouldn't be eligible for things like early release programs. So that's why prison would be more punitive for him than it would be for other Defendants.

This is a case -- now that you've ruled on the guidelines, that he's at an eight -- zero to six months. I'm not talking anymore so much about a departure in the sense of the Court having to do something outside the guideline range. Sentencing Barry Bekkedam to probation with a component being house arrest is a within guidelines sentence. That's already well within your authority to do. Within that guideline range, I think these immigration issues help push it more to the side of house arrest rather than incarceration. An incarceration would trigger all sorts of other problems for us in that we have a U.S./Canada -- Mr. Bekkedam is Canadian -- we have a U.S./Canada Prisoner Transfer Treaty. The U.S. and Canada are also parties to the Counsel of Europe Treaty

of Prisoner Transfers. We would want to begin the process of facilitating those transfers, but we're coming at a difficult time with the change in administration. I don't believe the responsible authorities within the Justice Department or the State Department have yet even been selected to help facilitate that process. In other cases I've been involved with, like United States v. Naaman, -A-A-M-A-N, in -- filed in District Court before Judge Heavily, we've had situations like this where the Court kept pushing back the report date so that we could coordinate with the Canadian Government and make those transfers.

THE COURT: What did Judge Heavily do?

MR. MAN: She did exactly that, she brought the Government in, she brought the State Department in, and they tried to facilitate everything in advance. And ultimately what we were able to do, we would have the inmate report to a facility in upstate New York. He checked in on one day; the next day they had a transport out to Canada. He went there and he completed his sentence in Canada. But it takes some process -- it takes some time. It took a few months to get that going. I think it would take more time now, given the current political climate with the change in authorities. But it's -- one thing that she emphasized, it's a bigger issue than just one Defendant. You know, these treaties, they just protect American citizens. We don't want an

American citizen forced to serve a term in a foreign prison under conditions that Americans may not find so nice. If we have a system here in America where people could point to this case as an example of the United States not following that, where Mr. Bekkedam were forced to spend all of his time and serve his sentence without giving the Canadians an opportunity to look out for one of their own citizens, it could come back as an adverse precedent against us in the future. I think that's all I have to say about the deportability issue, Your Honor.

THE COURT: Thank you.

MR. IGNALL: As Your Honor knows from our sentencing memorandum, we think the appropriate sentence would be a sentence above the guideline range, even above the guideline range before the Court sustained one of the objections. But there's certainly no basis to depart downward. I'm not sure how you depart downward from zero to six. But with respect to the Court's discretion to impose a sentence above the guideline range, I don't think that Mr. Bekkedam's alienage is a basis for leniency in this case. All I've heard is a lot of speculation about what may or may not happen with him. I can't stand up here and say whether Mr. Bekkedam is deportable or not. I'm not representing immigration authorities; I don't know that. Neither does Mr. Man, and there's no basis in the record to suggest that Mr. Bekkedam

is deportable. Under one statute I cited, he may well not be, because he's been in the United States more than five years legally. I've heard that Mr. Bekkedam would fight any attempt to deport him, yet I also hear maybe he'd want a prisoner transfer to Canada. Those are two speculations that seem to be inconsistent with each other here. He may have to worry about deportation; that may be true. He's in the United States; he's not a U.S. citizen. He committed an offense. That may be one of the collateral consequences is he has to be concerned about his immigration status. There's no immigration detainer on him now. There may be one later, there may not be. But simply because Mr. Bekkedam was not a United States citizen at the time of this offense is not a get-out-of-jail-free card, to make sure that he doesn't have to worry about consequences that apply to anyone who's not a United States citizen, whether it's someone who's committed -- whether it's a re-entry offense, or it's someone who's committing a drug offense and might be from another country, a violent crime, a fraud; there may well be collateral consequences. But simply because Mr. Man wants the Court to speculate about what those consequences might be, is not a basis to depart downward or to be lenient with respect to Mr. Bekkedam, as compared to Mr. Hartline.

MR. MAN: Thank you, Your Honor. There isn't anything inconsistent about seeking a prisoner transfer to

complete his -- for Mr. Bekkedam to complete a prison term in Canada, and wanting to avoid deportation and -- or making arrangements so that he could return to the United States. And I also want to be clear that we're not asking for a get-out-of-jail-free card. We're asking for a house arrest, and that is within the guideline sentence. That's within the zero to six months. They've suggested that the Court could have an upward departure, which is the same thing that they asked for in Mr. Hartline's case and the Court declined. I think if there's going to be that sort of parody, then you should decline the upper enhancement here as well. Home arrest is still punitive. It's not being able to leave. The Government wants to talk about it being a gilded cage, but a cage nonetheless. And I did want to address that specifically, because the Government cites a case in its supplemental sentencing memorandum we didn't get a chance to respond to, The United States v. Tomko. And I believe my new friend, Mr. Ignall, took some liberties with that case. Essentially, he omits that the 3rd Circuit rejects the very sort of argument that they were making in this sentencing memorandum in that case. The Government's language is misleading. They take -- they write {quote} "The 3rd Circuit has observed that gilded cage confinement has a certain unseemliness to it" {end quote}. Now factually, though, that's not exactly what was said. Tomko was addressing a

very different argument. As the 3rd Circuit framed the issue, they said the Government argument was {quote} "Detention in the house that Tomko partially funded with the illegal tax proceeds is plainly unreasonable" {end quote}. The 3rd Circuit went on and said {quote} "We agree with the Government that the sort of gilded cage confinement imposed here has a certain unseemliness to it" {end quote}. But there's no argument that Mr. Bekkedam has even a tainted dime in his pocket. None of his -- his home isn't built with tainted funds. So it's a very different sort of argument. But perhaps more importantly, while the Court found -- the 3rd Circuit found that the unseemliness of that house arrest in the Tomko case was present, they still affirmed the District Court's use of home house arrest, which I think only further demonstrates it would be entirely appropriate for this Court to do that. The Court said on page 569 of that opinion it is {quote} "precisely the type of fact-bound inquiry that a Sentencing Court is better suited to make" {end quote}. In other words, it's completely within your discretion to do that. And we also disagree with any notion that Mr. Bekkedam should be penalized because he has a nice house. That seems to me to run against the sentencing guidelines themself. Section 5H1.10 makes socioeconomic status a factor that is {quote} "not relevant in the determination of a sentence" {end quote}. And a house is

simply a proxy for status. It would be unfair to have a situation where a Judge would tell one Defendant that he'd be eligible for house arrest, except his house is too nice, but the guy with the less nice house, he gets to go there. You know, it just -- it would raise that sort of level of unfairness. Congress recognized when they created the Sentencing Commission, when they created the Sentencing Reform Act, {quote} "the general appropriateness of imposing a sentence other than imprisonment" {end quote} for a non-violent first offender. That's 18 U.S. -- sorry, 28 U.S.C. 994(j). And that's why the Sentencing Commission listened; that's why they created the zero to six-month range for people that would largely fall under this category, the non-violent first-time offenders. We believe that's appropriate here. There is no added value of deterrence. Our sentencing memorandum went through the studies. For a white collar offender like him, no one similarly situated to him is going to look at what happened to Barry Bekkedam and say, you know what, I'm going to go ahead and lie to the Treasury. It is sufficiently punitive where we're at. We don't need to go any further. Thank you, Your Honor.

THE COURT: Thank you. Anything further?

MR. IGNALL: Well, my response to that would be more along the lines, I think, of a 3553(a) argument, so I don't know when the Court wants to address that.

THE COURT: All right. The Court notes that neither the current -- current meaning seated at the Government's table, Mr. Ignall -- Assistant United States Attorney, nor even this Court has control over whether or not anyone is deported. That decision is left to another department of the United States system. The Court does not participate in speculation in order for the Court's decision regarding sentencing to rest. I can only go on what is and what's within this Court's control. I've had numerous cases wherein people are potentially deportees and the Court can only go on what the law is and not on what the speculation can be, for every Defendant's counsel in practically every one of those other cases has argued regarding what could happen in terms of deportation. And in the end, I've seen one in eight years that was based upon a conviction that appeared before this Court. A person was shot and killed in that case. Therefore, the Defendant's motion for downward departure based on alienage is denied. The Government has asked the Court to consider an upward departure or upward variance, and I will address that shortly. Is there anything further in this regard before I proceed?

MR. IGNALL: No, Your Honor.

MR. ENGLE: No, Your Honor.

THE COURT: I will now go through the statutory maximum and minimum sentences that can be imposed. Regarding

incarceration, as to counts 1, 3 and 4, not more than five years per count. For count 2, not more than ten years. For supervised release, counts 1, 2, 3 and 4, not more than three years per count. The fines for counts 1, 3 and 4, $250,000 per count; count 2, $1 million. There is also a special assessment which is required in the amount of $100 per count. Therefore the maximum sentence that may be imposed regarding incarceration is 25 years incarceration, a maximum fine in the amount of $1,750,000, a maximum period of supervised release of three years, and a maximum special assessment in the amount of $400. The Probation Department has calculated the guideline ranges as follows: Regarding the offense level computation, the 2016 guidelines manual incorporating all guidelines amendments for use was used to determine the Defendant's offense level. Counts 1 through 4 are grouped for guideline calculation purposes. The counts involve the same victim, and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan, and the offense level is determined largely on the basis of the total amount of harm or loss. Count 1, conspiracy to defraud the United States; count 2, Troubled Asset Relief Program fraud; counts 3 and 4, false statements to Federal Government. The calculations are as follows: Base offense level, the guideline for 18 United States Code §1031 offenses has a base offense level of 6.

Regarding special offense characteristics, two levels are added pursuant to United States Sentencing Guidelines §2B1.1(b)(10)©. Because the offense involved sophisticated means, that adds two levels, therefore it would currently be at 8. Specific offense characteristics pursuant to United States Sentencing Guidelines §2B1.1(b)(16)(B)(I), no upward adjustment was applied. Victim-related adjustment, no adjustment was applied. Adjustment for role in the offense, the Defendant abused the position of public or private trust, or used a special skill in a manner that significantly facilitated the commission or concealment of the offense, that was originally increased by 2, and the Court has sustained the defense objection, which therefore creates an adjusted offense level of 8. The criminal history convictions are zero and therefore a total offense level of 8 with a criminal history category of 1 is, as counsel has articulated, a guideline range of zero to six months incarceration.

Now the Court addresses the issue of the upward variance motion by the Government. The Court has reviewed the testimony of a variety of witnesses in this case, which included Mr. Levin, or *Levin*, and also Mr. Peeve's testimony, as well as that of Mr. Hartline himself, and a number of other persons who testified critical to the case. The Court notes that the totality of the circumstances -- the totality

is such that it merits an upward enhancement by variance, and therefore the Court is going to grant the Government's motion for a variance upward, up two levels which takes us to 10. Based upon that, the offense level being 10 and the criminal history category being 1, would be six to twelve months as a guideline range of incarceration. The Court notes, as the Court has stated throughout this sentencing procedure, that's what all the guidelines are, the starting point or the benchmark. The guidelines are not mandatory. At this time I will hear argument from both sides beginning with Mr. Ignall.

MR. IGNALL: Your Honor, there's not a lot I need to add to our sentencing memorandum. The sentence in this case simply needs to reflect the seriousness of this offense, that although Mr. Bekkedam and Mr. Hartline didn't get any funding, they were engaged in a scheme to get $13½ million of public funding, money that was designed to keep healthy banks in business during one of the most difficult financial times in recent memory. This wasn't money that was simply a gift. These were funds that were designed to allow banks to continue lending, to keep credit going, to keep the economy afloat. It wasn't simply a way to allow a struggling and/or failing bank to try and stay afloat for a little bit longer. So the Defendant's conduct here put the taxpayers at risk, a significant risk of losing $13½ million. So even though the Court is determined that the intended loss for guideline

purposes is zero, the offense is much more serious than simply a no-loss fraud. A significant sentence here is necessary and appropriate in order to make sure that we promote respect for the law. We reflect the seriousness of this offense. We provide deterrence to those who might be similarly situated. A sentence that includes simply probation and home confinement, whether it's in a mansion or in a more modest house, would not satisfy all these goals. It would not provide adequate deterrence, it would simply be a cost of doing business. Okay, I got my first felony conviction. Certainly there is a consequence to that. I don't want a felony conviction; I'm sure no one else in the Court wants one. But that alone is not the same thing as a curative incarceration. That is a sentence that would indicate to this Defendant and to anyone else out there that just because you didn't succeed in getting the money doesn't mean there isn't a significant consequence to it. It would help promote respect for the law. It would promote deterrence, and with respect to the nature and characteristics of this Defendant, it would be appropriate, given his conduct in this case, his role in connection with the bank, people who are invested in the bank, and people who are borrowing from the bank. We heard from two witnesses at this trial, Hilary Mussed and Anthony Bonomo, who were clients of Mr. Bekkendam's, who borrowed money from the bank

to invest with Mr. Bekkendam. This is all interconnected. This is part of his lifestyle. He wanted to keep it going. Maybe it was 1% of his lifestyle, maybe it was 50% of his lifestyle. Regardless, he still chose to engage in serious conduct that put the taxpayers at a serious risk, and therefore a significant sentence is appropriate. And I think a sentence at the high end of the variance that the Court is intending to imply, if 12 months, would be appropriate. I think a sentence even greater than that would be appropriate, as we said in our sentencing memorandum, so that it's equal to or greater than the sentence that was imposed by this Court on Mr. Hartline. Now there may be some other things that -- I don't know if the Court wants me to address anything that I've addressed in my supplemental sentencing memorandum that addressed the Defendant's sentencing memorandum, but if the Court has anything in particular, I'd be happy to address that.

THE COURT: You're at liberty to argue, counsel.

MR. IGNALL: Well, I don't think that -- we've already stated in our memorandum the financial hardship, again, is a total speculation in this case in terms of what incarceration would impose. Mr. Bekkendam was certainly free to answer questions from probation. He was certainly free to exercise his Fifth Amendment privilege if he wanted to not answer questions about his finances, but he can't choose

both. He can't now ask the Court to speculate about what his financial condition would be. And moreover, the evidence that probation does have suggests that Mr. Bekkendam is not in a tremendous financial hardship. He lives in a very nice house that I believe he paid nearly $3 million for. As of at least a couple years ago, he belonged to -- appears to have belonged to the golf club down there. He's bought a number of very expensive vehicles. So everything that we have before the Court suggests that an imposition of a sentence of incarceration would not pose any undue hardship, certainly no more so than a sentence of incarceration does on any family. And I know the Court has imposed sentences of imprisonment on people who are not as well off. There's always a hardship. There's always a hardship on the family. The family is always one of the victims whenever someone commits an offense. So I don't think that's a good basis for leniency. So I think when the Court considers all of the factors, a significant sentence, I would say at the high end of the variance range the Court intends to impose, is appropriate here.

THE COURT: Thank you.

MR. IGNALL: Thank you.

THE COURT: Counsel?

MR. MAN: Thank you, Your Honor. I understand your variance to reflect your thoughts about the crime that took

place, but one of the issues that the Court needs to consider beyond that is the characteristics of the individual. And the Supreme Court long ago in Pennsylvania ex rel. Sullivan v. Ash said that for the determination of sentences, justices generally require -- justice generally requires consideration of more than the particular acts by which a crime was committed, and that it be taken into account the circumstances of the offense, together with the character and propensity of the offender. And so you aren't going to sentence every Defendant to exactly the same offense for the exact same conduct. You're going to look at the type of person that is at issue. And here, even with the variance, Mr. Bekkendam is in zone B. He's eligible for a split sentence. We would still ask the Court to vary below that and provide for home confinement. And part of that is looking at -- even at the offense and the conduct that Mr. Bekkendam had. This wasn't driven by greed. He was trying to help his friends, he was trying to hopefully do right by his investors. But he didn't own any stock in the bank, he didn't make any money doing this, and he wouldn't have had. And also consider the fact we submitted a ton of letters to the Court identifying the circumstances of who Mr. Bekkendam is. The Government wants to talk about how he's been wealthy and so forth, but there's no doubt that his business has suffered, some of that because of the Rothstein scandal, the

decline of the economy generally, and others are related to the fact that he had this conviction. He has long investors and people have walked away from him. Other bad things that have happened, just last night a tornado struck his community, it damaged his house, it destroyed his daughter's school. You and I have discovered -- we're both from Oklahoma, we know what that's like. It's a difficult situation for the family that they're working through anyway. I'm not going to go through all the letters we provided the Court. I trust that the Court has read them. But --

THE COURT: Let me stop you there. What's the damage to the home?

MR. MAN: We're still in the process of assessing it. It happened last night. They were here. The house should be hurricane proof, but we understand that there is debris and things like that in the area. It should be a livable home, but we haven't had a chance to inspect. We know the school apparently was largely destroyed.

THE COURT: Was anyone injured?

MR. MAN: Not that we're aware of, but they learned about it I believe this morning, so we don't have a really --

THE COURT: No one was home?

MR. MAN: His daughter was home; she was in a closet. And then afterward I know that she is going and she's staying with friends now.

THE COURT: You'll have to confer with Mr. Bekkendam and let me know.

MR. MAN: Okay.

(Attorney and client confer)

MR. MAN: Mr. Bekkendam, he confirmed -- I was largely right. The daughter was -- because they weren't there, the daughter was staying at a friend's home and she was in the closet all last night with the tornado in the area, but she was not actually in the home.

THE COURT: All right.

MR. MAN: And his understanding, we haven't inspected it, but is that debris was flying. I don't know -- it didn't seem like serious damage to the home but it's a scary process, and the school itself has been hurt. So their family circumstances are not quite what they were five years ago. They're not quite living as high on the hog as they once did. The Court can consider this collateral consequences to their business that flow from the conviction anyway, the loss of investors, the loss of support as a factor that would be relevant. Mr. Bekkendam has been injured more than a Defendant's business would be in the mine line of work. He has lots of employees, and his inability to trade, his inability to do work would mean that those people's jobs would be in jeopardy.

THE COURT: Counsel, let me just interrupt for a

second. Now you're arguing the detriment financially, but the pre-sentence investigation shows nothing.

MR. MAN: Mr. Bekkendam was in an integral position. He did assert his Fifth Amendment rights and not disclose the assets that he has available to him, and that's because of a pending investigation. But I don't think there's an issue about the fact that the volume of his business has suffered as a result of this. I mean, he certainly has lost --

THE COURT: You're making an argument about something that is not of record, is my point.

MR. MAN: Okay.

THE COURT: There's no way that the probation investigator can corroborate anything that you're arguing at this point in time.

MR. MAN: All right, I can acknowledge that. That's a fair point, Your Honor. But so I guess I'll pivot. When, you know, a fellow at Oklahoma, Will Rogers, said when you're in a hole, stop digging. So I won't continue to pursue that point. But I do want to pursue the broader point that I do think is very fair, and that is that Mr. Bekkendam has definitely demonstrated himself to be a good man who has good character. These character letters, I'm sure you see a lot of them, Your Honor, but everyone should be able to identify some good deed that somebody has done for them. But Mr. Bekkendam was hoping, you know, somebody that he worked with

who lost their job, that lost their home and helped them find a home, took folks shopping to buy clothes, helped give him a place to live, that's kind of going above and beyond the call of duty. He does a lot of anonymous gifts, you know. The family that he stayed with in the United States, when his school wanted to have a gym built and they asked him for money, he wrote the check. A lot of guys who are wealthy can write the check, but he didn't donate the -- he didn't name it after himself, he named it after his host family, because that was just a nice testament. It's a nice way for him to give back to people. And, you know, there were at least two incidents that are addressed in the sentencing memo of people who had lost everything, they needed a place to stay and he brought them into his home. One of those people stayed there for three years. I mean, that is really going above and beyond the call of duty in terms of trying to be there for your friends in need. He bailed people out repeatedly when they had financial hardships. He helped people when they were suffering and worrying about a spouse that had lost wages. All those things are attested to for the Court, and I hope that the Court can appreciate that he's -- he doesn't stand in the typical position. This is his first-time offense and he's a man that has done -- lived a rather exemplary life up until now. So I hope that the Court can see fit to give him the benefit of the doubt and steer more

towards a home confinement situation, at least in part, rather than incarcerate him.

THE COURT: Are there witnesses you wish to present on behalf of the Defendant, other than those that were in written communication form that I have read? And I have read every letter, all 21 of them.

MR. MAN: We trusted that you would, Your Honor. And because of that, we didn't. We supplied the number of letters and we thought the letters largely spoke for themselves.

THE COURT: All right. Mr. Bekkendam, I've read the letters that were sent to me on your behalf, and you have the right of allocution, you have a right to speak to the Court at this time if you wish, you do not have to, regarding the sentence that the Court should impose in this case.

MR. BEKKENDAM: Your Honor, this is a very difficult day for me. I feel like I've let a lot of people down and I'm sorry for that. My family means the world to me, and the hardest part of all this for me is seeing how they are suffering. I am -- I have to tell you that I am so grateful to my family, my wife, my children, my parents, her parents, her brother, for having stood through this whole thing with me. It's been a long, long road. At this very low point of my life, they have been a bigger source of strength for me than they will ever know. Believe me when I tell you that I

would never want to do anything that could hurt them ever again. I've never imagined that I would be standing before any Court anywhere, but I promise you that this will be the last time. Whatever the line that has separated from right or wrong, I plan to be well on the side of doing the right thing, which I've always tried to do. I also hope that you do not see me as a lost cause. My parents instilled in me the importance of integrity, hard work, and I've not forgotten that. I've worked really hard every day. I also have benefitted so much over my life from the generosity of mentors and coaches and older friends and people that have taught me. I've tried to show the same kind of kindness to others. I've always tried to do that. I am grateful to my friends and family for writing to the Court to tell you of the times when I did succeed in being the kind of man that I wanted to be. I did none of those things for my own name, for publicity or anything like that. I always thought they were quiet; I forgot most of the things that I had done. Those letters were written to you so that you could see that there is good in me. But those letters may have had more powerful impact on me. As I said, I didn't remember half of the things that I did, because I do a lot of stuff. Because they remind me of how I want my children to see me. I want them to remember me as someone who is kind, a social support to others, and I promise them and I promise the Court that I

will work harder to be that guy. As one of the letters said, I'd jump in with two feet. Sometimes I jump in to help but I don't think about it, and I need to think about it. And I think this is a case where I should have thought a lot more. I would be grateful if you could impose a sentence on me that would not keep me from my family, allow me to continue to work even from wherever. That would allow me to continue to support them, support all the things that I continue to do for people, and for me to be a better person. I owe that to them. I appreciate the Court taking the time to hear from me, and I thank you.

(Pause in proceedings)

THE COURT: The Court will now address all considerations which the Court is required to do pursuant to Title 18 of the United States Code, specifically §3553(a). The advisory sentencing guidelines are a major factor that the Court must consider in imposing an otherwise discretionary sentence. §3553(a) directs that the Court, in determining the particular sentence to be imposed, shall also consider the nature and the circumstances of the offense, and the history and characteristics of the Defendant; the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; the need to afford adequate deterrence to criminal conduct and to protect the public from

further crimes of the Defendant; the need to provide the Defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; the guidelines and policy statements issued by the United States Sentencing Commission; the need to avoid unwarranted sentence disparities among Defendants with similar records who have been found guilty of similar conduct, and whether restitution is an issue in the case. I have painstakingly reviewed all of the relevant sentencing factors contained in the pre-sentence investigation report which was very, very thorough, and I commend Ms. Maier for doing such a grand job. I've considered the memoranda of the Government and the defense, and in particular the Court is acutely aware of the content of the letter that's referenced as Exhibit-B in the defense communications to the Court. I have received a letter requesting severe punishment for the Defendant from an individual who had nothing to do with this case, and I've received 21 letters as demonstrated in Exhibit-A of the Defendant's submissions, as well as the Defendant's statement of allocution. I've considered all the factors in fashioning a sentence that will not result in an unwarranted disparity in sentencing. I note that Mr. Bekkendam stands before the Court to be sentenced for very, very serious conduct. It is by no means de minimis as it is an attempt, or was an attempt, to obtain public funds. I am

now tasked with fashioning a sentence that must take into account all the factors that I've just referenced.

The record speaks for itself in terms of the history and characteristics of the Defendant as it pertains to the conduct for which the jury adjudged him guilty, including the fact that he held positions of responsibility prior to the commission of the offenses in this case, and wielded, as I indicated before, such influence that he was essentially granted sort of favored nation status, if you will. What is important to note here is not just the fact that there was an attempt to defraud the Government of the 3½ -- $13½ million, but rather, as counsel for the Government as argued consistently, the risk that was imposed by reason of this attempt, the risk that was posed to those people who supplied the funds for the TARP program, those people being the taxpayers. I note that the Defendant does not have a criminal history, and certainly among the myriad of letters that were written to the Court on his behalf, those from his ex-wife, those from his current wife, and those of his children -- and I say children collectively, because one of the things that I think that Mr. Bekkendam can be most proud of was the letter written on his behalf by his current wife regarding how he took her daughters under his wing and treated them as children of his own. One of the letters from Mr. D. Marc Antonio, who was a witness in this case, pointed

out a number of things that Mr. Bekkendam has done that he received no public acknowledgment for, but did the kind of things that I suppose making reference to Will Rogers would make someone say that I never met a man I didn't like, and clearly there are people who appreciated everything that Mr. Bekkendam did. But nevertheless, as I indicated before, there was one letter asking for his hide, if you will, as we say at Oklahoma. The fact of the matter is that the Court has taken into consideration every possible factor regarding the nature and circumstances of the act, as well as the history and characteristics of Mr. Bekkendam.

As I indicated early on, the advisory guidelines are just that, advisory, and they are, as required, to be considered by the Court in fashioning an appropriate sentence, and they are in essence the benchmark for consideration of the appropriate sentence. There have been numerous references to various cases, one of which is the Kipp decision decided by the 3rd Circuit regarding the application of the guidelines and in particular, again, the risk that was placed, not just the actual loss, as it was in this case, zero. I've also indicated I am going to grant and did grant the Government's motion for an upward variance, which results in a guideline range total offense level of 10, with a criminal history category of 1, the guideline range being 6 to 12 months' incarceration.

I will now state the sentence that I contemplate imposing. However, counsel will have a final opportunity to object to the formal imposition of sentence. Having taken everything into consideration, the Court contemplates imposing the following sentence: Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that the Defendant, Barry Bekkendam, be committed to the custody of the Bureau of Prisons to be imprisoned for a term of 11 months on each of counts 1, 2, 3 and 4, all such terms to run concurrently, one with the other. Upon release from imprisonment, the Defendant shall be placed on supervised release for a term of three years. This includes terms of three years' supervised release on each of counts 1, 2, 3 and 4, all such terms to run concurrently. Within 72 hours of release from the custody of the Bureau of Prisons, the Defendant shall report in person to the probation office in the District to which he is released. While on supervised release, the Defendant shall not commit another federal, state or local crime, shall be prohibited from possessing a firearm or other dangerous device, shall not possess an illegal controlled substance, and shall comply with the other standard conditions that have been adopted by this Court. The Defendant must submit to one drug test within 15 days of commencement of supervised release, and at least two tests thereafter as determined by the United States Probation

Officer. The Defendant shall submit to the collection of a DNA sample at the direction of the United States Probation Office, pursuant to §3 of the DNA Analysis Backlog Elimination Act of 2000. In addition, the Defendant shall comply with the following special conditions: The Defendant shall provide the United States Probation Office with full disclosure of his financial records to include yearly income tax returns on the request of the United States Probation Office. The Defendant shall cooperate with the probation officer in the investigation of his financial dealings and shall provide truthful monthly statements of his income. The Defendant is prohibited from incurring any new credit charges or opening additional lines of credit without the approval of the probation officer, unless the Defendant is in compliance with a payment schedule for any fine or restitution obligation. There is no restitution obligation; however, there will be a fine to be imposed. The Defendant shall not encumber or liquidate interest in any assets unless it is in direct service of the fine or restitution obligation, or otherwise has the express approval of the Court. Now as I made a reference, in any and every other case I've ever had regarding the imposition of a fine, the Court evaluates the information submitted by a Defendant in the pre-sentence investigation interview regarding the Defendant's assets and liabilities. The only thing that was alluded to in the pre-

sentence investigation that came from Mr. Bekkendam was that he has some consulting income and nothing more. Counsel for Mr. Bekkendam has made reference to Will Rogers. One other thing he said was all I know is what I read in the papers. I did not venture to read anything in the papers about Mr. Bekkendam and carefully avoided reading anything that referenced anything that occurred with Rothstein, or anything else in the Paeans scheme, and did not even let it come into Court during the testimony of this case. So therefore all I know is what's in the pre-sentence investigation referencing the value of his home, the value of some automobiles, and I think that's the extent. But based upon that, the Court can reasonably conclude that it will be appropriate to impose a fine in the amount of $100,000 and that's what I'm going to do.

Now I made reference to income taxes. The $100 fine will be due immediately. If the Defendant pays the $100 fine immediately -- $100,000 fine immediately, there won't be any need to go into income taxes to make sure that he can make monthly payments. As I indicated, the fine is due immediately. I will translate that to be within 30 days of today's date. The Defendant shall notify the United States Attorney's Office for this District within 30 days of any change of mailing address or residence that occurs while any portion of the fine remains unpaid. It is further ordered

that the Defendant shall pay to the United States a total special assessment of $400, which shall be due immediately. Now that is the sentence that is contemplated by the Court. I will hear from counsel.

MR. IGNALL: Nothing from the Government, Your Honor.

MR. MAN: Your Honor, you're within the zone B. We would ask if you could make part of the sentence a split sentence so that he could do part of it in a -- in something other than a penal institution.

THE COURT: Counsel, I have given that much thought, and I've been a Judge for almost 30 years. There are people who live {quote, unquote} "in the ghetto," who believe their home is a castle, because they have a home. There are people who are wealthy as all get-out, as we say, and aren't necessarily satisfied. I don't take consideration, or take into consideration the residence of an individual when I decide whether or not someone is entitled to a home confinement, because a person's home is a person's home regardless. What I consider is the fact that once you go behind a cell door, that door closes, and no matter what kind of home you have, you can't go out when you want to. You can't eat when you want to. And you have to sleep when you're told, and everything else. So therefore I've considered it, but I'm going to deny it. 11 months. The

Federal Bureau of Prisons will determine where he will be held. The Court will, however, make a recommendation to the Federal Bureau of Prisons that Mr. Bekkendam be housed in a facility that Mr. Bekkendam says to this Court would be amenable for visitation of his family here in the Philadelphia area and his family in Florida. I'll let you let me know what that is. Beyond that, is there any objection to the Court's sentence as contemplated?

MR. MAN: No, Your Honor.

THE COURT: Very well. Mr. Bekkendam, please rise. Mr. Barry Bekkendam, it is formally the sentence of this Court that you serve a period of incarceration of 11 months on counts 1, 2, 3 and 4 to run concurrently one with the other. The Court imposes three-year period of supervised release on each of counts 1 through 4, to run concurrently, one with the other. The Court imposes a $400 special assessment cost which must be paid immediately, and the Court imposes a fine in the amount of $100,000, which must be imposed immediate -- which must be paid immediately. However, the Court will give you 30 days to pay that amount. As I made reference as to one of the conditions of probation, of the supervised release period and the sentence, if the $100,000 fine is paid within 30 days of today's date, there will be no need for any further investigation regarding income taxes or reporting of monthly income. Do you

understand the sentence imposed by this Court?

MR. BEKKENDAM: Yes, Sir.

THE COURT: And sir, as a result thereof, you have a right to file a notice of appeal and you can do so, and must do so, within 14 days of the date of the entry of the judgment. If you cannot afford counsel, counsel will be appointed to represent you. Mr. Bekkendam, this has been a very, very arduous process, not by me, but rather by all of those whose lives you have touched, the good and the bad. Regardless of what happens ultimately in this case and to you, as many people as you hurt, a lot of good was done by you and there's no reason to stop doing that good. The difference simply is, is that there are rules that we all must abide by. The jury of your peers found that you violated those rules. The rest is up to the Court to impose what I believe is an appropriate sentence. Lastly, in terms of the letters that were written to me not only by your friends, but by your children, I read every one and they touched me, I can assure you of that. This matter is adjourned. Good day. Surrender date.

MR. MAN: Your Honor, we would ask that the Court grant a stay pending appeals so that we could work through the appellate issues, particularly given that the sentence would largely be served by the time any appeal could be complete, and also so that it would help give us time to work

with the Canadian Prisoner Transfer Treaty issues that we had addressed. That would be our opening request.

THE COURT: Counsel?

MR. IGNALL: We'd oppose that. I don't think there's a basis for bail pending appeal. I don't know that there's a issue of law or fact likely to result in a reversal or a new trial, but if there's a written motion, we'd certainly respond to that. I have no objection to the Court delaying the surrender date in 45 or 60 days to address anything that has to do with where he's going to be designated.

THE COURT: I'm going to give a surrender date of 60 days. Whatever it is you wish to do within that period of time, you're at liberty to do. But I will not stay the sentence.

MR. MAN: Okay. Your Honor, in terms of a recommendation for where he be housed, we are concerned about the immigration related issues, and for that reason we would ask that the Court recommend a facility that has an Institutional Hearing Program, or IHP. We believe those are currently available here in Pennsylvania in Allenwood or Moshannon, but we'd want to make sure that that would be right with BOP. The issue for Mr. Bekkendam is that as we discussed, a normal process is a criminal process runs its course and then the immigration will begin. For the IHP

process, the Court -- the immigration authority can start working at the same time he's in jail, so hopefully there will be no detainer that would last longer than the 11 months this Court had put on him.

THE COURT: Again, I have no control over it. I can only make a recommendation, and I will make that recommendation.

MR. MAN: Thank you, Your Honor.

THE COURT: Please put it in writing so that can get to my Deputy Clerk.

MR. MAN: We will, Your Honor. Thank you.

THE COURT: All right. Is there anything further?

MR. IGNALL: Nothing from the Government, Your Honor.

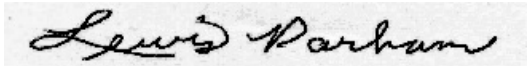
MR. MAN: No.

THE COURT: This matter is adjourned. Thank you.

(Court adjourned)

CERTIFICATION

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.



2/2/17

Signature of Transcriber Date

Exhibit B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	)	2:14-cr-00548-CDJ
	)	
	)	November 14, 2016
vs.	)	Philadelphia, PA
	)	
	)	
BRIAN HARTLINE, et al	)	9:24 a.m. - 12:57 p.m.

SENTENCING
BEFORE THE HONORABLE C. DARNELL JONES, II
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For United States of America:	DAVID IGNALL, ESQ. U.S. ATTORNEY'S OFFICE 615 Chestnut Street Suite 1250 Philadelphia, PA 19106
For Defendant Brian Hartline:	PATRICK J. EGAN, ESQ. JOHN C. FULLER, ESQ. FOX ROTHSCHILD, LLP 2000 Market Street, 10th FL Philadelphia, PA 19107

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he's fully aware of that.

But when it comes to punishment, given that the guidelines are advisory I just need to highlight the issue here is what's the appropriate ultimate punishment; that I think the guideline starting point should be the $13.5 million, but then that would overstate the seriousness of the offense.

If the Court were to sustain the objection and bring the loss down to zero, that would significantly understate the seriousness of this offense because there's no question that this defendant put the treasury at risk for losing up to $13.5 million.

So whichever way the Court comes down on this, I think the appropriate sentence as we'll get to when we look at the 3553(a) factors is somewhere in between those two.

THE COURT: All right. Thank you --

MR. IGNALL: Thank you.

THE COURT: -- very much.

Counsel, your next objection for the record --

MR. EGAN: Your Honor, could I just really briefly respond to that?

THE COURT: Surely.

he has not worked since February of 2016. The record also reflects that Mr. Hartline has a net worth of $2,686,404.

It is arguable that Mr. Hartline was not motivated to commit the instant offense by greed per se, but rather a desire to keep Nova Bank afloat. The Court notes that as would go Nova Bank and its successes, so would Mr. Hartline.

There are those who look upon the argument of counsel regarding what did not happen to the big banks and never -- nevertheless suggest that because it's a white collar crime those with means need not pay any penalties, but only the little person would have to endure prison or other sentences because of what they don't have and who they don't know. Their eyes are on both the convicted offender as well as the sentencer in deciding whether or not people get a fair shake in this country.

This Court notes that although there was $13,500,000 at issue in the case, as stated previously the bank did not suffer any loss. Nevertheless, that does not take into consideration the cost of prosecution of this case and the fact that a verdict of guilty was, in fact, returned.

Regarding the government's motion for

upward variance and the defendant's motion for a downward variance, each side has made very impressive and thoughtful arguments. In terms of what the government has requested, the Court thinks it is inappropriate to make an example out of Mr. Hartline.

Concomitantly, the Court believes that the basis that have been argued for a downward variance are such that as I indicated earlier so many people who come before any judge have argued. Thusly, each motion for upward variance and downward variance are hereby denied -- is hereby denied.

As I indicated early on the end result is an offense level of 12 with a criminal history category of one. The guideline range, therefore, is ten to 16 months of incarceration. As is clearly understood by all the guidelines are advisory. They are not mandatory.

Therefore, the sentence of the Court has to be one that is reasonable, and if incarceration is warranted that it be not greater than necessary to address the punish -- to address the criminality of the defendant.

To the extent that it has been argued that Mr. Hartline is the only person who can take care of his parents, and I do sympathize with their state,

God forbid if something happened to him this afternoon they would have to fend one way or the other, as is the case with everybody who appears before a court for sentencing.

The Court will now state the sentence that it contemplates imposing. However, before it is formally imposed, counsel for the government and the defendant will have a right to make objections and further arguments thereto.

The Court contemplates sentencing as follows:

Pursuant to the Sentencing Reform Act of 1984 it is the judgment of the Court that the defendant, Brian Hartline, be committed to the custody of the Federal Bureau of Prisons to serve a sentence of 14 months. That term of 14 months is to run as to Count I, Count II, Count III and Count IV, all concurrently, one with the other.

The Court also imposes a period of supervised release on each of Counts I, II, III and IV for a period of three years to run concurrently, one with the other.

Within 72 hours of release from the custody of the Bureau of Prisons the defendant shall report in person to the probation office in the

Exhibit C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,	)	14-CR-0548
	)	
vs.	)	
	)	
BRIAN HARTLINE and	)	
BARRY BEKKEDAM,	)	Philadelphia, PA
	)	April 7, 2016
Defendants.	)	9:44 a.m.

TRANSCRIPT OF JURY TRIAL (DAY 7)
BEFORE THE HONORABLE C. DARNELL JONES, II
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Government:	JENNIFER CHUN BARRY, ESQUIRE DAVID J. IGNALL, ESQUIRE ASSISTANT UNITED STATES ATTORNEYS UNITED STATES ATTORNEY'S OFFICE 615 Chestnut Street, Suite 1250 Philadelphia, PA 19106
For the Defendant Brian Hartline:	PATRICK J. EGAN, ESQUIRE FOX ROTHSCHILD LLP 2000 Market Street, 10th Floor Philadelphia, PA 19107
For the Defendant Barry Bekkedam:	MICHAEL J. ENGLE, ESQUIRE GREENBLATT, PIERCE, ENGLE, FUNT & FLORES 123 South Broad Street, Suite 2500 Philadelphia, PA 19109 ALLISON BAKER SHEALY, ESQUIRE JOEL D. SCHWARTZ, ESQUIRE RUSSELL D. DUNCAN, ESQUIRE SHULMAN, ROGERS, GANDAL, PORDY & ECKER, PA 12505 Park Potomac Avenue Potomac, MD 20854
Audio Operator:	CARL HAUGER
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MS. BARRY: No further questions, Your Honor.

THE COURT: You may cross-examine.

MR. EGAN: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. EGAN:

Q Good morning, Mr. Hanuscin.

A Good morning.

Q We'll go into this in all the detail, but before we do, I want to just ask you about an answer you gave just a few minutes ago. You said to the prosecutor that when KPMG brought up this issue of whether these loans counted as capital, I tried to write down your answer exactly, you wrote -- you said, "Mr. Hartline believed that they could be counted as capital and he didn't agree with it," correct?

A Correct.

Q And so now we are talking about April 2010, right? You have to say yes or no.

A Yes. Sorry.

Q And in April 2010, when KPMG said these couldn't count as capital, Mr. Hartline did not believe they were correct?

A Correct.

Q You didn't believe they were correct either, did you?

A Correct.

Q All right. We're going to get back to that. You went to work at Nova Bank in 2008?

A Correct.
Q And the first time that you ever heard of that was when Mr. Shubin at KPMG brought it up in May of 2010?
A Yes.
Q And at the time he sent to you a copy of EITF 85-1, right?
A Yes.
Q And that was so you could take a look at it?
A Yes.
Q And I believe you testified on direct examination that you disagreed with him that it was applicable, correct?
A Yes.
Q And Mr. Hartline also agreed with him (sic) that it was -- was not applicable?
A Yes.
Q And as a result, your belief was Nova should have been able to count the capital, correct?
A Yes.
Q And Mr. Hartline's belief was that Nova should have been able to count the capital --
MS. BARRY: Objection.
THE COURT: Sustained.
BY MR. EGAN:
Q Did Mr. Hartline tell you that he believed that Nova should have been able to count the capital?

A Yes.
Q But KPMG is your auditor, right?
A Yes.
Q And they're a big, big company, right?
A Yes.
Q And there aren't many KPMGs in the world, are there?
A No.
Q And, in fact, for a bank such as yours, to have its financial statements audited, you only have a few choices, correct?
A Yes.
Q Basically the big four?
A Yeah, it's a big four firm.
Q And KPMG costs a lot of money, don't they?
A Yes.
Q And they charge a lot of money to do these audits, correct?
A Yes.
Q So if you wanted to get somebody on KPMG's footing to disagree with KPMG, you would have to go out and hire one of these other big four auditing firms, correct?
A Correct.
Q And that would have cost the bank hundreds of thousands of dollars, correct?
A Yes.

Exhibit D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,	)	14-CR-0548
	)	
vs.	)	
	)	
BRIAN HARTLINE and	)	
BARRY BEKKEDAM,	)	Philadelphia, PA
	)	March 29, 2016
Defendants.	)	10:05 a.m.

TRANSCRIPT OF OPENING STATEMENTS
BEFORE THE HONORABLE C. DARNELL JONES, II
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Government:	DAVID J. IGNALL, ESQUIRE ASSISTANT UNITED STATES ATTORNEY UNITED STATES ATTORNEY'S OFFICE 615 Chestnut Street, Suite 1250 Philadelphia, PA 19106
For the Defendant Brian Hartline:	PATRICK J. EGAN, ESQUIRE FOX ROTHSCHILD LLP 2000 Market Street, 10th Floor Philadelphia, PA 19107
For the Defendant Barry Bekkedam:	MICHAEL J. ENGLE, ESQUIRE GREENBLATT, PIERCE, ENGLE, FUNT & FLORES 123 South Broad Street, Suite 2500 Philadelphia, PA 19109 RUSSELL D. DUNCAN, ESQUIRE SHULMAN, ROGERS, GANDAL, PORDY & ECKER, PA 12505 Park Potomac Avenue Potomac, MD 20854
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gotten at this point a total of $8 million, when in fact that $8 million came from the bank itself. That way, come December of 2015, Mr. Hartline could represent to the FDIC that the bank had met the contingency.

But the fraud here is that Mr. Hartline concealed the truth. He hid from the regulators that $8 million of that 15 million was the bank's own money. Mr. Hartline did that because he knew that if the regulators found out that the money came from the bank itself, that didn't make the bank any stronger. That's something they would want to know, and that's what makes this fraud.

What makes this a fraud is concealing the truth from regulators. What makes this a fraud is Mr. Bekkedam concealing the truth from investors that he and people who were working for him were soliciting to invest in the bank by making it seem that it was stronger than it was.

And you're going to learn from people at the Treasury, people who were on this CPP council working for the Treasury, that when they said $15 million, they meant $15 million. They didn't mean send out a loan and get an IOU and hope that someone will pay $8 million later. They wanted $15 million of actual money in the bank so the bank would be stronger, the bank could loan more money, but more importantly the bank could absorb losses. If people didn't pay money back on their loans, the bank had a cushion. An IOU doesn't

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	)	2:14-cr-00548-CDJ
	)	
	)	April 13, 2016
vs.	)	Philadelphia, PA
	)	
	)	PARTIAL TRANSCRIPT
BRIAN HARTLINE, et al	)	9:39 a.m. - 1:53 p.m.

EXCERPT OF JURY TRIAL DAY 11
TESTIMONY OF DAVID SWARTZ & ALLEN SHUBIN
BEFORE THE HONORABLE C. DARNELL JONES, II
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For United States of America:	DAVID IGNALL, ESQ. U.S. ATTORNEY'S OFFICE 615 Chestnut Street Suite 1250 Philadelphia, PA 19106
For Defendant Brian Hartline:	PATRICK J. EGAN, ESQ. FOX ROTHSCHILD, LLP 2000 Market Street, 10th FL Philadelphia, PA 19107
For Defendant Barry Bekkedam:	JOEL SCHWARTZ, ESQ. RUSSELL D. DUNCAN, ESQ. SHULMAN ROGERS GANDAL PORDY & ECKER 12505 Park Potomac Ave 6th FL Potomac, MD 20854
	MICHAEL J. ENGLE, ESQ. GREENBLATT PIERCE ENGLE FUNT FLORES 123 S. Broad Street Suite 2500 Philadelphia, PA 19109

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THE COURT: Isn't that what you're arguing to the jury, though?

MR. IGNALL: No. We're arguing to the jury is that these defendants engaged in a scheme to defraud the United States by making the bank --

THE COURT: By --

MR. IGNALL: -- by making the bank appear to be stronger than it was. So when --

THE COURT: And the way they would make it appear to be stronger than it was was violating this rule.

MR. IGNALL: Well, it also violated that rule. But that's -- whether it violate that rule or not doesn't matter. The question is, did they omit a material fact to the Treasury.

THE COURT: Let me ask it this way. If that rule did not exist, would they have violated the law and how?

MR. IGNALL: Yes. They would have violated the law and how because by failing to disclose to the Treasury that $8 million in this new capital was money that the bank had loaned. The Treasury would have considered that important in making a decision about whether the bank is viable and thereby a worthy beneficiary of the TARP funding.

THE COURT: Mr. Ignall?

MR. IGNALL: The question is would the regulator have been interested in the fact that Mr. Levin borrowed the $5 million. That's pretty clear the answer is yes. So the next question --

THE COURT: Again, this is where I'm -- I have a problem --

MR. IGNALL: Okay.

THE COURT: -- in understanding. Not in deciding but just in understanding. Again, where does it say in the statute which they're charged with violating that that's an essential element?

MR. IGNALL: The essential element is, is there a false statement or an omission. It doesn't have to -- any other fraud doesn't require that there be a specific statute that you violate in terms of the language that's false.

THE COURT: Is it the government's position that the actions here were either omissions or false statements --

MR. IGNALL: Yes.

THE COURT: -- or both?

MR. IGNALL: It's both, actually, Your Honor.

THE COURT: Because it was carried as

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	)	2:14-cr-00548-CDJ
	)	
	)	April 20, 2016
vs.	)	Philadelphia, PA
	)	
	)	
BRIAN HARTLINE, et al	)	10:04 a.m. - 4:32 p.m.

JURY TRIAL DAY 14
BEFORE THE HONORABLE C. DARNELL JONES, II
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For United States of America:	DAVID IGNALL, ESQ. JENNIFER CHUN BARRY, ESQ. U.S. ATTORNEY'S OFFICE 615 Chestnut Street Suite 1250 Philadelphia, PA 19106
For Defendant Brian Hartline:	PATRICK J. EGAN, ESQ. FOX ROTHSCHILD, LLP 2000 Market Street, 10th FL Philadelphia, PA 19107
For Defendant Barry Bekkedam:	JOEL SCHWARTZ, ESQ. RUSSELL D. DUNCAN, ESQ. SHULMAN ROGERS GANDAL PORDY & ECKER 12505 Park Potomac Ave 6th FL Potomac, MD 20854
	MICHAEL J. ENGLE, ESQ. GREENBLATT PIERCE ENGLE FUNT FLORES 123 S. Broad Street Suite 2500 Philadelphia, PA 19109

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foreseeable to Mr. Bekkedam as part of a scheme to make the bank seem stronger, to make the bank eligible for thirteen and a half million dollars in public funding.

There was some talk about what's the difference. Well, the Court's instruction is going to be about materiality and materiality simply means is a fact, is a fact something that was capable of influencing the decision maker. It doesn't have to actually have influenced the decision maker, but was it capable of it. Is an omission capable of influencing the decision maker? Is a half truth capable of influencing the decision maker?

Telling the decision makers that Mr. Levin invested $5 million is at best a half truth because it omits a very, very important fact when it comes to the health of the bank; that the $5 million came from Nova Bank itself.

Let's talk a little bit about the other counts in this indictment. We have the false statements and those are the false statements that Mr. Hartline made to the treasury in order to get the TARP funding, false statements about Mr. Levin investing $5 million and false statements about Nova Bank having satisfied the contingency. And those are statements