No. 22-____

IN THE

Supreme Court of the United States

HAMID AKHAVAN AND RUBEN WEIGAND,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Confrontation Clause of the Sixth Amendment is violated by denying a criminal defendant the right to cross-examine a key prosecution witness live in court—rather than via remote video feed—pursuant to a general allowance for remote testimony where a trial judge finds that "exceptional circumstances" exist and that remote testimony would "further the interest of justice."

PARTIES TO THE PROCEEDING

The parties to the proceeding below were Petitioner Hamid Akhavan as defendant-appellant-cross-appellee, Petitioner Ruben Weigand as defendant-appellant, James Patterson as defendant, and Respondent United States of America as appellee-cross-appellant. There are no corporate parties requiring a disclosure statement under Supreme Court Rule 29.6.

RELATED PROCEEDINGS

Pursuant to Supreme Court Rule 14.1, Petitioners state that the following proceedings are directly related to the action that is the subject of this Petition.

United States District Court (S.D.N.Y.):

- *United States v. Weigand*, No. 1:20-cr-188-JSR-1 (June 30, 2021, amended July 1, 2021; July 6, 2021)
- *United States v. Akhavan*, No. 1:20-cr-188-JSR-2 (Sept. 1, 2021)

United States Court of Appeals (2d Cir.):

- *United States v. Akhavan*, No. 21-1678 (Dec. 21, 2022)
- *United States v. Weigand*, No. 21-1708 (Dec. 21, 2022)
- *United States v. Weigand*, No. 21-2214 (Dec. 21, 2022)
- *United States v. Akhavan*, No. 21-2466 (Dec. 21, 2022)

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INTRODUCTION

This case presents a square and acknowledged conflict in circuit authority on one of the most pressing questions of criminal procedure courts face today: when, if ever, may a prosecution witness testify against a defendant by remote video teleconference, thereby denying the defendant the opportunity to confront the witness live in the presence of the jury.

The Confrontation Clause of the Sixth Amendment "guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact." *Coy v. Iowa*, 487 U.S. 1012, 1016 (1988). That protection follows not only from the "irreducible literal meaning of the Clause," *id.* at 1021, but also from the ancient understanding that "there is something deep in human nature that regards face-to-face confrontation between accused and accuser as 'essential to a fair trial in a criminal prosecution,'" *id.* at 1019 (citation omitted). Only once has this Court approved a departure from that rule—in the special circumstance where one-way video testimony was "necessary to protect a child witness from trauma that would be caused by testifying in the physical presence of the defendant." *Maryland v. Craig*, 497 U.S. 836, 857 (1990).

The Second Circuit, however, has defied that precedent by fashioning a sweeping exception to the rule of in-person confrontation. Under the law of the Second Circuit, a prosecution witness may testify by remote video teleconference (*i.e.*, two-way video) whenever a court finds that "exceptional circumstances" exist and remote testimony would "further the interest of justice." *United States v. Gigante*, 166 F.3d 75, 81 (2d Cir. 1999); *see* App., *infra*, 11a (applying that standard).

That atextual and malleable standard has been squarely rejected by other federal courts of appeals, which have rightly dismissed it as an "outlier," *United States v. Carter*, 907 F.3d 1199, 1208 n.4 (9th Cir. 2018), that "stands alone" in a lopsided circuit conflict, *United States v. Yates*, 438 F.3d 1307, 1313-14 (11th Cir. 2006) (en banc); *see United States v. Bordeaux*, 400 F.3d 548, 554-55 (8th Cir. 2005). It has also been repudiated by state courts of last resort. *See, e.g.*, *State v. Smith*, 636 S.W.3d 576, 584 (Mo. 2022). And Justice Scalia denounced it by name when this Court declined to adopt a similar standard in the Federal Rules of Criminal Procedure. 207 F.R.D. 89, 93-94 (2002). As he put it, "[v]irtual confrontation might be sufficient to protect virtual constitutional rights," but it is not "sufficient to protect real ones." *Id.* at 94.

This case typifies the problems posed by the Second Circuit's breakaway rule. In a federal white-collar trial for bank fraud in the Southern District of New York, Petitioners contended that their system for processing credit-card transactions did not intentionally misrepresent any information material to U.S. banks. *See* App., *infra*, 4a-6a. In attempting to prove both materiality and intent, the Government relied heavily on Visa's transaction-approval policies. *Id.* at 54a. When prosecutors subpoenaed the company to testify at the March 2021 trial, Visa chose a 57-year-old corporate representative from California. *Id.* at 54a-55a. Citing travel-related health concerns common to tens of millions of Americans, he moved to testify by remote video teleconference rather than in person at trial. *Id.* The district court granted the request under the Second Circuit's permissive standard, noting that Petitioners would retain "almost all" the benefits of in-person confrontation. *Id.* at 64a.

Predictably, the remote testimony was marred by technical glitches, as when the Visa representative's screen froze during cross-examination by Petitioners' lead counsel. App., *infra*, 210a. Even when the technology was working, Petitioners were denied the opportunity to "[l]ook" the witness "in the eye" and make him assert allegations "to [their] face." *Coy*, 487 U.S. at 1018-19. And the jury had no way to "draw its own conclusions" from mannerisms that cannot be observed remotely, such as a fidgeting foot or refusal to look at certain parts of the courtroom. *Id.* at 1019. Instead, this key prosecution witness—later alluded to 42 times in the Government's closing argument—was a remote figure on a pixelated screen, appearing from the comfort of his attorney's office 3,000 miles away from the crucible of the criminal trial.

This case affords an ideal vehicle to resolve the circuit conflict over the scope of the in-person confrontation right. That division in authority has taken on urgent importance during the COVID-19 pandemic. And its significance will endure, because resort to remote video testimony will only grow more tempting as technology evolves. What will not change, however, is a criminal defendant's constitutional right to confront the witnesses against him face-to-face—not screen-to-screen. The "two are not constitutionally equivalent." *Yates*, 438 F.3d at 1315. Just as there is no virus exception to the First Amendment, *see Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020), there is no Zoom exception to the Confrontation Clause. This Court should grant review and vindicate that "bedrock constitutional protection[] afforded to criminal defendants." *Hemphill v. New York*, 142 S. Ct. 681, 690 (2022); *see Crawford v. Washington*, 541 U.S. 36, 42 (2004).

OPINIONS BELOW

The order of the court of appeals (App., *infra*, 1a-21a) is not published in the Federal Reporter but is available at 2022 WL 17825627. The district court's opinion denying Petitioners' motion for a new trial (App., *infra*, 22a-42a) is not published in the Federal Supplement but is available at 2021 WL 2776648. The district court's opinion and order granting the motion to testify by video (App., *infra*, 43a-64a) is reported at 523 F. Supp. 3d 443.

JURISDICTION

The court of appeals issued judgment on December 21, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him."

STATEMENT

A. Factual Background

Petitioners specialize in processing various forms of "high-risk" credit-card transactions. App., *infra*, 132a-134a. This case concerns their work for Eaze, a "major on-demand marijuana delivery service" that partners with dispensaries to provide marijuana products in states that allow such products. *Id.* at 3a; *see* Eaze, *About Eaze*, https://www.eaze.com/about.

As relevant here, Eaze sought standard access (as enjoyed by other web-based merchants) to a payment-processing structure that would enable acceptance of

online credit-card payments from customers drawing upon their own funds. App., *infra*, 3a. Petitioners introduced Eaze to companies that routed purchases from Eaze's website through European companies that appeared as online retailers unrelated to marijuana, thereby aiding efforts to contract with European merchant banks. *Id.* at 154a, 158a, 163a-164a. U.S. banks would then authorize the purchase transactions, and the corresponding funds would be remitted back through the credit-card networks to the European merchant banks and eventually settled to Eaze's dispensary partners. *Id.* at 67a-68a.

Eaze transactions thus flowed through the processing system much like any other transactions would, with each entity—the merchant banks, credit-card companies, and U.S. issuing banks—retaining a portion of the processing fees while drawing funds from cardholders' accounts. App., *infra*, 15a, 35a. For their part, cardholders obtained the products they wanted, in locations where the purchases were permitted by state law, at the agreed prices, using their own funds. *Id.* at 27a-28a, 65a, 67a. And U.S. banks processed the transactions consistent with guidance from the U.S. Treasury Department's Financial Crimes Enforcement Network (FinCEN) permitting banking by marijuana-related businesses that were legal under state law. *Id.* at 222a-223a; *see* FinCEN, *BSA Expectations Regarding Marijuana-Related Businesses*, bit.ly/3EMxb4j.

B. District Court Proceedings

1. The United States nevertheless indicted Petitioners in March 2020 for conspiracy to commit bank fraud, in violation of 18 U.S.C. § 1349. App., *infra*, 22a, 257a-269a. The gravamen of the Government's

theory was that the information accompanying the Eaze transactions obscured the fact that the product purchased was marijuana and deceived the U.S. banks into approving the transactions. *Id.* at 78a.

Petitioners defended on multiple grounds, including that the alleged misrepresentations were not material and that they lacked any intent to defraud U.S. banks. Among other things, Petitioners noted that the data accompanying credit-card transactions does not specify the product involved (*e.g.*, a purchase of cold medicine shows up simply as "pharmacy"), such that any misrepresentations concealing marijuana-related products could not be material. App., *infra*, 168a-170a, 173a-176a, 192a-193a. Moreover, Petitioners noted that banks do not inform consumers that marijuana-related transactions are prohibited, do not prevent consumers from engaging in those transactions, and do not sanction consumers when such transactions are carried out. *Id.* at 27a-28a, 178a-179a, 192a. Nor do banks, even when information is available to identify marijuana-related transactions, make any attempt to block or reverse those transactions, or to return the fees they collect from processing them. *Id.* at 192a, 220a, 222a.

To overcome those defenses, the Government cited bank and credit-card policies that purportedly required cardholders to engage only in transactions that are legal where conducted. App., *infra*, 26a. In particular, the Government relied on the policies of Visa and Mastercard, which purportedly prohibited marijuana transactions (given marijuana's status as a prohibited controlled substance under federal law) and led U.S. banks to do the same. *Id.* at 26a, 171a-172a, 189a-190a.

2. Both the Government and Petitioners subpoenaed Visa to testify at trial through a corporate representative. App., *infra*, 54a. Visa selected Martin Elliott, its Global Head of Franchise Risk Management. *Id.* While Elliott had "no firsthand knowledge of the specific transactions at issue," he could provide "process-type testimony about the workings of the Visa payment network." *Id.* at 54a-55a.

At the time of the trial (March 2021), Elliott resided in California. App., *infra*, 55a. He was 57 years old and, like half the adult population of the United States, had hypertension. *Id.*; *see* Centers for Disease Control and Prevention (CDC), *Facts About Hypertension*, bit.ly/3F2k2o7. He also suffered from atrial fibrillation (or AFib), *see* App., *infra*, 55a, which is "the most common type of treated heart arrhythmia" and affects millions of Americans, CDC, *What is atrial fibrilliation?*, bit.ly/3m7V9k9; *see id.* ("It is estimated that 12.1 million people in the United States will have AFib in 2030.").

Elliott lived with his wife, who was 55 years old and also had hypertension. App., *infra*, 55a. Together, they were primary caregivers for his 83-year-old mother-in-law, who lived nearby. *Id.* Elliott's mother-in-law had received one dose of a COVID-19 vaccine, but neither Elliott nor his wife had yet been vaccinated. *Id.* Although Elliott asserted that he had not traveled outside California since the onset of the pandemic, he had flown to see his daughter in the summer of 2020. *Id.*

Based on these circumstances, Elliott and Visa sought leave for him to testify remotely by video teleconference, rather than in person at the trial. App.,

infra, 32a-33a. The Government initially took no position on the motion, while Petitioners vigorously opposed it. *Id.* at 54a. Given that Elliott was a corporate representative, Petitioners noted there was no apparent reason why another Visa employee could not testify in person in his stead. *Id.* at 107a-108a. Moreover, trial was set to proceed amidst strict protocols to protect against the spread of COVID-19, which was "trending downward." *Id.* at 56a; see *id.* at 44a, 50a, 126a-127a. Among other precautions, social distancing was required at all times, including for jurors and attorneys. *Id.* at 126a, 255a. Daily temperature screenings, questionnaires, and a negative COVID-19 test (for anyone recently traveling outside of New York and contiguous states) were all required to enter court. *Id.* at 250a-256a. Masks were mandatory except for the witness and examiner, who stood and sat inside a plexiglass box with a HEPA filter. *Id.* at 255a; *see id.* at 126a. The counsel, jurors, staff, and 15 other witnesses complied and appeared live in court; only Visa and Elliott sought an exception. *See id.* at 44a.

Initially, the district court orally granted leave for Elliott to testify remotely, without seriously inquiring into whether a different corporate representative would be available to provide the desired testimony live in court. App., *infra*, 122a. In a subsequent written opinion, the court explained that it was applying the Second Circuit's decision in *United States v. Gigante*, 166 F.3d 75 (2d Cir. 1999), by "asking whether Elliott [was] 'unavailable' and whether 'exceptional circumstances' warrant the use of two-way video testimony." App., *infra*, 62a. The court found that "a substantial risk of contracting COVID-19" due to travel, plus Elliott's "age and comorbidities (as well as, to a lesser extent, the risks his family would face),"

put him at risk of "serious illness or death"—thus rendering him "'unavailable' to testify in person within the meaning of *Gigante*." *Id.* The court further found that the need to protect Elliott and his family from this risk constituted "exceptional circumstances." *Id.* The court added that Elliott's remote testimony "from his attorneys' offices in the San Francisco area" would "preserve almost all 'the intangible elements of the ordeal of testifying in a courtroom.'" *Id.* at 64a (quoting *Gigante*, 166 F.3d at 81).

In a footnote, the court also stated that the "standard articulated in" *Maryland v. Craig*, 497 U.S. 836 (1990)—which permits one-way video testimony where "'necessary to further an important public policy'" and "'where the reliability of the testimony is otherwise assured'"—was "satisfied, as well." App., *infra*, 63a-64a n.12 (quoting *Craig*, 497 U.S. at 850). The court reasoned that "[p]reventing the serious illness or death of a third-party witness whose testimony is compelled by subpoena is an important public policy," and that "the procedures applied here, even more than the one-way video testimony in *Craig*, will preserve every adversarial element of confrontation other than physical presence itself." *Id.*

3. Given the importance of Visa's policies to the issues before the jury, Elliott was cross-examined by Mr. Akhavan's lead trial counsel. Predictably, the use of two-way video significantly constrained and impaired the cross-examination. App., *infra*, 34a-35a. For example, because Elliott was testifying remotely, the parties could not show him exhibits directly, as they could when witnesses were physically present. *Id.* at 34a. Awkwardness attending remote handling

of the exhibits allowed Elliott to eat up defense counsel's precious time—which the court strictly limited to 45 minutes without any prospect of recross, *id.* at 195a—as he struggled to identify documents or particular pages. *See, e.g.*, *id.* at 199a, 202a-203a, 207a, 211a-212a. Other technical difficulties beset the examination and handicapped the jury's ability to perceive the witness in real time. *See, e.g., id.* at 210a (Elliott's screen freezing).

Furthermore, the defense was unable to cross-examine Elliott about a key piece of evidence—a slide deck that he presented to Visa stakeholders, which featured a slide on revenue generated and projected by the marijuana industry. App., *infra*, 203a-204a. This slide was important to the defense because it showed that Visa specifically discussed with its stakeholders—including issuing banks, *id.* at 205a—the potential profits from participating in the marijuana market, thereby bolstering the defense's theory that the card networks and issuing banks *knew* they were authorizing marijuana transactions and were glad to do so because such transactions are profitable. Because a redacted portion of the exhibit was ultimately admitted into evidence only after Elliott testified, however, the defense was unable to ask him about it. *Id.* at 206a. And the court refused to allow the defense to recall Elliott in light of logistical impediments, including the need to set up multiple cameras in the courtroom while separately arranging for Elliott to return to the office of Visa's outside counsel. *Id.* at 219a.

Even when defense counsel was able to question Elliott, the remote format made it far more difficult to press for focused answers. For example, in response

to the question, "Eaze was not terminated, right?" Elliott began "[o]ur belief was – and very typical –." App., *infra*, 209a. Defense counsel interjected "Sir, before you answer – before you explain, my question was, was Eaze terminated? Yes or no. Then I'll let you explain." *Id.* Sitting in his attorney's office 3,000 miles away, Elliott refused to give a straightforward "yes" or "no." *Id.* at 209a-210a. In another instance, Elliott was asked whether he was "familiar based on [his] knowledge and experience in this field with the term 'proxy.'" *Id.* at 208a. He responded "I'm not familiar with the way you use that term, no." *Id.* Defense counsel tried again: "I just asked if you are familiar with the word 'proxy.'" *Id.* Elliott again responded, "I don't know what you mean by that." *Id.* Throughout these exchanges, Petitioners and their counsel were denied traditional means of controlling Elliott's testimony and keeping him within fair bounds before the jury.

4. As expected, Elliott's testimony was pivotal. During its closing argument, the Government referenced Visa (for which Elliott was the sole representative) 42 times. App., *infra*, 228a-248a. Beyond the Visa policies that Elliott discussed, the Government was hard-pressed to invoke evidence supporting materiality and intent. To the contrary, the evidence showed that the banks during the relevant period had profitably processed tens of millions of dollars in transactions that explicitly and accurately named Eaze, *id.* at 27a-28a, and never used the transaction data in question for anything other than confirming customers' identification and the availability of funds, *id.* at 215a-216a.

The jury nevertheless credited the Government's side and found Petitioners guilty. App., *infra*, 22a. In light of the crucial role that Elliott played, Petitioners renewed their objections to his remote testimony, arguing in their post-trial motions that the Confrontation Clause had been violated. *See id.* at 32a-36a. The district court disagreed and held that *Gigante*'s standard had been satisfied. *Id.* at 33a. Referencing its prior opinion, the court determined that the "global pandemic" and Elliott's personal circumstances constituted "exceptional circumstances" under *Gigante*, thereby permitting the prosecution to obtain his testimony without any opportunity for in-court confrontation. *Id.* The court "incorporate[d] by reference its detailed pretrial assessment of the governing law and its finding of exceptional circumstances," per *Gigante*. *Id.* The court also dismissed the practical difficulties posed by Elliott's remote testimony. *Id.* at 34a-35a.

Finally, the court stated that "any error in this case would have been harmless beyond a reasonable doubt," reasoning that Elliott's testimony "was largely duplicative of John Verdeschi's (of MasterCard)" and that "there was no shortage of testimony by the credit card companies." App., *infra*, 35a-36a. In so stating, the court did not explain how Elliott's testimony could have been "material," as it would need to be under *Gigante*, or how "largely duplicative testimony" could have furnished "exceptional circumstances" for deviating from constitutionally ordained procedure. *Id.*

C. Second Circuit Proceedings

Petitioners appealed on multiple grounds, including that the Confrontation Clause required reversal. App., *infra*, 3a. Throughout its briefing on appeal, the Government relied on Elliott's testimony

to defend the convictions. *Id.* at 276a-278a (citing to App., *infra*, 294a-305a). The Second Circuit rejected Petitioners' Confrontation Clause argument along with all others raised by the defense, affirming the convictions in an unpublished summary order. *See id.* at 1a-21a.[1]

As relevant here, the Second Circuit explained that, under *Gigante*, it would "[r]eview[] the district court's factual findings under the clear error standard" and its ultimate determination to deviate from physical confrontation only for "abuse [of] discretion." App., *infra*, 10a-12a. Through that highly deferential lens, the court of appeals credited the district court's finding that "Elliott was unavailable" because "he could not travel across the country at a time when vaccines were not yet easily obtained without subjecting himself to a substantial risk of contracting COVID-19," which could "result in serious illness or death" in light of his "age and comorbidities." *Id.* at 11a. The court of appeals further relied on the district court's conclusion that the need to prevent such illness and "protect [Elliott's] family, including his 83-year-old mother-in-law," amounted to "exceptional circumstances warranting use of two-way video." *Id.* at 11a-12a. Nowhere did the court of appeals address the po-

[1] In addition to affirming the convictions, the Second Circuit granted relief in favor of the Government by vacating the forfeiture Mr. Akhavan had been ordered to pay at sentencing. The district court had reduced the forfeiture from $17 million to $103,750 on the ground that it would otherwise be unconstitutionally excessive when analyzed against the established criteria, but the Second Circuit faulted the analysis in discrete respects and remanded for the district court to revisit it. App., *infra*, 14a-17a.

tential availability of another corporate representative from Visa to substitute for Elliott and provide corresponding testimony for the prosecution in person. Nor did the court purport to reconcile Elliott's "unavailability" for the trial in this case—which was attended by rigorous health protocols—with Elliott's demonstrated ability just months earlier to travel via plane of his own volition and initiative, notwithstanding COVID-19. *Id.* at 55a.

REASONS FOR GRANTING THE WRIT

The Sixth Amendment guarantees the accused "the right … to be confronted with the witnesses against him." This Court has long recognized that those words mean what they say: a criminal defendant must have the "opportunity to challenge his accuser in a face-to-face encounter in front of the trier of fact," *California v. Green*, 399 U.S. 149, 156 (1970), subject to a sole, discrete exception applicable when "necessary" to enable testimony by a traumatized child sexual-abuse victim, *Maryland v. Craig*, 497 U.S. 836, 857 (1990). The Second Circuit, however, has invented a separate, sweeping exception applicable whenever a court finds that "exceptional circumstances" and the "interest of justice" weigh in favor of remote video testimony. *United States v. Gigante*, 166 F.3d 75, 81 (2d Cir. 1999). That is precisely the kind of "open-ended exception[] from the confrontation requirement" that this Court has repeatedly foreclosed. *Hemphill v. New York*, 142 S. Ct. 681, 690 (2022) (quoting *Crawford v. Washington*, 541 U.S. 36, 54 (2004)). Other courts of appeals have accordingly repudiated the Second Circuit's position as an "outlier," *United States v. Carter*, 907 F.3d 1199, 1208 n.4 (9th Cir. 2018), which "stands alone" in a lopsided circuit

conflict, *United States v. Yates*, 438 F.3d 1307, 1313-14 (11th Cir. 2006) (en banc).

The Court should grant review in this case to resolve that conflict. By allowing a corporate representative in a white-collar trial to testify remotely based on health concerns shared by tens of millions of Americans, the Second Circuit illustrated just how broad and malleable its *Gigante* exception is. The remote testimony in this case was critical; the Government invoked it repeatedly to prove the contested materiality and intent elements of the bank-fraud charges, and the Second Circuit did not suggest that an error in permitting the remote testimony would be harmless. Nor is this case a one-off. Absent this Court's intervention, the Second Circuit may only slide further and further down the *Gigante* slope, permitting remote testimony in circumstances that no other federal court of appeals would. Even after the pandemic subsides, the vast discretion afforded by *Gigante* will persist, while the advances in videoconference technology inspired by COVID-19 will make remote testimony ever more enticing.

This Court's intervention is thus urgently needed. "The simple truth is that confrontation through a video monitor is not the same as physical face-to-face confrontation." *Yates*, 438 F.3d at 1315. Even the best video technology cannot replicate the intangible cues conveyed by in-person testimony, when a witness "stand[s] face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *Mattox v. United States*, 156 U.S. 237, 242-43 (1895). Nor does testimony through a camera across the country fulfill the

defendant's basic right to be in the presence and look in the eyes of his accuser—a protection so fundamental that it dates back to ancient times. *Coy v. Iowa*, 487 U.S. 1012, 1015-16 (1988). In short, while "[v]irtual confrontation might be sufficient to protect virtual constitutional rights," it is not "sufficient to protect real ones." *Order of the Supreme Court*, 207 F.R.D. 89, 94 (2002) (statement of Scalia, J.).

A. The Sixth Amendment Guarantees A Right To In-Person Confrontation

In recent years, this Court has repeatedly addressed the meaning of "witnesses" in the Confrontation Clause's guarantee of a defendant's "right … to be confronted with the witnesses against him." *See Williams v. Illinois*, 567 U.S. 50, 65 (2012) (plurality opinion) (collecting decisions). That is not the issue in this case. There is no dispute that Visa's corporate representative (Elliott) was a "witness against" Petitioners. *See* App., *infra*, 58a ("[T]here is no doubt that his statements will be testimonial."). The question here is what Petitioners' right to "confront" Elliott entails.

"Simply as a matter of English," the term "confront" requires "at least 'a right to meet face to face all those who appear and give evidence at trial.'" *Coy*, 487 U.S. at 1016 (quoting *Green*, 399 U.S. at 175 (Harlan, J., concurring)). Indeed, "the word 'confront' ultimately derives from the prefix 'con-' (from 'contra' meaning 'against' or 'opposed') and the noun 'frons' (forehead)." *Id.* "Shakespeare was thus describing the root meaning of confrontation when he had Richard the Second say: 'Then call them to our presence—face to face, and frowning brow to brow, ourselves will hear the accuser and the accused freely speak....'" *Id.* (citation omitted).

That understanding of confrontation "dates back to Roman times." *Crawford*, 541 U.S. at 43. "The Roman Governor Festus, discussing the proper treatment of his prisoner, Paul, stated: 'It is not the manner of the Romans to deliver any man up to die before the accused has met his accusers face to face, and has been given a chance to defend himself against the charges.'" *Coy*, 487 U.S. at 1015-16. The Confrontation Clause itself responded to the failure of English courts to preserve (among other things) the right to in-person confrontation. *Crawford*, 541 U.S. at 43-44. One of the "most notorious" cases was Sir Walter Raleigh's trial for treason, in which his alleged accomplice—Lord Cobham—implicated him through an ex parte examination and a letter read aloud in court. *Id.* at 44. "Suspecting that Cobham would recant," Raleigh "demanded that the judges call him to appear, arguing that '[t]he Proof of the Common Law is by witness and jury: let Cobham be here, let him speak it. Call my accuser before my face ....'" *Id.* (citation omitted). But the "judges refused, … the jury convicted, … Raleigh was sentenced to death," and England adopted reforms "that limited these abuses" and formed a model for the Sixth Amendment. *Id.*

This Court's earliest opinions addressing the Confrontation Clause similarly emphasized the defendant's rights "of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination." *Mattox*, 156 U.S. at 244. A defendant could be convicted, therefore, on the testimony of "only such witnesses as meet him face to face at the trial, who give their testimony in his presence, and give to the accused an opportunity of cross-examination." *Dowdell v. United States*, 221 U.S. 325, 330 (1911).

In more recent years, the Court has continued to enforce the defendant's "right physically to face those who testify against him." *Pennsylvania v. Ritchie*, 480 U.S. 39, 51 (1987); *see Green*, 399 U.S. at 156-57. The opinion most thoroughly analyzing the issue, authored by Justice Scalia for the Court in *Coy*, explained that in-person, face-to-face "confrontation is essential to fairness." 487 U.S. at 1019. As a matter of human nature and common experience, "[i]t is always more difficult to tell a lie about a person 'to his face' than 'behind his back.'" *Id.* Indeed, "[a] witness 'may feel quite differently when he has to repeat his story looking at the man whom he will harm greatly by distorting or mistaking the facts.'" *Id.* (citation omitted). In-person, face-to-face confrontation thus "'ensur[es] the integrity of the fact-finding process,'" and is faithful to the "literal meaning of the" Constitution. *Id.* at 1020-21 (citation omitted).

The Court has recognized a single, narrow exception to that rule. In *Craig*, the Court considered the constitutionality of a state procedural provision that allowed a court "to receive, by one-way closed circuit television, the testimony of a child witness who is alleged to be a victim of child abuse." 497 U.S. at 840. The state permitted such video testimony only upon a finding that "testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate." *Id.* at 841 (citation omitted). When such a finding was made, "the child witness, prosecutor, and defense counsel [would] withdraw to a separate room," where the child could be "examined and cross-examined"—in person—by counsel, while "the judge, jury, and defendant" watched from the courtroom via video monitor. *Id.*

The Court permitted that special procedure because it found the "state interest in protecting child witnesses from the trauma of testifying in a child abuse case"—embodied there in a state law—"sufficiently important" to overcome the defendant's right to "a physical, face-to-face confrontation." *Craig*, 497 U.S. at 850, 855. The Court cautioned, however, that the defendant's in-person confrontation right may not "easily be dispensed with," and that such a deviation could occur only where "necessary to further an important public policy and only where the reliability of the testimony is otherwise assured." *Id.* at 850.[2]

B. The Second Circuit's Position Conflicts With Decisions Of Other Circuits

In the three decades since *Craig*, most federal courts of appeals have applied that decision's demanding standard to analyze requests that prosecution witnesses be allowed to testify by video teleconference. The Second Circuit, in contrast, has emerged as a stark "outlier," *Carter*, 907 F.3d at 1208 n.4, that "stands alone," *Yates*, 438 F.3d at 1313-14, based on its rejection of *Craig* and creation of a far more permissive standard for remote witness testimony in *Gigante* and subsequent cases—including this one.

1. The Second Circuit's Gigante *Decision*

In the *Gigante* prosecution, the Government moved to allow one of its cooperating witnesses—a member of the same organized crime family as the de-

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[2] Four dissenting Justices maintained that even the narrow exception recognized by the *Craig* majority was unwarranted. 497 U.S. at 860 (Scalia, J., joined by Brennan, Marshall, and Stevens, JJ.).

fendant on trial—to testify at trial from a remote location via two-way video. *See* 166 F.3d at 79. The district court granted that motion, relying on a finding that the witness was too ill to attend trial and the court's view that "American criminal procedure … is pragmatic." *United States v. Gigante*, 971 F. Supp. 755, 756 (E.D.N.Y. 1997). The Second Circuit affirmed, reasoning not only that the longstanding constitutional principle entitling the defendant to "face-to-face confrontation with [the prosecution witness] in the same room" was inapplicable, but also that it was "not necessary to enforce the … standard" announced in *Craig*. 166 F.3d at 80-81 (emphasis omitted).

In the Second Circuit's view, the fact that the district court had authorized remote testimony by "two-way" video, 166 F.3d at 81—instead of one-way video, as in *Craig*—meant that the defendant's confrontation right could be overcome without the "showing of necessity" required by *Craig*, 497 U.S. at 855. Rather than following this Court's precedent interpreting the Confrontation Clause, the Second Circuit selected a standard derived from Federal Rule of Criminal Procedure 15(a), which provides that a "party may move that a prospective witness be deposed in order to preserve testimony for trial" in case of unavailability, and that a "court may grant [such a] motion because of exceptional circumstances and in the interest of justice." Fed. R. Crim. Pro. 15(a); *see Gigante*, 166 F.3d at 81.

The Second Circuit acknowledged that Rule 15 did not apply directly, because the district court had not ordered a deposition—nor did the district court permit the defendant to be present at the examination, as would be required by Rule 15(c). Fed. R. Crim. Pro. 15(c); *see Gigante*, 166 F.3d at 81. But the court of

appeals concluded that its chosen standard—permitting testimony against a defendant by a witness appearing remotely by two-way video "[u]pon a finding of exceptional circumstances" whenever that procedure "furthers the interest of justice"—would afford the defendant "greater protection" than Rule 15, and was therefore permissible. *Id.* The Second Circuit added that it would review a district court's factual findings under that standard for clear error and its ultimate determination to allow remote testimony for "abuse of discretion." *Id.* at 80-81.

In recent years, district courts within the Second Circuit have relied upon *Gigante* in case after case to justify denying criminal defendants the opportunity to confront prosecution witnesses in court. *See, e.g.*, *United States v. Avenatti*, 2022 WL 103494 (S.D.N.Y. Jan. 11, 2022); *United States v. Donziger*, 2020 WL 5152162 (S.D.N.Y. Aug. 31, 2020); *United States v. Mostafa*, 14 F. Supp. 3d 515 (S.D.N.Y. 2014); *United States v. Abu Ghayth*, 2014 WL 144653 (S.D.N.Y. Jan. 15, 2014); *see also Beltran v. Keyser*, 2019 WL 2271360 (E.D.N.Y. May 28, 2019); *Martin v. Lord*, 378 F. Supp. 2d 184 (W.D.N.Y. 2005); *Jelinek v. Costello*, 247 F. Supp. 2d 212 (E.D.N.Y. 2003); *cf. United States v. Griffin*, 2021 WL 3188264, at *1-*2 (S.D.N.Y. July 28, 2021) (discussing *Gigante*'s standard in context of violation of supervised release hearing). The district courts have done so in circumstances far removed from those at issue in *Craig* or even *Gigante*. *See, e.g.*, *Mostafa*, 14 F. Supp. 3d at 515 (allowing remote testimony based on the possibility that the witness would be arrested upon travel to the United States); *Abu Ghayth*, 2014 WL 144653, at *2-*3 (same).

2. The Circuit Conflict

Other courts of appeals have squarely and expressly rejected the Second Circuit's position in *Gigante*. *See Carter*, 907 F.3d at 1208 n.4 (Ninth Circuit stating that it "agree[s] with the Eighth and Eleventh Circuits that *Gigante* is an outlier and that the proper test is *Craig*") (citing cases).

The Eighth Circuit rejected *Gigante*'s approach in *United States v. Bordeaux*, 400 F.3d 548 (8th Cir. 2005). The defendant there argued that his confrontation rights were violated when the district court "allowed the prosecuting witness to testify via closed-circuit television." *Id.* at 552. Citing *Gigante*, the Government argued that the test in *Craig* did "not control" because *Craig* "involved a one-way closed-circuit television system," while its witness had testified via "a two-way system." *Id.* at 553. The Eighth Circuit rejected that argument, reasoning (as relevant here) that *Craig* governed. *Id.* at 554. The court explained that "*Gigante* does not persuade us that 'confrontation' through a two-way closed circuit television is constitutionally equivalent to a face-to-face confrontation because it neglects the intangible but crucial differences between a face-to-face confrontation and a 'confrontation' that is electronically created by cameras, cables, and monitors." *Id.* at 554-55. In particular, the "virtual 'confrontations' offered by closed-circuit television systems fall short of the face-to-face standard because they do not provide the same truth-inducing effect." *Id.* at 554.

The Eleventh Circuit sitting en banc likewise rejected *Gigante* in *Yates*. 438 F.3d at 1313-14. The question in *Yates* was "whether witness testimony presented on a television monitor at a criminal trial

in Montgomery, Alabama, by live, two-way video conference with witnesses in Australia, violated the Defendants' Sixth Amendment right to confront the witnesses against them." *Id.* at 1309. Reprising its and the Second Circuit's position in *Gigante*, the Government argued that the Eleventh Circuit "should not apply the *Craig* rule" because the testimony was obtained "by two-way video conference rather than one-way video conference." *Id.* at 1312. The Eleventh Circuit "reject[ed] this reasoning," stated that "[t]he *Gigante* trial court should have applied *Craig*," and added that "[t]he Second Circuit stands alone in its refusal to apply *Craig*." *Id.* at 1313-14. The court observed that "[t]he simple truth is that confrontation through a video monitor is not the same as physical face-to-face confrontation," that "the two are not constitutionally equivalent," and that "[t]he Sixth Amendment's guarantee of the right to confront one's accuser is most certainly compromised when the confrontation occurs through an electronic medium." *Id.* at 1315 (citing *Bordeaux*, 400 F.3d at 554-55).

The Ninth Circuit similarly rejected *Gigante* in *Carter*. There, the court of appeals vacated convictions because a prosecution witness had been permitted to testify remotely "by two-way video, as she was seven months pregnant and unable to travel." 907 F.3d at 1202. The Ninth Circuit "expressly h[e]ld" that "*Craig*'s two-part test applies to the use of two-way video testimony," thereby "join[ing]" the "other circuits" that had addressed the issue and applied *Craig*. *Id.* at 1207-08 & n.4 (citing *Yates* and *Bordeaux*, *supra*). The Ninth Circuit observed that, "[r]egardless of whether the video procedure is one-way or two-way, the defendant is being denied 'a physical, face-to-face confrontation at trial,'" *id.* at 1208 n.4

(quoting *Craig*, 497 U.S. at 850), and that "equating a two-way video procedure with face-to-face confrontation necessarily neglects" crucial "'intangible elements' of confrontation,'" *id.* (quoting *Gigante*, 166 F.3d at 81).

The conflict between *Gigante* and the decisions of the Eighth, Ninth, and Eleventh Circuits are clearest because those courts reversed convictions upon rejecting *Gigante* and instead applying *Craig*. But other federal courts of appeals and state appellate courts have also repudiated the Second Circuit's position by concluding that *Craig*'s standard—not Rule 15—governs analysis of a request for remote witness testimony by two-way video. *See, e.g.*, *United States v. Wandahsega*, 924 F.3d 868, 879 (6th Cir. 2019); *United States v. Abu Ali*, 528 F.3d 210, 240-41 (4th Cir. 2008); *Horn v. Quarterman*, 508 F.3d 306, 319 (5th Cir. 2007); *State v. Mercier*, 479 P.3d 967, 976-78 (Mont. 2021); *Lipsitz v. State*, 442 P.3d 138, 140 (Nev. 2019); *State v. Thomas*, 376 P.3d 184, 195 (N.M. 2016); *Bush v. State*, 193 P.3d 203, 214-15 (Wyo. 2008).

The Second Circuit's anomalous approach came into especially sharp relief during the pandemic. District courts repeatedly cited *Gigante* to justify deviation from physical confrontation based on COVID-19 concerns (albeit in cases where the issue was not preserved for appellate review). *See, e.g.*, *United States v. Avenatti*, 2022 WL 103494 (S.D.N.Y. Jan. 11, 2022) (relying on health risk if the witness contracted COVID-19 to permit remote testimony despite the fact that the witness testified in person against defendant at other trials during the COVID-19 pandemic);

United States v. Donziger, 2020 WL 5152162 (S.D.N.Y. Aug. 31, 2020).

By contrast, jurisdictions that have split from the Second Circuit have regularly found that COVID-19 concerns do *not* justify exceptions to in-person confrontation. *See, e.g.*, *United States v. Riego*, 2022 WL 4182431, at *3-*4 (D.N.M. Sept. 13, 2022) (denying request to testify remotely despite witness's "chronic respiratory condition that leaves her more vulnerable to COVID-19"); *United States v. Kail*, 2021 WL 1164787, at *1 (N.D. Cal. Mar. 26, 2021) (denying request to testify remotely based on concerns arising from COVID-19 and the witness's medical conditions).

C. The Second Circuit's Position Is Wrong

Not only has the Second Circuit split from other courts, but its position is wrong on its own terms and irreconcilable with this Court's precedent.

1. The Second Circuit's *Gigante* rule depends on the premises that (a) *Craig* applies only to one-way-video, but not two-way-video, remote witness testimony, and (b) in the absence of the *Craig* test, the Constitution requires nothing more than an amorphous "extraordinary circumstances" and "interest of justice" standard. *See* pp. 20-22, *supra*. Neither premise is tenable.

First, although *Craig* addressed a factual scenario in which a child witness's testimony was delivered by one-way video, nothing in the Court's decision suggests that its standard is limited to that particular technology. To the contrary, *Craig* stated a general rule: "[A] defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face

confrontation at trial *only* where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured." 497 U.S. at 850 (emphasis added). As the many courts of appeals that disagree with *Gigante* have recognized, *see* pp. 22-24, *supra*, this Court's reasoning leaves no room for the Second Circuit to conclude that "it is not necessary to enforce the *Craig* standard," *Gigante*, 166 F.3d at 81.

Second, if *Craig* does not supply the relevant test, there is no basis for concluding that an even more permissive "extraordinary circumstances" and "interest of justice" standard applies. Although the procedure approved in *Craig* denied the defendant the right to in-person confrontation, it did allow the defendant's *counsel* to conduct an in-person cross-examination on the defendant's behalf. *See Craig*, 497 U.S. at 841 (explaining that "the child witness, prosecutor, and defense counsel withdraw to a separate room," where the "child witness is then … cross-examined"). *Craig* thus provides no basis for the Second Circuit to apply a more *permissive* rule when the defendant's confrontation rights are more *restricted*—as they were here, because neither the defendant nor his counsel had the opportunity to conduct in-person cross-examination.

The Second Circuit's reliance on Rule 15, *see Gigante*, 166 F.3d at 81, fails for a similar reason. In a Rule 15 deposition, the defendant has the right to be "in the witness's presence during the examination," barring the defendant's waiver of the right or persistent "disruptive conduct justifying exclusion." Fed. R. Crim. P. 15(c)(1); *cf. Crawford*, 541 U.S. at 68 (explaining that the Confrontation Clause is not violated when the witness is "unavailab[le]" and the defendant

has "a prior opportunity for cross-examination"). But Rule 15's tolerance of that procedure hardly commends the procedure employed here, where the defendants did *not* have the right to be "in the witness's presence during the examination." Fed. R. Crim. P. 15(c).

2. This Court's handling of proposed amendments to the Federal Rules of Criminal Procedure in 2002 strongly underscores the defect in the Second Circuit's rule. That year, the Judicial Conference proposed an amendment to Rule 26's provision that "[i]n every trial the testimony of witnesses must be taken in open court, unless otherwise provided by a statute or by rule[.]" *See* 207 F.R.D. at 99. The proposed amendment provided that "[i]n the interest of justice, [a] court may authorize contemporaneous, two-way video presentation in open court of testimony from a witness who is at a different location if" three conditions were met: "(1) the requesting party establishes exceptional circumstances for such transmission; (2) appropriate safeguards for the transmission are used; and (3) the witness is unavailable within the meaning of Federal Rule of Evidence 804(a)(4)-(5)." *Id.* It was no coincidence that the proposed amendment echoed *Gigante* in incorporating an "extraordinary circumstances" and "interest of justice" standard, *see id.*; the Rules Committee repeatedly relied on *Gigante* in explaining its proposal. *See* 207 F.R.D. at 102-103.

This Court *rejected* the proposed amendment. 207 F.R.D. at 91. Although the Court did not provide written reasoning, Justice Scalia issued a statement explaining that he "share[d] the majority's view that the" proposed rule was "of dubious validity under the Confrontation Clause." *Id.* at 93. He explained that

the rule—which he noted was expressly based on *Gigante*—was "unquestionably contrary to the rule enunciated in *Craig*." *Id.* In particular, he noted that the Court "made clear in *Craig*" that "a purpose of the Confrontation Clause is ordinarily to compel accusers to make their accusations *in the defendant's presence*—which is not equivalent to making them in a room that contains a television set beaming electrons that portray the defendant's image." *Id.* (citation omitted). As several of the courts of appeals rejecting *Gigante* have noted, the Court's response to the proposed amendment thus strongly signals that it would not approve of *Gigante*. *See, e.g.*, *Carter*, 907 F.3d at 1207; *Yates*, 438 F.3d at 1314-15.

3. Moreover, while the Second Circuit has adopted a position more permissive than *Craig*, this Court's Confrontation Clause decisions after *Craig* point in the opposite direction. *Craig* relied in significant part on *Ohio v. Roberts*, 448 U.S. 56 (1980), which established an "indicia of reliability" test for exceptions to the Confrontation Clause. *Id.* at 68-69; *see Craig*, 497 U.S. at 846-50. But this Court subsequently overruled *Roberts* in *Crawford*, holding that "the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." 541 U.S. at 69; *see id.* at 55-56, 59 (explaining that confrontation is required apart from narrow, historical exceptions); *see also Hemphill*, 142 S. Ct. at 691 ("If *Crawford* stands for anything, it is that the history, text, and purpose of the Confrontation Clause bar judges from substituting their own determinations of reliability for the method the Constitution guarantees.").

As lower courts have increasingly recognized, *Crawford*'s overruling of *Roberts* "put *Craig*'s reliability-focused rule into serious doubt." *C.A.R.A. v. Jackson Cnty. Juv. Off.*, 637 S.W.3d 50, 62 (Mo. 2022) (en banc); *see, e.g.*, *Carter*, 907 F.3d at 1206 n.3 (9th Cir. 2018) ("The vitality of *Craig* itself is questionable in light of the Supreme Court's later decision in *Crawford*."). At a minimum, reconciling those competing lines of precedent requires reading "*Craig*'s holding according to its narrow facts." *People v. Jemison*, 952 N.W.2d 394, 396 (Mich. 2020).

Whether *Craig* retains vitality may be questionable. It should suffice here to note, however, that any vitality should be confined to a case like *Craig*—*i.e.*, one where an exception is necessary to enable testimony from a child sex-abuse victim who struggles to communicate in the presence of the alleged abuser. No such narrow reading of *Craig* can come anywhere close to justifying the denial of physical confrontation in this case, which involved an adult witness—indeed, a corporate representative—whose only purported basis for not attending trial was a health condition shared by tens of millions of others. *See* pp. 7-8, *supra*.

To hold that the Confrontation Clause required Elliott's presence at trial is not to diminish his concerns, or even necessarily to constrain the prosecution. The Government was free to ask Visa to designate another corporate representative; Elliott was not like an eyewitness to a murder or other one-of-a-kind witness. He had "no firsthand knowledge of the specific transactions at issue." App., *infra*, 54a. The Government also could have facilitated travel arrangements for Elliott complete with rigorous safety protocols equivalent to those attending the trial. Or the Government

could have chosen to prioritize Elliott's health concerns over any testimony on this point. The upshot might have decreased the likelihood of a conviction, but "[i]t is a truism that constitutional protections have costs." *Coy*, 487 U.S. at 1020.

This Court's subsequent decisions resolving to "preserve and protect" other Sixth Amendment rights—rather than "balance [them] away"—only further undermine *Craig*'s reasoning. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1402 (2020) (jury trial right); *cf. Craig*, 497 U.S. at 870 (Scalia, J., dissenting) (criticizing the majority for applying an "'interest-balancing' analysis where the text of the Constitution simply does not permit it"). Put simply, the Confrontation Clause in "its most literal" and fundamental application requires that a defendant be permitted "to meet *face to face* all those who appear and give evidence *at trial*." *Coy*, 487 U.S. at 1021 (citation omitted). If an in-person confrontation was required for the accusers of the Apostle Paul and Sir Walter Raleigh, it is no less necessary for Visa's corporate representative.

D. The Question Presented Is Exceptionally Important

The question presented is exceptionally important by any measure. The confrontation right is expressly enshrined in the Constitution, and this Court has been granting review in recent years to clarify its contours. *See* pp. 17-20, *supra*. But while "face-to-face confrontation forms 'the core of the values furthered by the Confrontation Clause,'" *Craig*, 497 U.S. at 847 (citation omitted), this Court has not reviewed a case on *this* branch of the confrontation doctrine in more than three decades, *see id.*

Now is the time to do so. The conflict among the federal courts of appeals—along with some state courts of last resort—is undeniable and has only deepened with time. *See* pp. 22-26, *supra*; *cf. Wrotten v. New York*, 560 U.S. 959 (2010) (statement of Sotomayor, J., respecting denial) (discussing the importance of the issue but noting that the case was in an interlocutory posture from a state court). And the Second Circuit has shown no inclination to change course, as the unanimous panel decision below—rendered in just a few paragraphs of a summary order applying maximally deferential review—makes clear.

The effects of the pandemic, moreover, have made the question presented more pressing than ever. The proliferation of videoconference technologies, combined with the increasing reluctance of many to attend in-person gatherings, have led to requests for remote testimony that would never have been made in the past. Cases involving travel-related health concerns are one example, *see* pp. 24-25, *supra*, but there are many others, *see, e.g.*, *State v. Smith*, 636 S.W.3d 576, 578 (Mo. 2022) (en banc) (holding that defendant's confrontation rights were violated when witness was permitted to testify via two-way video because he was on paternity leave). And even as the pandemic (hopefully) winds down, the significance of the question will not. Videoconferencing is here to stay; indeed, some "legal scholars have suggested that virtual remote trial proceedings may become a permanent feature of our justice system." Meghan O'Connell, *Zoom Jury Trials: The Inability To Physically Confront Witnesses Violates a Criminal Defendant's Right to Confrontation*, 52 STETSON L. REV. 329, 334 (2022).

The issues raised by increased reliance on video testimony are profound. Although the possibility of remote appearances increases efficiency and convenience, those are not the values that the Confrontation Clause prioritizes. "Any procedure that allows an adverse witness to testify remotely necessarily diminishes 'the profound effect upon a witness of standing in the presence of the person the witness accuses.'" *Carter*, 907 F.3d at 1207 (quoting *Coy*, 487 U.S. at 1020). And while remote testimony may superficially approximate in-person testimony, there are in fact "important practical differences" such as "the angle and quality of the courtroom camera," that can "distort any effort to approximate in-person testimony." *Id.* "With video testimony, the courtroom door never opens to reveal the next witness; nuances in inflection, facial expressions, and hesitation get lost or chalked up to technical glitches; electronic feedback and internet lag interfere with a witness's response; and the rhythm and visual impact of a cross-examination is disrupted as the witness and counsel attempt to discuss a document or piece of physical evidence remotely." Jessica Arden Ettinger, et al., *Ain't Nothing Like the Real Thing: Will Coronavirus Infect the Confrontation Clause?*, 44-MAY CHAMPION 56, 58 (2020).

At bottom, a video feed "is still a picture, not a life," and "the confrontation clause … insists on real life where possible, not simply a close approximation." *Stoner v. Sowders*, 997 F.2d 209, 213 (6th Cir. 1993); *cf. United States v. Nippon Paper Indus. Co., Ltd.*, 17 F. Supp. 2d 38, 42 n.9 (D. Mass. 1998) (noting that the jurors in *Twelve Angry Men* relied on the way a witness walked to the stand, a detail that likely would have been lost remotely).

E. This Case Is An Ideal Vehicle To Address The Question Presented

This case affords a prime vehicle for this Court to resolve the question presented. Petitioners preserved their Confrontation Clause objections throughout the proceedings. App., *infra*, 32a. The district court issued a series of written opinions rejecting them. *Id.* at 32a-36a, 54a-64a. And the Second Circuit squarely resolved the Confrontation Clause question in its decision, which—while unpublished—treated established circuit precedent as dispositive. *Id.* at 10a-12a.

The Second Circuit's willingness to allow remote testimony in this case—when the witness was a corporate representative who had basic travel-related health concerns widely shared by tens of millions of Americans—demonstrates just how broad and malleable its "extraordinary circumstances" and "interest of justice" rule really is. App., *infra*, 10a-12a. It is equally clear that the courts of appeals that have rejected *Gigante* would have applied the far more restrictive "necessity" standard of *Craig*, 497 U.S. at 855. And there is every reason to believe that other courts would have reached a different result on these facts; indeed, district courts within sister circuits have routinely denied similar requests. *See* p. 25, *supra*. The case thus highlights the circuit conflict.

Finally, the decision to permit remote testimony by the Visa corporate representative here was critically important. The Second Circuit did not suggest that any error would be harmless, and the error here clearly was not. *Cf. Coy*, 487 U.S. at 1021-1022 (rejecting harmlessness argument after finding Confrontation Clause violation). The Government put Visa's policies at the center of the trial by relying on them

for the materiality and intent elements of its novel, strained bank-fraud theory. *See* p. 6, *supra*. Especially given that reliance, it was not too much to ask that Visa's representative actually be at the trial—just like the other witnesses, the jurors, the judge, the lawyers, and the courtroom staff.

Instead, Elliott was allowed to testify from the comfort of his attorney's office 3,000 miles away; to exploit technological glitches and limitations to thwart effective cross-examination; to avoid the hostile glares of the defendants, the perceptive eyes of the jurors, and the solemnity of the courtroom environment; and ultimately to provide crucial evidence that led to the criminal convictions of both Petitioners for facilitating transactions that were lawful where they occurred and profitable for the banks that processed them. Allowing that testimony was a paradigmatic and profoundly prejudicial violation of the Confrontation Clause.

This Court's review is warranted to afford due regard for a core, express constitutional guarantee and to ensure that criminal defendants standing trial in the Second Circuit are afforded no less rights than criminal defendants elsewhere in the country.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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March 2, 2023

APPENDIX

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APPENDIX A

21-1678-(L)

United States v. Weigand (Akhavan)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 21-1678-cr (L), 21- 1708-cr (Con),
21-2214-cr (Con), 21-2466-cr (XAP)

UNITED STATES OF AMERICA,

Appellee-Cross-Appellant,

v.

JAMES PATTERSON,

Defendant,

RUBEN WEIGAND, AKA SEALED DEFENDANT 1,

Defendant-Appellant,

HAMID AKHAVAN,

Defendant-Appellant-Cross-Appellee.

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

(WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 21st day of December, two thousand twenty-two.

PRESENT:

PIERRE N. LEVAL,
DENNY CHIN,
EUNICE C. LEE,

Circuit Judges.

SUMMARY ORDER

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Appeal from a judgment of the United States District Court for the Southern District of New York (Rakoff, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is AFFIRMED in part and VACATED and REMANDED in part.

Defendant-Appellant Ruben Weigand and Defendant-Appellant-Cross-Appellee Hamid Akhavan ("Defendants") appeal from their convictions after jury trial on one count of conspiracy to obtain money from a financial institution by false representations. 18 U.S.C. §§ 1349, 1344. The government cross-appeals from the district court's reduction of the amount of the forfeiture it imposed on Defendant Akhavan. Weigand's and Akhavan's convictions are the product of a scheme whereby Defendants, principals at Eaze, a major on-demand marijuana delivery service, deceived United States banks and other financial institutions into processing credit card and debit card payments for the purchase and delivery of marijuana products. Defendants argue that there was insufficient evidence of materiality and intent to convict them, that the jury instructions were erroneous and prejudicial, and that the decision to allow a witness to testify remotely violated their Sixth Amendment Confrontation Clause rights. Weigand also argues that he was prejudiced by the district court's rulings on various evidentiary matters. The government cross-appealed challenging the district court's reduction of Akhavan's forfeiture liability from $17,183,114.57 to $103,750. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the arguments

presented on appeal. We first address the three challenges brought by both Defendants, then Weigand's additional evidentiary claims, and then the government's forfeiture argument.

I. Sufficiency of the Evidence

We review *de novo* the sufficiency of the evidence underlying a conviction and uphold the "conviction if *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Martoma*, 894 F.3d 64, 72 (2d Cir. 2017) (internal quotation marks omitted). In evaluating such challenges, we "view the evidence in the light most favorable to the government, deferring to the jury's evaluation of the credibility of witnesses, its choices between permissible inferences, and its assessment of the weight of the evidence." *United States v. Jones*, 482 F.3d 60, 68 (2d Cir. 2006). "We remain mindful that the government is entitled to prove its case solely through circumstantial evidence." *United States v. McKenzie*, 13 F.4th 223, 238 (2d Cir. 2021) (internal quotation marks omitted).

1. Materiality

Defendants first argue that the government failed to prove materiality. A defendant may be convicted of bank fraud under 18 U.S.C. § 1344 by proof that he

> knowingly executes, or attempts to execute, a scheme or artifice—(1) to defraud a financial institution; or (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises.

18 U.S.C. § 1344. "[P]roof of the violation of either subsection is sufficient to support a conviction." *United States v. Crisci*, 273 F.3d 235, 239 (2d Cir. 2001). To sustain a conviction under either subsection, the government must prove that the defendant made material misrepresentations. *Neder v. United States*, 527 U.S. 1, 20–26 (1999). "To be 'material' means to have probative weight, i.e., [to be] reasonably likely to influence the bank in making a determination required to be made." *United States v. Calderon*, 944 F.3d 72, 85 (2d Cir. 2019) (internal quotation marks omitted). In other words, "would the misrepresentation actually *matter* in a *meaningful way* to a rational decisionmaker?" *Id.* at 86.

Defendants claim that the government did not prove materiality because it failed to establish that banks actually consider the type of information misrepresented by Defendants, which included names, locations, descriptors, and category codes for merchants for each transaction. Defendants urge that, to the contrary, the defense introduced evidence that banks do not consider the type of evidence misrepresented by Defendants in making any determinations. Specifically, Defendants argue that the evidence showed that, even had the banks been provided with accurate information, they would have processed the marijuana transactions anyway. We are not persuaded. The government introduced substantial evidence, including bank officer testimony and bank rules and regulations, supporting the inferences both that issuing banks would not knowingly have processed marijuana transactions and that, in deciding whether to process the transactions, they would have relied on the type of information falsified by Defendants. Based on that evidence, a rational factfinder could have determined that banks do consider the type of information falsified by

Defendants and that accurate information would have been reasonably likely to have influenced the banks. *See Calderon*, 944 F.3d at 86 (rejecting the defendants' argument that they "needlessly modified [bills of lading]" and holding that the materiality requirement was met because "the Government offered substantial evidence at trial . . . that the banks could have and would have rejected the bills of lading had they not been altered" (emphasis omitted)).

2. Intent

Second, Defendants argue that the government failed to establish that Akhavan and Weigan intended to harm the banks. We reject this argument because § 1344(2) does not require an intent to harm; it requires an intent to take bank property. *See Loughrin v. United States*, 573 U.S. 351, 356–57 (2014). Defendants' error is in conflating the requirements for conviction under § 1344(1)—scheme to defraud—with those for conviction under § 1344(2). While the former requires proof of intent to defraud, the latter does not. *Id.* at 357 (noting that the argument that § 1344(2) requires intent to defraud "becomes yet more untenable in light of the rest of the bank fraud statute . . . because the first clause of § 1344, as all agree, includes the requirement that a defendant intend to 'defraud a financial institution'"). Because there was sufficient evidence to convict Defendants under § 1344(2) and proof of a violation of either subsection is sufficient to support a conviction, we need not determine whether there was sufficient evidence of intent to defraud. *See Crisci*, 273 F.3d at 239.

II. Jury Instructions

Where a defendant timely objects to a district court's jury instructions, we review the instruction *de novo*

"and will vacate a conviction for an erroneous charge unless the error was harmless." *United States v. Nouri*, 711 F.3d 129, 138 (2d Cir. 2013). If the defendant fails to timely object, we review the instructions for plain error and have "discretion to reverse only if the instruction contains (1) error, (2) that is plain, and (3) that affects substantial rights." *United States v. Botti*, 711 F.3d 299, 308 (2d Cir. 2013) (internal quotation marks omitted). "If those three conditions are met, a court has discretion to correct the error if it seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *Id.* (internal quotation marks omitted, modification in original).

Defendants challenge three of the district court's jury instructions: the materiality instruction, the intent instruction, and the curative instruction issued after Akhavan's closing argument.[1] All three challenges fail.

In its jury charge, the district court defined a "material fact" as "a fact that a reasonable banker would be reasonably likely to consider in making a decision authorizing a bank transaction involving the transfer of money or property." Joint App'x 2397. The court further explained,

> [f]or example, if a perpetrator made misrepresentations designed to make marijuana purchases look like the purchases of other goods, the misrepresentations would be material if, had the banker known that the purchasers—that the purchases were disguised

[1] Though the parties dispute whether the Defendants timely objected to the district court's materiality jury instructions, we need not resolve the issue because, even assuming the Defendants timely objected, their argument is without merit.

> and really were for marijuana, such knowledge would be reasonably likely to influence a reasonable banker in deciding whether to authorize the purchases.

Id. Defendants claim this "example" misdirected the jurors because it presupposed that, but for the misrepresentations, a reasonable banker would have been able to tell that the transaction related to marijuana. Therefore, they argue that, contrary to defense evidence, the example suggested that banks would always know and care that a transaction involved marijuana if provided with accurate transaction information. We do not agree.

"In reviewing a jury instruction, we examine not only the specific language that the defendant challenges but also the instructions as a whole to see if the entire charge delivered a correct interpretation of the law." *United States v. Al Kassar*, 660 F.3d 108, 127 (2d Cir. 2011) (internal quotation marks omitted). Here, the district court stated the correct materiality standard: "a material fact . . . [is] a fact that a reasonable banker would be reasonably likely to consider in making a decision authorizing a bank transaction involving the transfer of money or property." Joint App'x 2397. And the "example" that followed accurately described a scenario in which a misrepresentation would be material, without directing the jury that it had to find the hypothetical facts described. Thus, we discern no error in the district court's materiality instruction, when taken as a whole.

Weigand and Akhavan also argue that the district court's instructions improperly conflated the elements of § 1344(1) and (2) by suggesting that the mere intent to facilitate the transactions, rather than an intent to harm, would satisfy the intent requirement. But, as

discussed *supra*, § 1344(2) has no such intent to harm requirement. *See United States v. Lebedev*, 932 F.3d 40, 49 (2d Cir. 2019) ("Subsection (2) . . . does not require that 'a defendant have a specific intent to deceive a bank.'" (quoting *Loughrin*, 573 U.S. at 356–57)). And the district court's instruction that the jury must find Defendants acted with "an intent to use misrepresentations to obtain money or property from a federally insured bank" properly described the requisite level of intent for § 1344(2). Joint App'x 2937; *see also Loughrin*, 573 U.S. at 355–56 (describing § 1344(2)'s requirements).

Lastly, Defendants argue that the curative instruction the court issued after Akhavan's closing argument misstated the law.[2] Defendants were charged with an ongoing scheme, yet defense counsel suggested in closing that misinformation was material only if it might reasonably affect the banks' behavior as to each individual transaction at the time it was made. This position takes too cramped a view of the materiality requirement, almost veering toward a reliance argument, *i.e.*, that misinformation is material only if it actually influenced the banks' authorization of each transaction. *See Neder*, 527 U.S. at 24–25 (noting that reliance "[h]as no place in the federal fraud statutes").

---

[2] The curative instruction directed the jury that:

> It is not necessary that a misrepresentation made in connection with a particular transaction be reasonably likely to affect the decision to authorize that particular transaction at that particular time. Rather, what is charged here is an ongoing scheme to defraud, including a course of misrepresentations over a period of time through a pattern or a course of deceptive conduct. So you need to look at the whole picture.

Joint App'x 2936–37.

The district court's instruction was proper to clear up any potential juror confusion. *See United States v. White*, 552 F.3d 240, 250 (2d Cir. 2009) (holding that curative instruction was correct where it "refocused the jury on the [proper] elements"); *United States v. Civelli*, 883 F.2d 191, 195 (2d Cir. 1989) ("If a supplemental charge is legally correct, the district court enjoys broad discretion in determining how, and under what circumstances, that charge will be given.").

III. Confrontation Clause

"Alleged violations of the Confrontation Clause are reviewed *de novo*, subject to harmless error analysis." *United States v. Vitale*, 459 F.3d 190, 195 (2d Cir. 2006). We review the factual finding that a witness is unavailable for clear error and review for abuse of discretion a court's ultimate decision whether to permit testimony by two-way video. *United States v. Gigante*, 166 F.3d 75, 80–82 (2d Cir. 1999).

Defendants argue that the district court's decision to allow Martin Elliot, Visa's representative, to testify remotely via two-way video violated their Sixth Amendment right to face-to-face confrontation. They first argue that this Court's decision in *Gigante*, which held that in exceptional circumstances testimony of an unavailable witness via two-way video satisfied the Confrontation Clause, does not withstand *Crawford v. Washington*, 541 U.S. 36 (2004). In the alternative, they argue that *Gigante*'s standard for testimony via two-way video was not met here. We address each argument in turn.

Contrary to Defendants' contention, *Crawford* does not stand in tension with *Maryland v. Craig*, 497 U.S. 836 (1990), or *Gigante*. Both *Craig* and *Gigante* hold that, in limited circumstances, something less than in-

court testimony may comply with the Confrontation Clause. *See Craig*, 497 U.S. at 857 (holding that the Confrontation Clause was satisfied by one-way video testimony). In *Gigante*, this Court concluded that a trial court may allow testimony via two-way video provided that the court make a finding that there are exceptional circumstances (which included in that case the unavailability of the witness), and that testimony via two-way video would further the interests of justice. 166 F.3d at 81. Thus, *Gigante*, like *Craig*, concerned whether video testimony may vindicate Confrontation Clause rights that undeniably exist. *Crawford*, on the other hand, answered whether the Confrontation Clause is implicated in the first instance by testimonial, out-of-court statements notwithstanding other indicia of reliability. 541 U.S. at 68–69. Because *Crawford* concerns an entirely different question than *Gigante* and *Craig*, it does not stand in tension with those cases. The district court rightly applied *Gigante* in determining whether Elliott could testify via two-way video.

Furthermore, we reject Defendants' argument that, even if *Gigante* is still good law, the district court's *Gigante* analysis was mistaken because there were no exceptional circumstances justifying testimony by two-way video. The district court determined that Elliot was unavailable because he could not travel across the country at a time when vaccines were not yet easily obtained without subjecting himself to a substantial risk of contracting COVID-19, which, given his age and comorbidities, could well result in serious illness or death. The court found that the need to prevent serious illness and death and to protect his family, including his 83-year-old mother-in-law for whom he was the primary caretaker, constituted exceptional circumstances warranting use of two-way

video. Reviewing the district court's factual findings under the clear error standard, we conclude that the district court did not err in finding Elliott unavailable or in finding exceptional circumstances.

Nor did the district court abuse its discretion in permitting two-way video testimony pursuant to *Gigante*. By permitting Defendants, defense counsel, the questioner, the judge, and the jurors all to see and be seen by the witness, two-way video safeguarded "the reliability of the evidence by subjecting it to rigorous adversarial testing." *Craig*, 497 U.S. at 857. Although two-way video testimony "should not be considered a commonplace substitute for in-court testimony by a witness," allowing two-way video testimony amidst an unprecedented global pandemic, where the witness was unvaccinated and risked substantial illness or death from COVID-19, "further[ed] the interest of justice." *Gigante*, 166 F.3d at 81.

IV. Weigand's Evidentiary Claims

A district court's decision to exclude expert testimony, as well as other evidentiary rulings, is reviewed for abuse of discretion and reversed only where "the decision to admit or exclude evidence was manifestly erroneous." *United States v. Litvak*, 808 F.3d 160, 179 (2d Cir. 2015) (internal quotation marks omitted). Even if this standard is met, the Court will "still affirm if the error was harmless." *Id.* (internal quotation marks omitted).

Weigand challenges the district court's exclusion of evidence of lack of pecuniary loss, exclusion of an expert witness, and exclusion of post-arrest statements. In all three instances, the district court acted within its discretion. Nonetheless, we need not delve into the substance of Weigand's challenges because,

even assuming an abuse of discretion, the evidentiary errors were harmless against the totality of the evidence presented in the case *See United States v. Casamento*, 887 F.2d 1141, 1180 (2d Cir. 1989) ("[T]he properly admitted evidence of guilt is so overwhelming, and the prejudicial effect of the [error] so insignificant by comparison, that it is clear beyond a reasonable doubt that [the error] was harmless error." (quoting *Parker v. Randolph*, 442 U.S. 62, 70–71 (1979)) (alteration in *Casamento*)).

V. Akhavan's Forfeiture

This Court "determine[s] *de novo* 'whether a fine is constitutionally excessive,' although [it] must accept the District Court's factual findings 'unless clearly erroneous.'"[3] *United States v. Viloski*, 814 F.3d 104, 109 (2d Cir. 2016) (quoting *United States v. Bajakajian*, 524 U.S. 321, 336 & n.10 (1998)).

In *Bajakajian*, the Supreme Court established the inquiry for determining whether a financial penalty is excessive under the Eighth Amendment. 524 U.S. at 335. "The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish." *Id.* at 334. In interpreting *Bajakajian*, this Court has instructed consideration of the following, non-exhaustive "*Bajakajian* factors":

> (1) the essence of the crime of the defendant and its relation to other criminal activity, (2) whether the defendant fits into the class of

[3] Neither Akhavan nor the government appear to dispute that the forfeiture at issue is a "fine" within the meaning of the Excessive Fines Clause.

> persons for whom the statute was principally designed, (3) the maximum sentence and fine that could have been imposed, and (4) the nature of the harm caused by the defendant's conduct.

Viloski, 814 F.3d at 110. Courts may also consider whether the forfeiture would deprive the defendant of their livelihood. *Id.* at 110.

In its cross-appeal, the government challenges the district court's decision to reduce Akhavan's forfeiture amount from $17,183,114.57 to $103,750. On June 18, 2021, the district court orally sentenced Akhavan to 30 months' imprisonment, a fine of $100,000, and forfeiture of $17,183,114.57, but it did not enter a final written judgment at that time.[4] It subsequently granted Akhavan's request for an evidentiary hearing and, following the hearing, granted Akhavan's request for supplemental briefing on forfeiture. On August 30, 2021, by written opinion, the district court found that the government had established by the required preponderance of the evidence that Akhavan "obtained" $17,183,114.57 for purposes of forfeiture under 18 U.S.C. § 982(a)(2). Nonetheless, because such a forfeiture would constitute an excessive fine in violation of the Eighth Amendment, the court determined that it could not be imposed consistent with *Bajakajian*. Consequently, the court only imposed a forfeiture of $103,750, the value of the Eaze stock Akhavan received as part of the payment for his services.

---

[4] The government had argued at sentencing that the district court should impose forfeiture in the amount of $156,225,211.61, reflecting the gross proceeds of Akhavan's scheme, or in the alternative, forfeiture of $17,183,114.57, reflecting the amount Akhavan charged for his services.

In weighing the *Bajakajian* factors, the court observed as to the first and fourth factor—essence of the crime and nature of the harm—that though Akhavan perpetrated "a serious fraud," from an economic standpoint, "no one lost money." Special App'x at 17. Instead, "[t]he banks, in fact, made money." *Id.* at 18. Of all the factors, however, the district court appeared to give particular weight to the third: the maximum possible sentence and fine. The court noted that under § 1344 the "maximum sentence was 360 months' imprisonment; the maximum fine was $1 million," and emphasized that a "$17 million forfeiture order would be 17 times the maximum fine possible under § 1344 and would be 170 times the amount of the fine actually imposed in this case." *Id.* at 17-18. Having made these observations, the court stated that a $17 million forfeiture "is wholly out of proportion to the maximum and actual fine." *Id.* at 18. Following its findings on all four factors, the court said that "the overarching question . . . remains whether a $17 million forfeiture order is grossly disproportional to the gravity of Akhavan's offense" and reiterated that "a $17 million forfeiture order is seventeen times the maximum fine and 170 times the actual fine imposed in this case." *Id.* at 19. The court then concluded that a forfeiture amount of $17 million would be grossly disproportionate. *Id.* at 20.

We are persuaded by the government's argument that, on the record before us, the district court's reasoning as to the third *Bajakajian* factor stands in tension with this Court's caselaw. In particular, our precedents suggest that a forfeiture amount is not necessarily greatly disproportionate where it equals the proceeds of the illegal scheme, even if it significantly exceeds the maximum statutory fine. In *United States v. Castello*, for example, we ordered the district

court to reimpose a $12 million forfeiture order where the maximum penalty was five years' imprisonment and the maximum statutory fine was $250,000, but where the defendant's fraud involved more than $200 million in unreported funds.[5] 611 F.3d 116, 121–24 (2d Cir. 2010). Similarly, in *United States v. Bonventre*, we observed that where "forfeiture ordered is in an amount equivalent to the undisputed, actual proceeds of the fraud," we cannot conclude "that the order was grossly disproportionate to the gravity of [the] offense." 646 F. App'x 73, 91–92 (2d Cir. 2016) (summary order) (upholding a $19 million forfeiture order for an offense with a statutory maximum of $10 million); *see also United States v. Elfgeeh*, 515 F.3d 100, 139 (2d Cir. 2008) (upholding a $22 million forfeiture order where evidence showed the amount roughly equaled the total funds defendants unlawfully transmitted). Thus, because a $17 million forfeiture is equivalent to Akhavan's proceeds from the fraud, the fact that a forfeiture in that amount would greatly exceed § 1344's statutory maximum fine does not, in and of itself, compel a finding of unconstitutionality. Accordingly, we vacate the district court's forfeiture judgment and remand for reconsideration in light of this Court's ruling.

---

[5] Furthermore, though the district court stated that Akhavan's scheme generated no articulable loss, our analysis in *Castello* suggests that the harm inquiry should not be so narrow. 611 F.3d at 124 (noting that defendant's filing of fraudulent currency transactions reports "helped his customers evade taxes, cash fictitious checks, and commit securities fraud"). Marijuana is a federally illegal narcotic. *See* 21 U.S.C. § 812(c)(Schedule I)(c)(10). Akhavan's scheme resulted in banks processing transactions they would not have otherwise processed and allowed others to take actions that, absent the scheme, "the government could have prevented or prosecuted." *Castello*, 611 F.3d at 124. Though not articulable in dollars, those consequences are nonetheless a harm.

In reapplying all the *Bajakajian* factors, the district court may well again conclude that a $17 million forfeiture would be greatly disproportionate. In that case, we emphasize that the $17 million forfeiture may only be "discounted by whatever amount is necessary to render the total amount not grossly disproportional to the offense." *Castello*, 611 F.3d at 120 (internal quotation marks omitted) ("[t]hus a forfeiture of zero would be proper only if a forfeiture of even $1 would be grossly disproportional to the offense of conviction").

VI. Conclusion

For the foregoing reasons, the judgment of the district court is AFFIRMED in part and VACATED and REMANDED in part.

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

[SEAL Catherine O'Hagan]

United States Court of Appeals
for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

DEBRA ANN LIVINGSTON
CHIEF JUDGE

CATHERINE O'HAGAN WOLFE
CLERK OF COURT

Date: December 21, 2022
Docket #: 21-1678cr
Short Title: United States of America v. Weigand (Akhavan)

DC Docket #: 1:20-cr-188-2
DC Court: SDNY (NEW YORK CITY)
DC Docket #: 1:20-cr-188-1
DC Court: SDNY (NEW YORK CITY)
DC Docket #: 1:20-cr-188-2
DC Court: SDNY (NEW YORK CITY)
DC Docket #: 1:20-cr-188-2
DC Court: SDNY (NEW YORK CITY)
DC Judge: Rakoff

BILL OF COSTS INSTRUCTIONS

The requirements for filing a bill of costs are set forth in FRAP 39. A form for filing a bill of costs is on the Court's website.

The bill of costs must:

* be filed within 14 days after the entry of judgment;

* be verified;

* be served on all adversaries;

* not include charges for postage, delivery, service, overtime and the filers edits;

* identify the number of copies which comprise the printer's unit;

* include the printer's bills, which must state the minimum charge per printer's unit for a page, a

cover, foot lines by the line, and an index and table of cases by the page;

* state only the number of necessary copies inserted in enclosed form;

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United States Court of Appeals
for the Second Circuit
Thurgood Marshall U.S. Courthouse
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New York, NY 10007

DEBRA ANN LIVINGSTON
CHIEF JUDGE

CATHERINE O'HAGAN WOLFE
CLERK OF COURT

Date: December 21, 2022
Docket #: 21-1678cr
Short Title: United States of America v. Weigand (Akhavan)

DC Docket #: 1:20-cr-188-2
DC Court: SDNY (NEW YORK CITY)
DC Docket #: 1:20-cr-188-1
DC Court: SDNY (NEW YORK CITY)
DC Docket #: 1:20-cr-188-2
DC Court: SDNY (NEW YORK CITY)
DC Docket #: 1:20-cr-188-2
DC Court: SDNY (NEW YORK CITY)
DC Judge: Rakoff

VERIFIED ITEMIZED BILL OF COSTS

Counsel for _____
respectfully submits, pursuant to FRAP 39 (c) the within bill of costs and requests the Clerk to prepare an itemized statement of costs taxed against the

_____
and in favor of

_____
for insertion in the mandate.

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(VERIFICATION HERE)

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Signature

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

20-cr-188 (JSR)

UNITED STATES OF AMERICA

-v-

HAMID AKHAVAN & RUBEN WEIGAND,

Defendants.

OPINION

JED S. RAKOFF, U.S.D.J.

Hamid "Ray" Akhavan and Ruben Weigand conspired to defraud U.S. banks and credit unions by tricking them into processing more than $150 million of cardholder transactions for marijuana purchased through the marijuana delivery company Eaze when the banks and credit unions had a firm policy of not allowing such transactions. For their roles in this scheme, Akhavan and Weigand were each charged with conspiracy to commit bank fraud, in violation of 18 U.S.C. § 1349, and on March 24, 2021, a jury convicted both defendants of that charge. The defendants moved, under Federal Rules of Criminal Procedure 29 and 33, for judgment of acquittal or, in the alternative, for a new trial. ECF Nos. 259 & 300. By bottom-line order dated June 18, 2021, the Court denied those motions. This Opinion sets forth the reasons for that ruling.

LEGAL STANDARDS

The Court is required to "enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." Fed. R. Crim. P. 29. "It is a fundamental general principle that [defendants] challenging the sufficiency of the evidence underlying a conviction bear a very heavy burden." *United States v. Ragosta,* 970 F.2d 1085, 1089 (2d Cir. 1992). "In considering such a challenge, [the court] must view the evidence in the light most favorable to the government, crediting every inference that could have been drawn in the government's favor, and deferring to the jury's assessment of witness credibility, and its assessment of the weight of the evidence." *United States v. Chavez,* 549 F.3d 119, 124 (2d Cir. 2008) (citations, quotation marks, and brackets omitted). "[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia,* 443 U.S. 307, 319 (1979).

*T*he Court is also authorized, in its discretion, to "vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33. "The ultimate test on a Rule 33 motion is whether letting a guilty verdict stand would be a manifest injustice." *United States v. Ferguson,* 246 F.3d 129, 134 (2d Cir. 2001). Manifest injustice can occur where, although the evidence is technically sufficient to sustain the verdict, the Court has "a real concern that an innocent person may have been convicted." *United States v. Sanchez,* 969 F.2d 1409, 1413 (2d Cir. 1992). Alternatively, a court may find manifest injustice based upon a procedural issue affecting the fundamental fairness of the trial. *United States v. Yannai,* 791

F.3d 226, 242 (2d Cir. 2015) ("A defendant's motion for a mistrial may be granted where something has occurred to interfere with the defendant's right to a fair trial.").

ANALYSIS

The parties' familiarity with the evidence adduced at trial is here assumed. That evidence is summarized in what follows only as necessary to address the arguments raised in the defendants' motions. The evidence is construed in the light most favorable to the Government, and all inferences and credibility determinations are drawn in the Government's favor.

Akhavan and Weigand argue that the jury verdict should be set aside for (1) insufficient evidence of materiality; (2) insufficient evidence of fraudulent intent; (3) a violation of the Confrontation Clause; (4) an improper clarifying jury instruction regarding materiality; and (5) improper denial of several of Weigand's motions in limine. The Court addresses these arguments in turn, finding that each lacks merit.

I. Materiality

The defendants first argue that the evidence at trial was insufficient to demonstrate that their misrepresentations were material. The Court instructed the jurors that, to return a verdict of guilty, they would need to find that the Government proved beyond a reasonable doubt two elements: "First, the existence of a conspiracy to commit federal bank fraud at any time during the charged time period of 2016 through 2019; and Second, that the defendant you are considering knowingly, willfully, and with specific intent to defraud joined and participated in this conspiracy." Tr. 2635:12-17. The Court further instructed that, to find

that the object of the conspiracy was bank fraud, the jurors would need to find that the object of the conspiracy had three elements. "First, that a person devised a scheme to defraud a federally insured bank or credit union by means of misrepresentations. Second, that one or more of the misrepresentations was material. Third, that the perpetrator devised the scheme knowingly, willfully, and with a specific intent to defraud." Tr. 2636:10-16. Finally, the Court instructed the jurors that

> a material fact, as applicable here, is a fact that a reasonable banker would be reasonably likely to consider in making a decision authorizing a bank transaction involving the transfer of money or property. For example, if a perpetrator made misrepresentations designed to make marijuana purchases look like the purchases of other goods, the misrepresentations would be material if, had the banker known that the purchases - that the purchases [sic] were disguised and really were for marijuana, such knowledge would be reasonably likely to influence a reasonable banker in deciding whether to authorize the purchases. Keep in mind that the test of materiality is what a reasonable banker would think and do. The Government does not need to prove that any bank actually relied on a misrepresentation.

Tr. 2638:5-18.

On the issue of materiality, the defendants do not dispute the Court's recitation of the law. Rather, they argue that no reasonable jury could find, based on the evidence at trial, that the defendants' misrepresentations were material. The defendants are plainly

mistaken; construed in the light most favorable to the Government, the evidence of materiality was overwhelming.

First, the Court instructed the jury that purchasing marijuana was illegal under federal law throughout the period of the charged scheme. Even assuming for the sake of argument that a reasonable banker would ever process unlawful transactions, common sense dictates that a banker would at least *consider* the fact that a merchant sought to process illegal transactions when deciding whether to process that merchants' transactions. And the Government offered more than common sense: testimonial and documentary evidence from several issuing banks demonstrated that those banks had policies prohibiting unlawful transactions. Tr. 1130:11-14, 1201: 2-18, 1768:1-2, 1769:15-17, 2083:20-22, 2090:6-18. This alone was sufficient evidence for a reasonable juror to find, beyond a reasonable doubt, that the defendants' misrepresentations were reasonably likely to influence a reasonable banker in deciding whether to authorize transactions by the phony merchants.

Second, testimonial and documentary evidence from credit card networks Visa and MasterCard showed that they prohibited unlawful transactions on their networks and that issuing banks could be penalized for permitting such transactions. GX 2312, Tr. 446:16-447:10, GX 2217, Tr. 1880:9-15. Furthermore, Visa and MasterCard took steps to terminate some of the phony merchants that Akhavan, Weigand, and their coconspirators set up to facilitate the scheme. GX 2309, GX 2313, GX 2228, GX 2230, Tr. 463:8-21, Tr. 1927:3-6. From this evidence, too, a reasonable jury could find materiality beyond a reasonable doubt.

Third, the Government offered evidence that some issuing banks investigated, and in some cases terminated, merchants that were processing marijuana transactions. GX 2427, GX 2633, GX 2634, GX 2635. This further demonstrates materiality.

That banks cared whether they were processing marijuana transactions cannot come as a surprise to the defendants; after all, they went to extraordinary lengths to conceal the true nature of these transactions. Why do this if not because they believed that banks did, in fact, care?

The defendants' response is simple: the banks did not care whether they were processing marijuana transactions; they only cared about whether they *appeared* to be knowingly processing marijuana transactions, for which they might be penalized. Thus, the banks wanted to be kept in the dark, to remain willfully blind of the true nature of the transactions. The Court permitted the defendants great latitude to raise at trial this creative, albeit strained, argument. Defense counsel focused on the fact that, even after the indictment in this case, U.S. issuing banks and credit unions continued to authorize tens of millions of dollars of marijuana transactions for Eaze. Eaze processed these transactions through a third-party vendor known as Circle, using a cryptocurrency known as USD Coin. (A USD Coin has a value pegged to the U.S. dollar.) Evidence at trial showed that well into 2021, banks continued to authorize transactions of the following form: the cardholder would purchase marijuana on the Eaze platform; this would trigger the purchase of USD Coin in the exact amount of the marijuana purchase. The USD Coin would be transferred to the marijuana merchant where it could immediately be converted

back to dollars. The marijuana merchant would then deliver the marijuana through Eaze's delivery service.

The Court recognized that a reasonable jury might, in theory, infer from banks' continued processing of Eaze transactions through Circle that banks did not care that Eaze's transactions were ultimately for marijuana. That is why the Court declined to quash the Rule 17(c) subpoena issued to Circle, and that is why the Court permitted the defense to argue this point to the jury at length.

But the evidence in no way *compelled* the conclusion that banks do not care that they are processing marijuana transactions for Eaze, via Circle. A reasonable jury could have found beyond a reasonable doubt – as this jury evidently did – that the Circle transactions did not preclude a finding of materiality. For example, the jury could have concluded that the banks viewed cryptocurrency purchases differently from non-cryptocurrency purchases. Or, more straightforwardly, the jury could have concluded that the banks were not devoting many resources to rooting out marijuana purchases and so did not even learn of the Circle transactions until this trial. *See* Tr. 1275-1276 (testifying that Bank of America reported the Circle transactions to Visa and MasterCard when it learned of them). The evidence regarding banks' continued processing of marijuana transactions after the indictment in this case does not foreclose a finding of materiality beyond a reasonable doubt.

The defendants also raise a slightly different form of this argument: that the Government has offered no proof that a bank ever declined to authorize a marijuana transaction. Indeed, the defense points out, banks decide whether to authorize transactions in a fraction of a second, based on little information. There

is little doubt that, even if the information provided to the issuing bank had been truthful *(cf.* the Circle transactions), a marijuana purchase would have been authorized.

However, this argument misunderstands the Government's burden in two separate ways. First, the Government was only required to prove that a reasonable banker was reasonably likely *to consider t*he fact that these were marijuana transaction, not that this consideration would have been dispositive. The evidence at trial was more than sufficient to support a juror's inference that the illegality of the transactions was something a reasonable banker would consider. Second, the defendants take far too narrow a view of what it means for a banker to decline to authorize a transaction. Even if a bank would have processed any *single* marijuana transaction based upon accurate information presented about that transaction, the defendants conspired to carry out an overarching *scheme* spanning many transactions. In assessing whether those misrepresentations were material, the jury was entitled to consider whether a bank, upon review of *past,* previously authorized transactions, might have declined to process *future* Eaze transactions. The evidence adduced at trial supports the conclusion that, when they learned the truth, banks did so. In particular, the Government demonstrated that banks sometimes referred merchants to Visa or MasterCard when the banks suspected the merchants were processing marijuana transactions, and ultimately, Visa and MasterCard terminated some such merchants. Although this was an indirect means of refusing to process a transaction, it supports a conclusion that the defendants' misrepresentations were material.

For all these reasons, when the evidence is construed in the light most favorable to the Government, it overwhelmingly supports the jury's finding of materiality.

II. Fraudulent Intent

The defendants next argue that the Government was required, but failed, to prove that they intended to cause actual harm through misrepresentations that affected an "essential element" of the banks' agreements with cardholders.

This Court previously described the elements for federal bank fraud in denying the defendants' motions to dismiss the indictment, and the Court incorporates by reference that discussion. *See* Opinion & Order, ECF No. 91 (Aug. 31, 2020). For present purposes, the Court constrains its assessment of the sufficiency of the evidence to a bank fraud scheme under 18 U.S.C. § 1344(2).[1] To prove such a scheme, the Government must show that a defendant (1) knowingly executed (or attempted to execute) a scheme through which the defendant "intend[ed] to obtain any of the moneys . . or other property owned by, or under the custody or

[1] To the extent Akhavan argues that the Court only instructed the jury on § 1344(1), he is mistaken. Although the Court used the phrase "scheme to defraud," rather than the less parsimonious phrase "scheme to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises," the Court's instructions made abundantly clear that the jury could find the defendants guilty based upon a violation of § 1344(2). *See* Court's Instructions of Law, ECF No. 246, at 16 ("[A] scheme to defraud a bank or credit union means a scheme to use one or more misrepresentations to obtain money or property from a bank or credit union.").

control of, a financial institution" by means of misrepresentations; (2) one or more of the misrepresentations was material; and (3) the defendant acted knowingly, willfully, and with a specific intent to defraud. *See Loughrin v. United States,* 573 U.S. 351, 355-56 (2014).

The Government need not prove an intent to cause harm other than the obtaining of bank property, nor need it prove that the misrepresentations related to an "essential element" of the bank's agreement with its cardholders. The defendants' arguments relating to the "essential element" requirement turn on caselaw that applies only to § 1344(1). Here, however, the evidence also supported a conviction under § 1344(2), so the Court need not consider the "essential element" requirement. *Compare United States v. Lebedev,* 932 F.3d 40 (2d Cir. 2019) (finding sufficient evidence to sustain bank fraud conviction under § 1344(2) where defendants used phony merchant to conceal true nature of Bitcoin transaction).

Even if the Government were required to prove that the defendants' misrepresentations went to an "essential element" of the bank's bargain, the defendants do not persuasively explain why the proper bargain to look to is the bargain between the banks and their cardholders. Here, the misrepresentations were conveyed by the merchant bank through the card payment network to the issuing bank – the cardholder was not a conduit for misinformation. Thus, the more reasonable approach in this case would be to ask whether the misrepresentations related to an essential element of the bargain between the issuing bank and the card payment network. And they did: testimony at trial demonstrated that Visa and MasterCard were completely unwilling to process payments for illegal

goods and services, such as marijuana transactions in the United States. The misrepresentations directly related to an essential element of the issuing banks' bargain with Visa and MasterCard, so, even if the Government were required to demonstrate this, they did so.[2]

For these reasons, the Court finds that the evidence was sufficient to support the jury's verdict.

The defendants' Rule 33 motions argue that, even if the evidence is technically sufficient to support the verdict, the risk of wrongful conviction is so high that the Court should set aside the verdict and order a new trial to prevent manifest injustice. The Court totally disagrees. The evidence overwhelmingly supported the guilty verdicts in this case, so the Court will neither enter a judgment of acquittal nor order a new trial for insufficiency of evidence.

III. Confrontation Clause

Over the defendants' objection, the Court permitted one Government witness, Martin Elliott of Visa, to testify by live two-way videoconference. The defendants argued in advance of trial that permitting such

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[2] To the extent the defendants argue that there was no evidence to show that the defendants intended to defraud a federally insured bank, this argument is without merit. The Government demonstrated that, even though the defendants' misrepresentations were made directly to merchant banks, rather than issuing banks, those representations would "naturally reach the [issuing] bank." *Loughrin,* 573 U.S. at 365 n.8. The evidence adduced at trial showed that the defendants were aware of this fact including, for example, from discussions held in Akhavan's office in Calabasas. This is, if anything, probably more than is required to satisfy this element (that is, the Government was not also required to prove that the defendants knew that the issuing banks were federally insured).

testimony would violate the Confrontation Clause. The Court analyzed the relevant caselaw and rejected the defendants' argument, finding that under Supreme Court and Second Circuit precedent, the use of live two-way video testimony may be permitted, without violating the Confrontation Clause, "[u]pon a finding of exceptional circumstances . . . when this furthers the interests of justice." *United States v. Gigante,* 166 F.3d 75, 80-81 (2d Cir. 1998).

This Court was forced to balance competing considerations in the face of a global pandemic. Vaccines were not yet widely available, but defendant Weigand was fervently pressing his constitutional and statutory rights to a speedy trial, and the case was trial-ready. The witness, Elliott, averred that given the ages and medical conditions of the members of his household, complying with the Government's subpoena by flying across the country to testify in person would imperil his and his family members' lives. This was an extraordinarily unusual situation, and the Court found that "exceptional circumstances" warranted the use of live two-way videoconferencing. The Court incorporates by reference its detailed pretrial assessment of the governing law and its finding of exceptional circumstances. Opinion and Order, ECF No. 208 (Mar. 1, 2021).[3] In their post-trial motions, the defendants largely rehash their prior arguments on this topic, but they offer no change in law or fact to warrant reconsideration of the Court's prior ruling.

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[3] Notably, the Court set detailed guidance to ensure that the two-way video would have the hallmarks of live testimony: the defendants were permitted to have representatives in the room from which the witness testified, and at all times the witness could see and be seen by the defendants, the jurors, the examiner, and the judge.

Akhavan raises one new Confrontation Clause-related argument: that the defendants suffered practical difficulties when cross-examining Elliott by video that were exacerbated by the time limits the Court imposed on cross-examination. Akhavan first argues that there were certain minor issues with video transmission or with locating exhibits; such arguments are entirely without merit. Both the raising and the resolution of these issues was incredibly brief and was about as disruptive as a witness's sneeze.

Akhavan next argues that he would have been able to better "control" the witness if he were present in open court. This is unsubstantiated speculation; from all the evidence offered at trial, the Court sees no reason to believe that Elliott would have testified differently on any relevant topic merely because he was in the same room as the defendant. To be sure, the ephemeral coercive force of being contemporaneously present in the same room as the accused is a theory that, though both highly speculative and seemingly contrary to ordinary trial practice,[4] is sometimes said to be partly behind the Confrontation Clause right. But the Supreme Court and the Second Circuit have made clear that the right to contemporaneous physical presence is subject to exceptions under extraordinary circumstances. *See, e.g., Maryland v. Craig, 4*97 U.S. 836, 844 (1960). When such circumstances are present, as here, the defense must offer more than mere speculation to show that the witness would have testified differently in the courtroom.

[4] If, for example, a defense counsel was "badgering" an adverse witness, no judge would hesitate to intervene to put a stop to such misconduct.

Akhavan next argues that the Court imposed improper time limits upon his cross-examination of Elliott and that this, combined with the added logistical difficulties of cross-examining by video, rendered the trial fundamentally unfair. But the Court acted within its "wide discretion" in limiting the time for cross-examination. *United States v. Flaherty,* 295 F.3d 182, 190-91 (2d Cir. 2002). And the accusation is itself misleading. In actuality, the Court asked defense counsel how much longer defense counsel would need for cross-examination, and the Court then permitted defense counsel to take that time, and more.

Moreover, Akhavan points to no significant topic he was unable to cover with the witness on cross-examination. He points to a slide deck of modest relevance, HAX-5014, and argues that he would have asked questions about the deck if given additional time. But this slide deck bordered on the trivial, and the defense repeatedly adduced evidence and testimony from Elliott and others to support the overarching point for which he offered the slide deck: that credit card companies and banks profited from marijuana transactions, giving them a motive to be willfully blind to the defendants' misrepresentations. From such other evidence, the jurors were well aware that banks profited from marijuana transactions. They evidently, and reasonably, refused to infer from this that the banks did not care whether the transactions were for marijuana. Further testimony on this topic would have been cumulative.

Finally, the Court notes that even in the unlikely event that the Supreme Court and the Second Circuit were to adopt the extreme view of the Confrontation Clause asserted by the defense, any error in this case would have been harmless beyond a reasonable doubt.

Elliott's testimony was largely duplicative of John Verdeschi's (of MasterCard), and more generally, there was no shortage of testimony by the credit card companies.

IV. *Curative Instruction*

During closing arguments, Akhavan's counsel argued that "the question for bank fraud isn't what the banks do after the fact; remember, it's what they do to authorize a transaction." Tr. 2581. This raised the risk that the jurors might be led to take a myopic, single-transaction view of materiality. The jurors might have mistakenly believed that the defendants' misstatements could not possibly have been material because banks only have limited information and process transactions in milliseconds. In truth, however, misrepresentations about transactions, and about the merchants processing those transactions, may be material because of what the bank does "after the fact." As explained above in connection with the defense's materiality arguments, a juror could reasonably find that had a bank learned the truth about an already-authorized transaction *(i.e.,* that it was for marijuana, rather than pet supplies or SCUBA gear), the bank may have relied on that information in making a subsequent decision not to process further transactions by that merchant (or to report that merchant to Visa and MasterCard, potentially leading to the same result). That is why the Court instructed the jury that a material fact is one "a reasonable banker would be reasonably likely to consider in making a decision authorizing a bank transaction" – not in authorizing *the* specific transaction to which the misrepresentation most directly related. *See* Court's Instructions of Law, ECF No. 246, at 17.

Given the possibility that the defense's argument could have confused the jury into adopting an overly narrow view of materiality, the Court offered a minor responsive clarification:

> [I]t is not necessary that a misrepresentation made in connection with a particular transaction be reasonably likely to affect the decision to authorize that particular transaction at that particular time [because] what is charged here is an ongoing scheme to defraud, including a course of misrepresentations over a period of time through a pattern or a course of deceptive conduct. So you need to look at the whole picture.

Tr. 2673-38.

This curative instruction properly stated the law and did not jeopardize the defendants' rights to a fair trial.

V. Weigand's Motions in Limine

Finally, Weigand argues that five of the Court's rulings on motions in limine were erroneous and, together, amounted to a miscarriage of justice. Weigand's arguments on this score largely duplicate his arguments previously made with respect to the motions in limine, and the Court rejects them for the reasons stated below and the reasons stated orally during the trial.

A. Weigand's Laptop

The Court received in evidence many exhibits obtained from Weigand's laptop, which was seized incident to his arrest. Weigand argues that the Court erred by admitting these documents, in two respects.

First, Weigand objects to certain files for which metadata suggests that the files were added to Weigand's laptop in January 2020, after the charged scheme. The exhibits were properly received in evidence. The jurors could have reasonably inferred, for example, that Weigand possessed these files on another electronic device, and that they were then added to his laptop in January 2020. Alternatively, the jurors could have reasonably inferred that Weigand received these files from a co-conspirator for the first time in January 2020. Even if he did not possess them during the charged conspiracy, the fact that a coconspirator would send them to him, and that he would retain them on his laptop, is probative.

That is not to say the metadata was irrelevant. The Court permitted the defense to inquire about the metadata at trial, and it did so. After learning that these exhibits may have been added to Weigand's laptop as late as January 2020, it was for the jury to decide how much weight to afford each exhibit.

Second, Weigand argues that certain documents were improperly admitted because they were admitted without context, requiring the jury to speculate about them. He maintains that some of the documents predated his involvement in the scheme and others concerned legitimate business relationships in Europe. But many of these documents were highly probative, revealing Weigand's awareness of, and involvement in, various aspects of the fraudulent scheme. And none was unduly prejudicial or misleading. Again, Weigand was entitled to argue that the jury should have afforded little weight to these documents, but they were properly received in evidence.

B. Wirecard

*W*eigand argues that his trial was fundamentally unfair because the Government offered evidence regarding a merchant bank, Wirecard, which has been in the news for other alleged misconduct. This argument borders on the frivolous. The Government adduced evidence regarding multiple merchant banks, including Wirecard. The evidence was directly probative of the scheme charged in this case, and neither the evidence nor the Government's arguments came remotely close to suggesting that Weigand was involved with any alleged wrongdoing involving Wirecard other than the charged bank fraud conspiracy.

C. Expert Witness

The Court excluded proposed testimony by Weigand's expert witness, Stephen Mott. Weigand argues that the Court erred by excluding three categories of proffered testimony. First, Mott would have testified that companies commonly "locate subsidiaries or related entities" in the same jurisdiction as the merchant bank to "comply with Visa and MasterCard's 'Area of Use' rules." ECF No. 227. However, such testimony would have been misleading in this case. No evidence adduced at trial suggested either that the overseas companies incorporated by the conspirators were "subsidiaries or related entities" to Eaze in any legitimate sense or that they were created to comply with "area of use" rules. Rather, they were phony merchants used to launder transactions. Insofar as Mott would have theorized a potential alternative reason for incorporating overseas entities – one divorced from the evidence – his testimony would have been irrelevant and misleading. The Court properly excluded it.

Second, the Court held that Weigand's expert disclosure regarding Mott's proffered testimony concerning ISOs was inadequate. The defense merely proffered that Mott would testify regarding "the influence that credit card networks and the issuing banks have over the [ISO] with respect to the creation of Merchant Category Codes." This disclosure was far too vague and offered no indication either of Mott's opinion or the basis for that opinion. Therefore, such testimony was properly excluded.

Finally, Weigand indicated that Mott would opine that merchant banks bear the risks of chargebacks with respect to non-secure e-commerce transactions. The Court found that this topic was properly the subject of lay testimony, not expert testimony, and that it was cumulative because substantial testimony was offered regarding chargebacks by other witnesses. The evidence before the jury made it abundantly clear that U.S. issuing banks profited from these transactions and that cardholders' money would be returned following a successful chargeback.

The only respect in which Mott's testimony was arguably not cumulative was that Mott might have opined that merchant banks, rather than issuing banks, bore the financial risk of chargebacks for Eaze transactions. If this was true, however, it should have been demonstrated through lay evidence showing how, in fact, Eaze chargebacks were processed. In any event, the only possible relevance of such testimony would be to rebut the Government's evidence of materiality, and as noted above, the defense had many other opportunities to demonstrate that banks benefited financially from these Eaze transactions.

For these reasons, the Court properly excluded the proffered expert testimony of Stephen Mott.

D. Weigand's Post-Arrest Statement

The Government offered into evidence a statement Weigand made to the FBI following his arrest. Of course, such a statement is admissible despite the rule against hearsay as the statement of a party opponent. Weigand responded by seeking to introduce a much larger excerpt of his post-arrest statement, arguing that the larger excerpt was necessary under the rule of completeness. However, as the Court explained at trial, Weigand "really exaggerates the scope of the rule of completeness. This is designed to deal with things like someone introduces half a sentence and not the other half of a sentence. It doesn't open the door to pages and pages of what is otherwise clearly hearsay." Tr. 856-857.

The Court permitted defense counsel to introduce Weigand's statement that his understanding of English was "okayish," finding that that disclaimer offered necessary context for the remainder of Weigand's post-arrest statement. However, the other statements offered by Weigand were not admissible under the rule of completeness. The Court adheres to its oral ruling on this topic. Tr. 2120-2125 (explaining why each of the other statements Weigand sought to introduce was not admissible under the rule of completeness).

E. Pecuniary Harm

Finally, Weigand maintains that he should have been permitted to argue that he lacked fraudulent intent because he did not intend pecuniary harm to the banks. Weigand misapprehends the law. As this Court has repeatedly held throughout this case based on Supreme Court precedent, to prove bank fraud the Government need not demonstrate that banks suffered pecuniary harm. *E.g., Shaw v. United States,*

137 S. Ct. 462, 467 (2016); *Loughrin v. United States,* 573 U.S. 351, 366 n.9 (2014). Thus, to prove fraudulent *intent,* the Government need not demonstrate that the defendants *intended* pecuniary harm. Rather, the Government needed to prove that the defendants knowingly and willfully devised a scheme with the specific intent to deprive banks of money or property by means of misrepresentations. This the Government proved beyond a reasonable doubt.

The Court permitted the defense to argue extensively that banks profited from the scheme; such evidence was relevant to materiality. What the Court did not permit, and properly so, was an argument that the defendants needed to cause, or to intend, pecuniary harm; that is not an element of bank fraud.

For the foregoing reasons, by bottom-line order dated June 18, 2021, the Court denied the defendants' motions for judgment of acquittal or, in the alternative, for a new trial, ECF Nos. 259 & 300.

Dated: New York, NY
July 2, 2021

/s/ Jed S. Rakoff
JED S. RAKOFF, U.S.D.J.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

20-cr-188 (JSR)

UNITED STATES OF AMERICA

-v-

HAMID AKHAVAN & RUBEN WEIGAND,

Defendants.

OPINION & ORDER

JED S. RAKOFF, U.S.D.J.

This case began less than one year ago, on March 9, 2020, when a grand jury returned indictments against Ruben Weigand and Hamid ("Ray") Akhavan for conspiracy to commit bank fraud. Today, the Court will empanel a jury to try the case.

The intervening year has been challenging. Just two days after the indictments were returned, the World Health Organization declared a global pandemic.[1] Two days later, President Trump announced that "[t]o unleash the full power of the federal government, in this effort today I am officially declaring a national emergency. Two very big words."[2] Since then, the total

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[1] James Keaton, et al., *WHO Declares Coronavirus a Pandemic, Urges Aggressive Action,* Reuters (Mar. 12, 2020), https://apnews.com/article/52e12ca90c55b6e0c398d134a2cc286e.

[2] The New York Times, *Two Very Big Words: Trump Announces National Emergency for Coronavirus* (Mar. 13, 2020), https://

number of confirmed COVID-19 cases has surpassed 113 million worldwide, and more than 2.5 million people have died.[3] In the United States alone, there have been more than 28 million confirmed cases, and more than half a million people have died.[4]

Recognizing the importance of the defendants' and the public's right to a speedy trial, and despite the complexity of this case and the many difficulties generated by the pandemic, the Court has expended considerable effort to bring the case swiftly and safely to trial. So have many others: support personnel at the courthouse; Pretrial Services Officers; U.S. Marshals; witnesses who have been subpoenaed and who will travel to the courthouse, some from great distances; counsel for both sides, including some who have flown across the country to defend their clients; and now, dozens of jurors who, despite the risk, will board buses and subways to answer the call to discharge one of their most sacred civic duties.

Now before the Court are two motions relating to the pandemic and the Court's response to it. First, Weigand moves to dismiss the indictment under the Speedy Trial Act and the constitutional Speedy Trial Clause, arguing that the COVID-19 pandemic did not offer a valid basis for adjourning this trial from its originally scheduled date, December 1, 2020, until

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www.nytimes.com/video/us/politics/100000007032704/trump-coronavirus-live.html.

[3] Henrik Petterson, et al., *Tracking COVID-19's Global Spread,* CNN, https://www.cnn.com/interactive/2020/health/coronavirus-maps-and-cases/ (last accessed Feb. 28, 2021).

[4] Centers for Disease Control & Prevention ("CDC"), *COVID Data Tracker,* https://covid.cdc.gov/covid-data-tracker/#datatracker-home (last accessed Feb. 28, 2021).

today. This motion borders on the frivolous and is denied for reasons set forth below.

Second, Martin Elliott and his employer, Visa, Inc., third parties, have been subpoenaed to give trial testimony in this case. However, Elliott resides in California and contends that, because of his personal medical situation and that of his family, he is unable to travel to New York and back during the pandemic without seriously jeopardizing his and their health. He moves for leave to testify by two-way videoconference. The defendants oppose the motion, arguing that permitting such testimony would violate their Sixth Amendment right to confront witnesses against them. The Court granted Elliott's motion orally on February 19, 2021, *see* Tr., and this Opinion sets forth the basis for that ruling.

I. WEIGAND'S MOTION TO DISMISS THE INDICTMENT ON SPEEDY TRIAL GROUNDS

Anyone who has appeared before the undersigned knows that this Court moves its cases swiftly. This is especially true in criminal cases, where

> [i]nordinate delay between public charge and trial, wholly aside from possible prejudice to a defense on the merits, may seriously interfere with the defendant's liberty, whether he is free on bail or not, and may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends.

United States v. Taylor, 487 U.S. 326, 340 (alterations omitted). Even so, moving a document-heavy white-collar case like this from indictment to trial in less

than one year would be an accomplishment under even normal circumstances, let alone the delays brought on by the pandemic. The argument that the delay in this action violated Weigand's rights under the Speedy Trial Act is specious at best, and the claim that it violated his *constitutional* rights is frivolous. The Court takes up Weigand's statutory and constitutional arguments, in turn.

A. *Speedy Trial Act*

1. Legal Standard

The Speedy Trial Act sets guardrails on federal courts' powers to delay criminal trials. It provides that trial "shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs." 18 U.S.C. § 3161(c)(1). However, the 70-day clock is not always running. Certain "periods of delay shall be excluded . . . in computing the time within which the trial of any such offense must commence." *Id.* § 3161(h). Some exclusions operate automatically, including, as relevant here, "[a]ny period of delay resulting from other proceedings concerning the defendant, including but not limited to . . . delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion" and "delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court." *Id.* § 3161(h)(1)(D), (H). In addition to these automatic exclusions, the Court may exclude periods of time in the interests of justice. Specifically, the 70-day clock does not run

> if the judge granted [a] continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

Id. § 3161(h)(7)(A). "[I]n determining whether to grant [such] a continuance," the Court "shall consider" certain enumerated factors, "among other[]" non-enumerated factors; enumerated factors include "[w]hether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice." *Id.* §3161(h)(7)(B)(i).

2. Analysis

Weigand's initial appearance before this Court took place remotely, with Weigand's consent, on April 28, 2020. Thus, the 70-day clock would have begun ticking on that day. However, on that day the Court set the case for trial on December 1, 2020 and, without objection, granted an exclusion of time until December 1, 2020 under 18 U.S.C. § 3161(h)(7)(A), finding the exclusion "necessary for the completion of discovery, the making and deciding of motions, the accommodation of counsel's complicated schedules, [and] the special delays put in place by the coronavirus crisis," among other reasons. Tr., ECF No. 30, at 12:18-21.

Weigand concedes that time was properly excluded through December 1, 2020.

The case progressed swiftly. On May 11, 2020, the defendants moved for a bill of particulars pursuant to Federal Rule of Criminal Procedure 7(f), and the Court granted that motion on May 20, 2020. ECF Nos. 35-38. On June 26, 2020, the defendants moved to dismiss the indictment, to compel certain discovery, and to suppress certain evidence seized from Weigand incident to his arrest. ECF Nos. 61-74. The parties briefed and argued the motions, and the Court issued an Opinion and Order granting them in part and denying them in part on August 31, 2020. ECF No. 91. Discovery continued in earnest through summer and fall 2020. Throughout this time, the Court granted Weigand's requests to remain in custody in California, rather than requiring that he be brought to the Southern District of New York; this permitted his California-based counsel to meet with him more easily. Moreover, on October 6, 2020, the Court granted Weigand's renewed motion for bail, permitting him to be released into the custody of private security guards and further facilitating his access to counsel. ECF No. 112.

The parties and the Court were on track to proceed with trial on December 1, 2020, but the trial did not proceed for one reason: the COVID-19 pandemic. On November 30, 2020, Chief Judge McMahon issued a standing order announcing a "temporary curtailment of operations [that] is required to preserve public health and safety in light of the recent spike in coronavirus cases, both nationally and within the Southern District of New York." Standing Order M-10-468, at 1, *In re: Coronavirus/COVID 19 Pandemic,* Dkt. No. 20 mc-622-CM (Nov. 30, 2020). The Standing

Order provided that "[a]ll jury trials scheduled for the period beginning December 1, 2020 and ending January 15, 2021 are adjourned." Id. at 2.

On December 1, 2020, the Government filed a letter that stated in part, "For the reasons set forth in the Chief Judge's Standing Order, as well as those previously stated by the Court when it excluded time through today, the Government respectfully requests the exclusion of time under the Speedy Trial Act from today through January 15, 2021." Ltr, ECF No. 123. The Court endorsed the letter by writing, "So ordered," that same day. ECF No. 124. The Court adjourned the trial to January 25, 2021.

The Chief Judge issued a First Amended Standing Order on January 5, 2021, extending the suspension of jury trials in the District through February 12, 2021 because of a continuing surge in COVID-19 cases. First Amended Standing Order M-10-468, *In re: Coronavirus/COVID 19 Pandemic,* Dkt. No. 20-mc-622-CM (Jan. 5, 2021). On January 7, 2020, the Court conducted a teleconference regarding the need to further adjourn this trial. The Court explained that it was still hopeful that the trial could proceed in March, or perhaps even in late February, but warned counsel that, due to limitations in the number of courtrooms that have been outfitted with equipment to permit safe trials during the pandemic and given previously scheduled cases, a trial in February or March might not be possible. Because counsel were unavailable for a trial in April or early May, the Court

> set the trial down for May 17th. And pursuant to the Speedy Trial rules, [the Court] exclude[d] all time between [January 7] and [May 17], finding that because of the pandemic the best interests of justice in

> excluding such time substantially outweighs the interests of the public and the defendants in a speedy trial.

Tr., ECF No. 130, at 9:11-16.

Weigand's counsel objected, arguing that Weigand is a German citizen with no criminal history; that this was a "no-loss" fraud in which no banks had been harmed; and that discovery had been completed, pretrial motions had been decided, and "there's nothing remaining to do." *Id.* at 15:5-13. The Court asked, "So you think those grounds override the risk of someone dying from COVID-19 if we went forward with a trial, say, tomorrow?" *Id.* at 15:16-18. Weigand's counsel responded, "Certainly not, Your Honor." Id. at 15:19-20. The Court adhered to its ruling, excluding time through May 17, 2021.

1. The Court's Exclusions Were Proper

The Court's exclusions of time based on the pandemic were proper. Due to specific surges in COVID-19 cases around the holidays, the Chief Judge adjourned all jury trials, ultimately for a period of 11 weeks. During that time, many of the most vulnerable members of the public, and many courthouse employees, were vaccinated. While the courthouse cannot entirely eliminate the possibility of COVID-19 transmission during a trial – let alone the possibility of transmission during travel to and from the courthouse – now that many of the most vulnerable members of our population have been vaccinated, and given the downward trend in cases, the "risk of someone dying from COVID-19" because of the trial is markedly lower now than it was in December. As Weigand himself conceded, his interests in a slightly speedier trial do not override

this risk, which would have been markedly more significant during the winter COVID-19 spike.[5]

2. Even Without the Court's Exclusion of Time, 70 Days of Non-Excludable Time Have Not Passed

Even setting aside this Court's pandemic-induced exclusions of time, 70 days of non-excludable time have not yet passed.

The Speedy Trial Act automatically excludes "[a]ny period of delay resulting from other proceedings concerning the defendant, including but not limited to . . . delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion" and "delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court." 18 U.S.C. § 3161(h)(1)(D), (H). Other courts have found that motions in limine are pretrial motions for purposes of this provision.

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[5] Weigand also argues that the Court's "so ordered" exclusion on December 1 was inadequate because it did not explicitly state the basis for the Court's exclusion of time. The Supreme Court has explained on this issue that "the findings must be made, if only in the judge's mind, before granting the continuance," *Zedner v. United States,* 547 U.S. 489 (2006), and "must be put on the record by the time a district court rules on a defendant's motion to dismiss," *id.* at 506-07. Before granting the exclusion of time, this Court found, in its own mind, that the exclusion was warranted because of the pandemic. And the Court unambiguously explained its reasoning during the teleconference on January 7. Tr., ECF No. 130, at 15:21-23 ("The whole reason for these adjournments is the pandemic, nothing else. The government is ready to go. I'm ready to go."). Thus, there is no merit to the argument that the Court failed to articulate the basis for its ruling.

E.g., *United States v.* Jones, No. 15-CR-133S, 2017 WL 2957818, at *6 (W.D.N.Y. July 11, 2017). This Court agrees.

The Government filed a motion in limine on February 5, 2021, which the Court granted in part and denied in part on February 14. All parties filed additional motions in limine on February 16, 2021, which remain pending and on which the Court will rule before opening arguments today.

The February 5 motion was, and the February 16 motions will be, promptly resolved less than 30 days after they were taken under advisement. Thus, time is excluded "from the filing of [each] motion through the . . . prompt disposition" of the motion, i.e., from February 5 through February 14 for the earlier motion and from February 16 through today for the subsequent motions.

Therefore, even assuming contrary to fact that there was a defect in the Court's exclusions of time in the interests of justice under the Speedy Trial Act, no more than 66 non-excludable days have passed since December 1, 2020: 65 days from December 2 through February 4, plus February 15 (the day between the Court's ruling on the initial motion in limine and the filing of the remaining motions).[6]

B. Speedy Trial Clause

The Court need not dwell on Weigand's claim that the delay in this case violates his constitutional right to a speedy trial. When conducting a constitutional

[6] February 15 might also be properly excluded because a third-party motion to quash was pending. The Court need not resolve that question because, either way, 70 non-excludable days have not passed.

speedy trial inquiry, courts look, as a threshold matter, to the length of the delay; a court "will only consider the other . . . factors when the defendant makes a showing 'that the interval between accusation and trial has crossed the threshold dividing ordinary from presumptively prejudicial delay.'" *United States v. Ghailani,* 733 F.3d 29, 43 (2d Cir. 2013) (quoting *Doggett v. United States,* 505 U.S. 647, 652 (1992)) (further quotation marks omitted). A delay that "approaches one year" triggers further inquiry. *Doggett,* 505 U.S. at 652 n.1. Trial in this case will commence eight days shy of one year after indictment, so the Court assumes without deciding that further inquiry is necessary.

To assess whether a speedy trial violation has occurred, the Court considers four factors: "length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *United States v.* Moreno, 789 F.3d 72, 78 (2d Cir. 2015) (quoting *Barker v. Wingo,* 407 U.S. 514, 530 (1972)) (brackets omitted). Balancing these factors, Weigand's claim easily fails. First, the less-than-one-year delay, while perhaps sufficient to trigger further inquiry, is unremarkable in a case of such complexity. Second, the delay through December 1, 2020 is equally attributable to the Government and to the defendants, and the three-month delay thereafter is not attributable to the Government but rather to the pandemic, a neutral reason outside of the Government's control. Third, while Weigand properly and timely asserted his speedy trial rights for delays after December 1, he explicitly waived any argument that prior delays were improper. Finally, Weigand argues that he has suffered various forms of prejudice: needing to undergo medical treatment in prison, a year away from his family, costs, loss of livelihood, and psychological

trauma associated with incarceration during the pandemic. However, most of these had nothing to do with the three-month delay from December 1 to March 1, the only cognizable delay for present purposes. The only prejudice he has demonstrated that is attributable to *that* delay is, almost circularly, the additional time he has spent away from his family and the associated costs and continued harms to his livelihood.

In sum, the three-month delay attributable to the pandemic comes nowhere close to violating Weigand's constitutional right to a speedy trial.

II. MARTIN ELLIOTT'S MOTION TO TESTIFY BY VIDEO

The Court next turns to another coronavirus-related motion, the motion by third parties Visa, Inc., and Martin Elliott to offer trial testimony from California by two-way video technology. The defendants oppose the motion, arguing that permitting videophonic testimony would violate their rights under the Confrontation Clause of the Sixth Amendment. The Government takes no position. Following expedited briefing and oral argument, the Court granted the motion on February 19, 2021. This Opinion explains the basis for that ruling.

A. Background

The Government has subpoenaed Elliott, commanding that he testify at this trial. Akhavan has also subpoenaed Visa for trial testimony, and Visa intends to offer Elliott as its witness to discharge that obligation. Elliott was Visa's Global Head of Franchise Risk Management during the relevant period. Although he represents that he "has no firsthand knowledge of the specific transactions at issue in this case," he is expected to provide, in his counsel's words, "process-

type testimony about the workings of the Visa payment network." Elliott Ltr. Motion, ECF No. 174, at 1. The defendants do not contest this description, although they maintain that "questions about what Visa's policies did (or did not) require and how Visa did (or did not) enforce those policies are among the most critical questions in this case." Ltr. Opp., ECF No. 175, at 5.

Elliott is 57 years old and has been diagnosed with hypertension and atrial fibrillation (a heart condition). His wife is 55 and has been diagnosed with hypertension. To his knowledge, no one in his household has contracted COVID-19, and no one has received the coronavirus vaccine. He and his wife are also the primary caretakers of his 83-year-old mother-in-law, who has received the first dose of the COVID-19 vaccine. Elliott lives in the San Francisco Bay area and would need to travel by commercial flight to testify in this trial. He avers that he and his wife have diligently complied with Centers for Disease Control and Prevention ("CDC") guidance during the pandemic. They have not left California since early 2020 and have not flown on an airplane since the early summer.

Elliott's age and preexisting conditions place him at increased risk of serious illness or death if he were to contract COVID-19. The CDC has found that people aged 50-64 are 400 times more likely to die and 25 times more likely to be hospitalized from COVID-19 than children aged 5-17 years, and are more than 25 times more likely to die and 3 times more likely to be

hospitalized than young adults aged 18-29.[7] On top of that, "adults of any age" with "heart conditions, such as heart failure, coronary artery disease, or cardiomyopathies" "are at increased risk of severe illness" from COVID-19, and "adults of any age" with hypertension "might be at an increased risk for severe illness."[8]

Although COVID-19 cases are trending downward, they remain high, and the "CDC recommends that [people] do not travel at this time."[9] Under present courthouse policy, those who do travel from outside New York and its adjacent states must quarantine for four days and then obtain a negative COVID-19 test on the fifth day before they may enter the courthouse. Elliott points out that if he testified in person, then, due to the heightened risks faced by his wife and mother-in-law, he would also need to quarantine apart from his family after returning to California.

B. Legal Standard

None dispute that the Court has the inherent authority to permit testimony by videophonic means, unless doing so would be contrary to federal law. Defendants argue that such testimony is impermissible here for one reason, the Confrontation Clause of the Sixth Amendment, which provides: "In all criminal

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[7] CDC, *Older Adults and COVID-19,* https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html (last accessed Feb. 28, 2021).

[8] CDC, *Certain Medical Conditions and Risk for Severe COVID-19 Illness,* https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html (last accessed Feb. 28, 2021).

[9] CDC, *Travel During COVID-19,* https://www.cdc.gov/coronavirus/2019-ncov/travelers/travel-during-covid19.html (last accessed Feb. 28, 2021).

prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI.

"The primary object of" this clause is "to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner." *Maryland v. Craig,* 497 U.S. 836, 845 (1990). Instead, courts generally must permit

> a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

Id. (internal quotation marks and citation omitted).

C. Analysis

A "confrontation" encompasses several elements – "physical presence, oath, cross-examination, and observation of demeanor by the trier of fact" – that together "serve[] the purposes of the Confrontation Clause by ensuring that evidence admitted against an accused is reliable and subject to . . . rigorous adversarial testing[.]" *Id.* at 846. Despite the values of confrontation, however, the Supreme Court "ha[s] never held . . . that the Confrontation Clause guarantees criminal defendants the absolute right to a face-to-face meeting with [all] witnesses against them at trial." Id. at 844. For example, "a literal reading of the Confrontation Clause would abrogate virtually every hearsay excep-

tion," a result the Court has long rejected. *Id.* at 848 (internal quotation marks and citation omitted).

Confrontation Clause analysis comprises two distinct questions. First, a court must ascertain whether the evidence in question even implicates the accused's right to confront "witnesses against him." The Supreme Court identifies such evidence as "testimonial." This question is not difficult in this case. If Elliott were offering evidence by means of an affidavit, then some aspects of his testimony might bear on matters, like Visa's policies, that are sufficiently ministerial that his statement might qualify as non-testimonial. See, e.g., *Melendez*-Diaz *v. Massachusetts,* 557 U.S. 305, 324 (2009) ("[H]aving been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial[,] [certain records would] not [be] testimonial."); *United States v. Boyd,* 686 F. Supp. 2d 382, 386 (S.D.N.Y. 2010), *aff'd,* 401 F. App'x 565 (2d Cir. 2010) ("[W]here the defendant had ample opportunity to confront the Government witness who undertook the final, critical stage of the DNA analysis, and where that witness was personally familiar with each of the prior steps, testified that the analysis included safeguards to verify that errors would not result in a false positive, and demonstrated that the prior steps were essentially mechanical in nature, the Confrontation Clause is satisfied."). But Elliott will be testifying live, so there is no doubt that his statements will be testimonial. *See Melendez-Diaz,* 557 U.S. at 310 ("[T]estimonial statements" include "ex parte in-court testimony or its functional equivalent" and "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial[.]") (internal quotation marks and citations omitted). After all,

the purpose of the "testimonial" inquiry is to assess whether, in the words of the Sixth Amendment, the declarant is a "witness," and Elliott will obviously be one. Put simply, testimony is always "testimonial."

Ordinarily, this ends the Confrontation Clause inquiry because a defendant has a right to confront witnesses against him. But in some cases, courts also face a second question: whether the "confrontation" requirement may be satisfied by something short of traditional, live, in-court testimony.

In *Maryland v. Craig,* for example, the Supreme Court found that live testimony through a one-way videoconferencing system satisfied the Confrontation Clause. The state court permitted such technology so that a child witness could testify regarding alleged abuse without facing the accused. The Court "f[ou]nd it significant" that, other than requiring the witness to face the defendant, the procedure "preserves all of the other elements of the confrontation right," including oath, cross-examination, and the ability of the judge, jury, and defendant to view the witness's demeanor. *Craig,* 497 U.S. at 851. The Court recognized "the many subtle effects face-to-face confrontation may have on an adversary criminal proceeding," but it nevertheless found that the one-way videoconference procedure "adequately ensures that the testimony is both reliable and subject to rigorous adversarial testing in a manner functionally equivalent to that accorded live, in-person testimony." *Id.* The Court concluded "that use of the one-way closed circuit television procedure, where necessary to further an important state interest, does not impinge upon the truth-seeking or symbolic purposes of the Confrontation Clause." Id. at 852. And the Court held that Maryland's "interest in the physical and psychological well-being

of [the] child abuse victim[]" was an important state interest furthered by the one-way video procedure used in the state court. *Id.* Therefore, the Court found no Confrontation Clause violation. *Id.* at 857.

The Second Circuit likewise approved the use of video testimony in *United States v. Gigante,* 166 F.3d 75 (2d Cir. 1999). *Gigante* held that, "upon a finding of exceptional circumstances, . . . a trial court may allow a witness to testify via two-way closed-circuit television when this furthers the interest of justice." *Id.* The Second Circuit reviews a district court's "exceptional circumstances" determinations for "abuse [of] discretion." *Id*. at 82.

The *Gigante* panel reasoned that Federal Rule of Criminal Procedure 15 permits deposition of pretrial witnesses in exceptional circumstances and that courts permit such deposition testimony to be used at trial if the witness is unavailable. The panel explained that

> two-way closed-circuit presentation of [the witness's] testimony afforded greater protection of Gigante's confrontation rights than would have been provided by a Rule 15 deposition [that was later introduced at trial]. It forced [the witness] to testify before the jury, and allowed them to judge his credibility through his demeanor and comportment; under Rule 15 practice, the bare transcript of [the witness's] deposition could have been admitted, which would have precluded any visual assessment of his demeanor. Closed-circuit testimony also allowed Gigante's attorney to weigh the impact of [the witness's] direct testimony on the jury as he crafted a cross-examination.

Id. The panel concluded that if *Gigante* could have been deposed under Rule 15, then *a fortiori* he could be examined by two-way videoconference. Because the witness "was in the final stages of an inoperable, fatal cancer," *id.* at 79, and was "participat[ing] in the Federal Witness Protection Program," *id.* at 81-82, the Second Circuit held that the use of two-way videoconference technology was consistent with the Confrontation Clause. *Gigante* has never been overturned by the Second Circuit.

The defendants argue that *Gigante* is no longer good law because it conflicts with the Supreme Court's 2004 opinion in *Crawford v. Washington,* 541 U.S. 36 (2004). In *Crawford,* the Supreme Court ruled that certain out-of-court statements could not be admitted, consistent with the Confrontation Clause, unless the defendant was allowed to cross-examine the declarant. Drawing from historical evidence, the Court explained that "the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused." *Id.* at 50. Thus, the Court held that testimonial out-of-court statements are only admissible when the witness is "unavailab[le]" and where there was "a prior opportunity for cross-examination." *Id.* at 68.

The error in defendants' reasoning is that *Crawford* and *Gigante* answered different questions. *Crawford* addressed whether confrontation was required for certain out-of-court statements. *Gigante* addressed whether, when the defendant undeniably has a Confrontation Clause right, that right can be vindicated in exceptional circumstances by video testimony. The answer to that question is yes. By arguing otherwise, defendants would have this Court believe that the

Crawford Court overruled *Maryland v. Craig*. But the majority opinion in *Crawford* did not even mention *Craig*. This Court declines to find that the Supreme Court overruled *Craig sub silentio,* just fourteen years after issuing that opinion, with nary a word about *stare decisis*.

Because *Crawford* answered a different question than the question presented here, and because *Gigante* is consistent with *Craig,* the Court applies *Gigante,* asking whether Elliott is "unavailable" and whether "exceptional circumstances" warrant the use of two-way video testimony.[10] Here, these two inquiries largely overlap. Elliott cannot travel across the country without subjecting himself to a substantial risk of contracting COVID-19. Given his age and comorbidities (as well as, to a lesser extent, the risks his family would face), contracting COVID-19 could well result in serious illness or death. Therefore, the Court finds that Elliott is "unavailable" to testify in person within the meaning of *Gigante*. Likewise, the need to prevent Elliott's serious illness or death (and to protect his family) offers exceptional circumstances warranting the use of two-way video testimony.

The defendants point out that many trial participants (e.g., counsel, witnesses, jurors, courthouse staff) must travel to the courthouse in the presence of others using public transit. However, this does not show that Elliott's circumstances are not exceptional.

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[10] The witness and the defendants suggest that Elliott's testimony must also be "material" to warrant the use of two-way video testimony, citing Judge Forrest's opinion in *United States v. Mostafa,* 14 F. Supp. 3d 515, 519 (S.D.N.Y. 2014). The Court need not consider whether such a requirement exists, because the witness and the defendants agree that Elliott's testimony satisfies any such materiality requirement.

If other trial participants present similarly severe risks of severe illness or death, the Court will similarly endeavor to limit such risks. To that end, the Court has agreed to permit two defense attorneys to view the proceedings by video and, with reasonable advance notice, to argue non-jury motions. Moreover, the Clerk of Court's procedure for summoning jurors has considered, and the Court's procedure for selecting jurors will consider, prospective jurors' risks of contracting severe COVID-19. Elliott merely asks that the Court similarly consider his individualized circumstances, which are exceptional.[11]

Because Elliott has demonstrated that he is unavailable to testify, and because exceptional circumstances support his request to testify by two-way video, his motion is granted.[12]

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[11] Judge Preska reached a similar conclusion in *United States v. Donziger,* No. 11-CV-691 (LAK), 2020 WL 5152162, at *2 (S.D.N.Y. Aug. 31, 2020), *reconsideration denied,* No. 11-CV-691 (LAK), 2020 WL 8465435 (S.D.N.Y. Oct. 23, 2020). Judge Preska reasoned that a witness "was at heightened risk of serious health complications if he were to contract COVID-19, that the Government had proposed adequate procedures to ensure the reliability of his testimony by video, and that the video testimony would comport with the requirements of the Sixth Amendment as construed in *Maryland v. Craig,* 497 U.S. 836 (1990), *United States v. Gigante,* 166 F.3d 75 (2d Cir. 1999), and related decisions." *Id.* at *1. This Court agrees, and the same rationale applies here.

[12] The standard articulated in *Craig* is satisfied, as well. *See Craig,* 497 U.S. at 850 ("[A] defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured."). Preventing the serious illness or death of a third-party witness whose testimony is compelled by subpoena is an important public policy.

The Court has made clear, and here reiterates, that Elliott, Visa, and their counsel are responsible for making all necessary technological arrangements for Elliott's testimony. The Court has been assured that this technology will permit the defendants, defense counsel, the questioner, the judge, and the jurors all to see and be seen by the witness. *Cf. United States v. Mostafa,* 14 F. Supp. 3d 515, 525 (S.D.N.Y. 2014) (adopting similar approach). The Court has also been informed that Elliott will testify from his attorneys' offices in the San Francisco area and that counsel for the defendants have been invited to send representatives, who can be present in the same room as Elliott throughout the entirety of his testimony. The Court need not address whether such procedures are constitutionally necessary in this case, but the Court agrees that they are prudent. This approach, even more than the approaches approved in *Craig* and *Gigante,* will preserve almost all "the intangible elements of the ordeal of testifying in a courtroom." *See Gigante,* 166 F.3d at 81.

For the foregoing reasons, Weigand's motion to dismiss the indictment on speedy trial grounds, ECF No. 183, is denied, and Visa and Elliott's motion to testify by video, ECF No. 174, is granted.

SO ORDERED.

Dated: New York, NY
March 1, 2021
Time: 12:02 a.m.

/s/ Jed S. Rakoff
United States District Judge

And the procedures applied here, even more than the one-way video testimony in *Craig,* will preserve every adversarial element of confrontation other than physical presence itself.

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

20-cr-188 (JSR)

UNITED STATES OF AMERICA,

-v-

RUBEN WEIGAND and HAMID AKHAVAN,

Defendants.

OPINION & ORDER

JED S. RAKOFF, U.S.D.J.

The indictment in this case alleges that many banks will not approve credit or debit card transactions for marijuana, even in states like California and Oregon that permit the sale of marijuana. To circumvent this, the indictment continues, defendants Ruben Weigand and Hamid Akhavan, and their co-conspirators, set up fictitious businesses, complete with websites and bank accounts, purporting to sell a host of products like dog food, face creams, green tea, carbonated drinks, and diving gear. They then used these fictitious businesses to fool the banks into approving marijuana credit card and debit card sales by disguising those transactions as sales of dog food and the like. As a result, the banks processed more than $100 million worth of transactions that they otherwise would have declined. Based on these allegations, the indictment here charges defendants with one count of conspiracy to commit bank fraud.

Now before the Court are defendants' motions to dismiss the indictment, defendant Weigand's motion to suppress electronically stored information that the Government seized from him pursuant to a warrant, and defendants' motions to compel certain discovery and to set pretrial disclosure deadlines.

I. MOTIONS TO DISMISS

The following allegations are drawn from the third superseding indictment. The Court accepts them as true for the purpose of evaluating the defendants' motions to dismiss. *See United States v. Goldberg,* 756 F.2d 949, 950 (2d Cir. 1985).

A credit or debit card transaction generally involves five parties: the cardholder (here, the would-be purchaser of marijuana), the merchant (here, the company created by the defendants and their co-conspirators to facilitate these card purchases, which the indictment calls the "Online Marijuana Marketplace Company"), and three intermediaries – the issuing bank, which issued the customer's card and funds the transaction; the processor (*e.g.,* Visa), which processes the transaction; and the merchant's bank, also known as the "acquiring bank," which receives funds on behalf of the merchant. S3 Superseding Indictment, ECF No. 16, at ¶¶ 7, 10. In the usual course, a cardholder initiates a transaction by seeking to purchase a good or service (such as here the purchase of marijuana) and offering a credit or debit card for payment. The merchant then transmits information regarding the transaction to the processor (or to the merchant's bank, which then passes the information on to the processor). This information includes a "merchant category code" ("MCC") that describes the category of product or service that the merchant sells. *Id.* ¶¶ 9, 10(d). The processor then passes that information to the issuing bank, which

approves or declines the transaction. If the issuing bank approves the transaction, it then transfers funds through the processor to the merchant's bank. Finally, the merchant's bank credits the merchant's account, and the issuing bank debits the cardholder's account (in the case of a debit card) or includes the charge on the cardholder's next monthly statement (in the case of a credit card). *See id.* 1 11(b)- (d).

The indictment alleges that Weigand and Akhavan were principals of the Online Marijuana Marketplace Company, which developed a website and mobile phone application through which customers in California and Oregon could order marijuana for delivery from a variety of retailers. *Id.* ¶¶ 1, 3. Many United States banks, however, are unwilling to process card payments for marijuana. *Id.* ¶ 1. Weigand and Akhavan, together with unnamed co-conspirators, allegedly deceived United States banks by disguising the transactions to create the false appearance that they were unrelated to the purchase of marijuana. *Id.* IT 1, 16.

To do so, Weigand, Akhavan, and their co-conspirators, beginning in 2016 and continuing through mid-2019, created a series of fictitious merchants purportedly selling legitimate goods including dog products, diving gear, carbonated drinks, green tea, and face creams (the "Phony Merchants"). The conspirators created web pages to support the illusion that the Phony Merchants had actually sold these legitimate goods. *Id.* 1 13. The conspirators worked with third-party payment processors and offshore merchant banks to create bank accounts for these Phony Merchants. *Id.* ¶ 12. The conspirators then applied incorrect MCCs to the Online Marijuana Marketplace Company transactions in order to create the appearance that the

transactions were related to the Phony Merchants and unrelated to marijuana. *Id.* ¶ 14.

When cardholders attempted to use credit and debit cards to make marijuana purchases from the Online Marijuana Marketplace Company, the issuing banks, at least some of which were federally insured financial institutions, were tricked into believing that cardholders were purchasing legitimate goods from the Phony Merchants. *Id.* The issuing banks approved over $100 million of credit and debit card transactions for the Online Marijuana Marketplace Company. *Id.*

The defendants move to dismiss on three grounds: (A) failure to state an offense; (B) lack of specificity; and (C) violation of a provision in an appropriations act (the "Rohrabacher-Farr Amendment") that bars certain Government interference with state medical marijuana regimes. The Court addresses each argument in turn.

A. Failure to State an Offense

Defendants argue that the indictment does not state an offense, for three reasons:

(1) Bank fraud requires an intent to inflict harm on a financial institution, and the indictment does not allege such an intent. Weigand Mem. in Support of Mot. to Dismiss, ECF No. 62 ("Weigand MTD"), at 12; Akhavan Mem. in Support of Mot. to Dismiss, ECF No. 72 ("Akhavan MTD"), at 15.

(2) Bank fraud requires an intent to deceive a financial institution, but the indictment does not allege that defendants made misrepresentations to issuing banks – only to intermediaries

who are not protected by the bank fraud statute. Weigand MTD 15, 17.

(3) Because at least some issuing banks were willing to process marijuana-related transactions, the indictment does not allege that defendants' misrepresentations were material. Akhavan MTD 15; Weigand MTD 17.

As noted, this indictment charges defendants with conspiracy to commit bank fraud in violation of 18 U.S.C. § 1349. Bank fraud, in turn, is defined in 18 U.S.C. § 1344, as follows:

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

The bank fraud statute was modeled on prior federal fraud statutes, as a Senate Judiciary Committee Report explained:

> The proposed bank fraud statute is modeled on the present wire and mail fraud statutes which have been construed by the courts to

[1] "Financial institution" is defined at 18 U.S.C. § 20. The indictment here alleges that at least some of the issuing banks were financial institutions, as defined in Section 20. ECF No. 16, T 16.

> reach a wide range of fraudulent activity. Like these existing fraud statutes, the proposed bank fraud offense proscribes the conduct of executing or attempting to execute "a scheme or artifice to defraud" or to take the property of another "by means of false or fraudulent pretenses, representations, or promises."

S. Rep. No. 98-225, at 378 (1983); *see also* 18 U.S.C. § 1341 (prohibiting "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises," using the mail); 18 U.S.C. § 1343 (same, but with use of interstate wire connection).

To state a violation of Subsection 1 of the bank fraud statute, the Government must allege that a defendant (1) knowingly executed (or attempted to execute) a scheme to "deceive [a] bank,"[2] (2) through "a misrepresentation or concealment of material fact,"[3] and (3) to "deprive it of something of value,"[4] with (4) "knowledge that [the defendant] would likely harm the bank's property interest" through the scheme.[5]

To state a violation of Subsection 2, the Government must allege that a defendant (1) knowingly executed

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[2] *Shaw v. United States,* 137 S. Ct. 462, 469 (2016).

[3] *Neder v. United States,* 527 U.S. 1, 3 (1999).

[4] *Shaw,* 137 S. Ct. at 469. Although the defendant must intend, through the scheme, to "deprive [the bank] of something of value," *id.* at 465, the Government need not allege "that the defendant intend that the victim bank suffer [financial] harm," *id.* at 467. A scheme to obtain an accountholder's funds is enough, because the bank holds a property interest in those funds, akin to a bailee. *Td.* at 465.

[5] *Id.* at 468.

(or attempted to execute) a scheme through which the defendant "intend[ed] to obtain any of the moneys . . . or other property owned by, or under the custody or control of, a financial institution" (hereinafter, "bank property");[6] (2) the defendant made "false or fraudulent pretenses, representations, or promises" (hereinafter, "misrepresentations");[7] (3) the misrepresentations were "of material fact";[8] and (4) the misrepresentations were the "means" by which defendant intended to obtain the bank property.[9]

1. Intent to Harm Banks

*D*efendants first argue that the indictment must be dismissed for failure to allege an intent to harm. Defendants cite *United States v. Miller,* a Ninth Circuit opinion that reasoned in the case of wire fraud (but with frequent analogies to bank fraud) that "the government can[not] escape the burden of showing that some actual harm or injury [to the victim's money or property] was contemplated by the schemer." *United States v. Miller,* 953 F.3d 1095, 1102 (9th Cir.

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[6] *Loughrin,* 573 U.S. at 355-56. While the indictment must allege an intent to obtain bank property, it need not allege that "the defendant's scheme created a risk of financial loss to the bank." *Id.* at 366 n.9.

[7] *Id.*

[8] *Neder v. United States,* 527 U.S. 1, 3 (1999).

[9] *Loughrin,* 573 U.S. at 355-56. The Supreme Court has described this as "a relational component: The criminal must acquire (or attempt to acquire) bank property 'by means of the misrepresentation . . . such that the connection between the two is something more than oblique, indirect, and incidental." *Id.* at 362-63. In other words, the Government must prove that "the defendant's false statement [was] the mechanism naturally inducing a bank (or custodian of bank property) to part with money in its control." *Id.* at 363.

2020) (quoting *United States v. Regent Office Supply Co.,* 421 F.2d 1174, 1180 (2d Cir. 1970)) (alterations in original). Defendants argue that here the indictment does not adequately allege an intent to impose "actual harm or injury" on the issuing banks.

In describing the sorts of harm that qualify, however, the Supreme Court's bank fraud precedents cast a wide net. The indictment need only describe a scheme to "deprive [the bank] of something of value," *Shaw,* 137 S. Ct. at 469 (Subsection 1) or to "obtain any of the moneys . . . or other property owned by, or under the custody or control of, a financial institution," *Loughrin,* 573 U.S. at 356 (Subsection 2). The Government need not allege harm in the sense of pecuniary loss. *Shaw,* 137 S. Ct. at 467 (Subsection 1 "demands neither a showing of ultimate financial loss nor a showing of intent to cause financial loss."); *Loughrin,* 573 U.S. at 366 n.9 (Subsection 2 does not "require[] the Government to prove that the defendant's scheme created a risk of financial loss to the bank" or that it, in fact, caused "damage.").

Here, the indictment alleges that the defendants intended to deprive the issuing banks of certain property rights and to obtain money that was under bank control. The particular property rights at issue depend on whether the transaction was by credit card or by debit card. When a customer bought marijuana with a credit card, the issuing bank transferred to the merchant bank its own funds, which it had offered on credit to the cardholder. When a customer used a debit card, the bank transferred funds from the cardholder's account. Nevertheless, even in the debit card situation, the bank, prior to the transfer, held a property interest in those funds. "When a customer deposits funds," sometimes the bank "becomes the owner of the funds,"

subject to a customer's right to withdraw them; other times "the bank merely assumes possession." *Shaw,* 137 S. Ct. at 466. But even in the latter case, "the bank is like a bailee" and has a "special qualified property" right in the account. *Id.* (quoting 2 W. Blackstone, Commentaries on the Laws of England 452-454 (1766)).

Because the indictment alleges that defendants intended to deprive the bank of these property rights, and to thereby obtain money under bank control, it sufficiently describes an intent to cause harm under both subsections of the bank fraud statute. *Compare United States v. Lebedev,* 932 F.3d 40, 49 (2d Cir. 2019), *cert. denied sub nom. Gross v. United States,* 140 S. Ct. 1224 (2020) (upholding bank fraud conviction where "there was sufficient evidence showing that [defendant] caused false information to be sent to financial institutions to disguise the fact that their customers were transacting business with" an unlicensed Bitcoin exchange, "with the intent to obtain funds under those institutions' custody and control"). *Id.* at 49.

To be sure, the foregoing analysis applies Supreme Court precedent. Defendants argue that more is required in the Second Circuit because a panel of the Second Circuit stated in 2012 that bank fraud requires an "intent to victimize the institution by exposing it to actual or potential *loss." See United States v. Nkansah,* 699 F.3d 743, 748 (2d Cir. 2012) (emphasis supplied; internal quotation marks omitted). Last year, the Second Circuit declined to address whether this holding survives *Shaw* and *Loughrin. See United States v. Calderon,* 944 F.3d 72, 92 (2d Cir. 2019) ("We need not wade into this debate.").

Though apparently an open question, this is not a difficult one. Four years after the Second Circuit's

decision in *Nkansah,* the Supreme Court, as already noted, explicitly held that Subsection 1 requires no "intent to cause financial loss," *Shaw,* 137 S. Ct. at 467, and that Subsection 2 requires no "risk of financial loss to the bank," *Loughrin,* 573 U.S. at 366 n.9. Thus, *Nkansah* is no longer good law.

Finally, defendants argue that even if the indictment alleges some intent to harm banks, the only bank property at stake here is the "ethereal right to accurate information," Weigand Reply in Support of Def'ts' Mots., ECF No. 82, at 7, which, they argue, cannot support a fraud conviction in light of the Supreme Court's recent decision in *Kelly v. United States,* 140 S. Ct. 1565 (2020). This argument, however, stretches *Kelly* to the breaking point. *Kelly* concerned public corruption and the misuse of regulatory power, holding that an allegedly corrupt state regulatory decision, where no actual money changed hands, did not have as its object money or property. *See Kelly,* 140 U.S. at 1572-74.

Here, by contrast, the object of the alleged scheme was money. The banks had concrete property interests in these funds, and defendants allegedly sought to injure those interests by causing the banks to relinquish those funds through deception. Thus, the indictment sufficiently stated an intent to harm their property interests; whether the banks also had a "right to accurate information," "ethereal" or otherwise, is beside the point.

2. Intent to Deceive Banks

Defendants next argue that the Government has not alleged an intent to deceive a covered financial institution *(i.e.,* an issuing bank). Rather, "the Government has maintained that the defendants were responsible

for sending 'application packages' and credentials for the Phony Merchants only to offshore banks and payment processors," which, unlike the issuing banks are not protected by the bank fraud statute. Weigand MTD 18. In other words, the defendants argue that the defendants' deception must be aimed at the same banks as are harmed.

If the charge here were wire fraud, the argument would be meritless. Five courts of appeals, including the Second Circuit, have concluded that the wire fraud statute does not "require convergence between the parties intended to be deceived and those whose property is sought in a fraudulent scheme." *United States v. Greenberg,* 835 F.3d 295, 306-07 (2d Cir. 2016); *see id.* n.16 (collecting cases).

But when it comes to the bank fraud statute, it appears that the Supreme Court does require such convergence. With respect to Subsection 1, this is because of how the Court construes the statutory language itself. Specifically, Subsection 1 of the bank fraud statute requires that a defendant attempt both to "deceive [a] bank" and to "deprive it of something of value." *Shaw,* 137 S. Ct. at 469. But because the bank fraud statute only applies to federally insured banks, the Supreme Court has also read a similar requirement into Subsection 2 for "federalism-related reasons": the indictment must allege "some real connection to a federally insured bank – namely, [that] a false statement will naturally reach such a bank (or a custodian of the bank's property)." *Loughrin,* 573 U.S. at 365 n.8.[10]

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[10] For example, building upon an example offered by the Supreme Court in *Loughrin,* imagine a con artist who tricks a tourist into buying a handbag, claiming it is a designer brand.

But though this convergence is required, here it is met. Specifically, the indictment states that the purpose of defendants' alleged misrepresentations to merchant's banks *(e.g.,* inaccurate MCCs) was so that those misrepresentations would be conveyed to the issuing banks to secure their approval for the transactions. Accordingly, the indictment adequately alleges an intent to deceive financial institutions protected by the bank fraud statute.

3. Materiality

Finally, defendants argue that the indictment does not state a claim because it does not allege that the misrepresentations were material. This borders on the frivolous. The indictment explicitly alleges that many issuing banks would not have approved these transactions if they had known marijuana was involved. ECF No. 16, ¶ 1.

Defendants, however, argue that the indictment implicitly concedes that at least *some* issuing banks would have been willing to process marijuana transactions, even if they knew they were marijuana transactions. But the Government need not allege that every issuing bank would have refused to process accurately presented marijuana transactions. The indictment alleges that many banks would have

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The tourist purchases the handbag by credit card. The MCC and other transaction information transmitted to the bank were accurate. Was this bank fraud? The con artist intended to obtain bank property, and he made misrepresentations of material fact. However, the con artist never intended that the misrepresentations would be conveyed to the financial institution. Therefore, the con artist did not deceive a bank (Subsection 1), and the misrepresentation was not the means by which the defendant obtained bank funds (Subsection 2). This was fraud, but not bank fraud.

refused to do so; that is enough, at this stage, to allege materiality.

For the foregoing reasons, the indictment states a claim for conspiracy to commit bank fraud.

B. Lack of Specificity

Defendants next move to dismiss the indictment for lack of specificity. On rare occasion, "specification of how a particular element of criminal charge will be met . . . is of such importance to the fairness of the proceeding that it must be spelled out in the indictment," but otherwise, "[a]n indictment is sufficient if it 'first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense.'" *United States v. Stringer,* 730 F.3d 120, 125-26, 124 (2d Cir. 2013) (quoting *Hamling v. United States,* 418 U.S. 87, 117 (1974)).

Defendants argue that the indictment is insufficiently specific for four reasons:

(1) The indictment does not point to a specific transaction or misrepresentation. Akhavan MTD 10.

(2) Although, as this Court ordered, the Government provided a bill of particulars identifying the alleged co-conspirators, it offered "nothing concrete . . . to indicate how the alleged scheme was executed, or by whom . . . [nor] who the intended victim supposedly was." *Id.* at 12.

(3) The indictment essentially charges a violation of bank policy, without citing any specific policy. *Id.* at 9-10.

(4) The indictment does not allege that the misrepresentations induced the issuing banks to enter into the transactions, *i.e.,* that they otherwise would have been unwilling to do so. *Id.*

These arguments are largely an attempt to relitigate the motion for a bill of particulars. *See* Order, ECF No. 38, at 5-7 (finding that, apart from the request for a list of co-conspirators, the information sought by defendants was either "irrelevant" or "merely evidentiary detail at best," and the indictment was "sufficiently clear" without such information). In particular, the Court has already considered and denied defendants' request (1) for information regarding specific transactions and misrepresentations and (2) for more concrete information regarding how the alleged scheme was executed and against which victims. The Court adheres to its prior holding that the indictment is sufficiently particular on these points. The Court likewise rejects the arguments that the indictment (3) does not cite a bank policy and (4) does not show that the misrepresentations induced the banks to act. The indictment alleges that the defendants "engaged in a scheme to deceive United States banks . . . into processing . . . payments for the purchase and delivery of marijuana products." ECF No. 16, 91 1. It asserts that "many United States banks are unwilling to process payments involving the purchase of marijuana, [so] the Online Marijuana Marketplace Company used fraudulent methods to avoid these restrictions." *Id.* This sufficiently describes the applicable bank policies and alleges that the defendants intended deception to be the means by which they obtained bank property.

In short, the Court reaffirms its prior holding that "[t]he indictment's description of the Transaction Laundering Scheme . . . is sufficiently clear for the defendants to understand the crime with which the Government accuses them . . . thus placing the defendants on notice and allowing them to prepare a defense." Order, ECF No. 40, at 6.

C. The Rohrabacher-Farr Amendment

Finally, defendants argue that the indictment must be dismissed because it contravenes an appropriations law binding on the Government. The Rohrabacher-Farr Amendment was originally passed by Congress as part of the omnibus spending bill in 2014; it has been renewed each year since. The amendment provides, in part, that "[n]one of the funds made available in this . . . Act to the Department of Justice may be used, with respect to . . . California [or] Oregon . . ., to prevent such States from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana." Consolidated Appropriations Act of 2020, Pub. L. No. 116-93, § 531, 133 Stat. 2317 (2019).

Defendants contend that "the Government is attempting to prosecute Defendants for a federal felony based only on conduct that is legal under applicable state law," thus violating the Rohrabacher-Farr Amendment. Akhavan MTD 24. The defendants rely on *United States v. McIntosh,* 833 F.3d 1163 (9th Cir. 2016). In *McIntosh,* the Ninth Circuit considered appeals by defendants charged with marijuana-related violations of the Controlled Substances Act. The Ninth Circuit opined that the Rohrabacher-Farr Amendment limited the DOJ's authority to bring such prosecutions. "By officially permitting certain [marijuana-related] conduct, state law provides for non-prosecution of individuals

who engage in such conduct. If the federal government prosecutes such individuals, it has prevented the state from giving practical effect to its law providing for non-prosecution of individuals who engage in the permitted conduct," which would violate the Rohrabacher-Farr Amendment. *Id.* at 1176-77. Therefore, the Ninth Circuit remanded to the district courts, holding that "[i]f DOJ wishes to continue these prosecutions, Appellants are entitled to evidentiary hearings to determine whether their conduct was completely authorized by state law, by which we mean that they strictly complied with all relevant conditions imposed by state law on the use, distribution, possession, and cultivation of medical marijuana." *Id.* at 1179.

If the defendants here had been similarly charged with violations of the Controlled Substances Act, then this Court would need to consider whether to adopt the reasoning of *McIntosh.* But the indictment in this case does not charge defendants for behavior that is legal under state medical marijuana laws. It charges conspiracy to commit bank fraud. The Rohrabacher-Farr Amendment does not condone bank fraud by a medical marijuana dispensary any more than it condones murder, robbery, or assault. Thus, the Amendment, and *McIntosh,* are inapplicable on their own terms. *See id.* at 1178 (noting that the Rohrabacher-Farr Amendment does not apply when the DOJ "prosecutes individuals who engage in conduct unauthorized under state medical marijuana laws").

For these reasons, the motions to dismiss are denied.

II. MOTION TO SUPPRESS

Defendant Weigand moves to suppress evidence seized from two cell phones and a computer that were

in his possession when he was arrested on March 9, 2020 at Los Angeles International Airport. The evidence was seized pursuant to a warrant, which a magistrate judge issued upon the application of FBI Special Agent Matthew Mahaffey.

The affidavit supporting the request for a warrant, which is filed at ECF No. 70-1 ("Aff."), describes the alleged scheme, attaches the indictment, and identifies the three devices. It avers that Weigand, Akhavan, a cooperating witness, and various co-conspirators communicated using an end-to-end encrypted messaging application *(i.e.,* an application that transmits communications in such a way that they can only be read on the sender's and the recipient's devices and cannot be intercepted by wiretap or by a search warrant served on an internet service provider). It also avers that the alleged conspirators used an encrypted email service.

The affidavit includes several quotations from a group message on the encrypted messaging application involving the cooperating witness on April 27, 2018. Other participants in the group message had the display names "Ray CE" and "Ruben Weigand"; according to the cooperating witness, these were Akhavan and Weigand, respectively. The conversation appears to relate to the setup of a Phony Merchant, including what prices the conspirators should display on the fictitious website to ensure that they matched the price points for the associated marijuana transactions. Later that day, the conversation turned to the brief descriptions of goods and services that issuing banks would list on customers' monthly credit card statements. *Id.* ¶ 17(c).

According to the affidavit, the conspirators continued communicating about the alleged scheme using

the encrypted messaging application until at least late 2018 and using encrypted emails until May 2019. Weigand also spoke with the cooperating witness about the alleged scheme by phone in May 2019 (*i.e.,* approximately ten months before Weigand was arrested).

The affidavit does not link criminal activity specifically to the three seized devices. However, it says generally that "[l]ike individuals engaged in any other kind of activity, individuals who engage in fraud and money laundering offenses store records relating to their illegal activity and to persons involved with them in that activity on electronic devices such as the Subject Devices." *Id.* ¶ 22. The affidavit further states that files can be recovered "months or even years after they have been created or saved." *Id.* ¶ 23.

The affidavit sought permission for, if necessary, up to "a complete review of all the [electronically stored information] from the Subject Device to locate all data responsive to the warrant." *Id.* ¶ 27. The agent sought to seize certain specific, detailed categories of information. Warrant, ECF No. 70-2, at 5-6.

A magistrate judge approved the warrant. To be lawful under the Constitution, a search warrant must, *inter alia,* set forth evidence establishing probable cause to believe a crime has been committed and that evidence of that crime can be found in what is to be searched. "[P]robable cause is a fluid concept – turning on the assessment of probabilities in particular factual contexts – not readily, or even usefully, reduced to a neat set of legal rules." *Illinois v. Gates,* 462 U.S. 213, 232 (1983). It is a "flexible, common-sense standard," *Texas v. Brown,* 460 U.S. 730, 742 (1983), which requires a case-by-case analysis of the totality of the circumstances, *see Illinois v. Gates,* 462 U.S. at 230. A nexus with criminal activity may be supported by a

"reasonable inference from the facts presented based on common sense and experience." *United States v. Singh,* 390 F.3d 168, 182 (2d Cir. 2004) (internal quotation marks omitted).

Even where probable cause is established, still "those searches deemed necessary should be as limited as possible," as to avoid a "'general warrant,'" i.e., "a general, exploratory rummaging in a person's belongings." *Coolidge v. New Hampshire, 4*03 U.S. 443, 467 (1971) (citations omitted). At the same time, some threshold review may be necessary to identify items of potential relevance because courts recognize "the reality that few people keep documents of their criminal transactions in a folder marked 'drug records.'" *United States v. Riley,* 906 F.2d 841, 845 (2d Cir. 1990).

"To be sufficiently particular under the Fourth Amendment, a warrant must satisfy three requirements." *United States v. Ulbricht,* 858 F.3d 71, 99 (2d Cir. 2017), *overruled on other grounds by Carpenter v. United States,* 138 S. Ct. 2206 (2018). It must (i) "identify the specific offense for which the police have established probable cause," (ii) "describe the place to be searched," and (iii) "specify the items to be seized by their relation to designated crimes." *Id.* (internal citation omitted). "The Fourth Amendment does not require a perfect description of the data to be searched and seized." *Id.* at 100. Indeed, "[s]earch warrants covering digital data may contain some ambiguity." *Id. (*internal citation omitted).

In light of these standards, Weigand argues that the Government lacked probable cause because (A) the affidavit did not link his specific devices to the crime, Weigand Mem. in Support of Mot. to Suppress ("Weigand MTS") 9; and (B) any probable cause that

might have previously existed had dissipated due to the passage of time between any alleged conspiratorial communications and the seizure, *id.* at 11. He also argues that the warrant was (C) overbroad because it permitted a preliminary search of the entire device, *id.* at 14; and (D) insufficiently particular because it failed to provide meaningful guidelines for what could be seized, *id.* at 15. The Court addresses each of these arguments in turn.

A. Probable Cause

Under the circumstances of this case, there was probable cause to believe the devices would contain evidence of crime. The charged crime is conspiracy, so communications with alleged co-conspirators, and evidence regarding such communications, is directly relevant. The affidavit tends to show that Weigand used encrypted messaging applications and encrypted email to communicate about the alleged conspiracy. There was, thus, probable cause to believe that evidence of the alleged conspiracy would have existed on electronic devices possessed by Weigand.

Weigand offers no persuasive support for his claim that the Government must show that *these very devices* were used for conspiratorial communications in order to justify searching them. Weigand, in addition to citing to cases where warrants were lawfully issued, cites to one case where a warrant was held improper because "two-year-old evidence of participation in a heroin mill, not at the dwelling to be searched, is stale and cannot support a search warrant." *United States v. Thomas,* 757 F.2d 1359, 1368 (2d Cir. 1985). That case is inapposite because in *Thomas,* the Court knew that the location to be searched was different from the location of the old heroin mill. Weigand does not allege that the Government knew that Weigand had, for

instance, changed phones between the end of the period of the charged conspiracy and his arrest.

Therefore, there was probable cause to search these devices – at least at some point in time.

B. Passage of Time

Weigand correctly points out that there is a further question whether probable cause continued to exist despite the passage of time. The Government's general allegations that files can be stored for a long time and can be recovered even after deletion are insufficient to provide probable cause that evidence would remain on Weigand's devices indefinitely. That said, the affidavit quotes messages on the encrypted messaging application that were less than 2 years old at the time of seizure and avers that there were pertinent encrypted emails and phone calls within one year prior to the time of seizure. Under these circumstances, there was still probable cause to believe evidence would remain.

C. Preliminary Search of the Entire Device

Weigand argues that "the [w]arrant made no attempt to limit the scope of the search to the locations on the [d]evices for which there was probable cause to believe evidence of the scheme could be found." Weigand MTS 13. The Government responds that it must be able to conduct a preliminary search of the entire device to determine which folders, files, and data may be responsive to the warrant. This is analogous to "searches for papers," for which it is certain that some innocuous documents will be examined, at least cursorily, in order to determine whether they are, in fact, among those papers authorized to be seized." *Andresen v. Maryland, 4*27 U.S. 463, 482 n.11 (1976).

Here, the magistrate judge reasonably issued a warrant that permitted threshold searches across the entirety of the devices. Weigand objects that such a review is overbroad given the terabytes of at-issue data and the fact that the devices clearly contained legitimate files of a personal nature, such as folders full of family photos and a folder labeled "private." To be sure, the Government must reasonably limit its initial search, taking only those steps reasonably necessary to identify documents responsive to the warrant. This is what the affidavit requested and what the warrant permitted. *See* Aff. IT 25-27.

Weigand is incorrect to suggest that the review must be limited from the outset to folders that, on their face, might be linked to crime. "[F]ew people keep documents of their criminal transactions in a folder marked 'drug records.'" *United States v. Riley,* 906 F.2d 841, 845 (2d Cir. 1990).

D. Particularity of the Specific Requests

Finally, Weigand argues that the designated categories of material to be seized are overbroad and insufficiently particular. The Court considers the evidence by category:

- Evidence of the subject offenses and evidence concerning co-conspirators, their relationships and relationships with victims, and transactions between co-conspirators and victims, from 2016-2019. Warrant, ECG' No. 70-2, at 5-6, #2-5.

This evidence goes to the heart of the alleged scheme; its relevance is readily apparent.

- "Evidence concerning the location of other evidence of the Subject Offenses," such as social

media accounts, and passwords for those accounts. *Id.* #6-7.

Because this evidence would show the location of other evidence, it is relevant. Of course, the warrant did not authorize the Government to search other locations *(e.g.,* Weigand's social media accounts) or to use passwords that it found. Rather, if the Government uncovered evidence showing that further evidence of the conspiracy existed in other locations, it would then need to seek another warrant.

- "[E]vidence concerning the identity or location of the owner or user of the Subject Device" and concerning subscriber information for the devices. *Id.* #1, 9.

Evidence that Weigand owns and used these devices is of threshold relevance in determining whether other documents on the device could be evidence that he committed a crime. Subscriber information is relevant to ascertaining identity. Billing records and location information are also independently relevant, as the affidavit establishes probable cause to believe that Weigand spoke with co-conspirators by phone and met with them in person.

- "[N]on-content transactional information of activity of the Subject Devices, including log files, dates, times, methods of connecting, ports, dial-ups, and/or locations." *Id.* #8.

Setting aside location information (which is already included in the previous category), this category of data is somewhat broad. At oral argument, the Court inquired as to its relevance. The Government explained that this data is relevant, especially when viewed in conjunction with other information, to establish that Weigand was the specific individual who used the

device at a particular time. For example, if the method of connection was through Weigand's home internet, then that would help to corroborate the location of the device and Weigand's control over it. The Court finds this justification sufficient and concludes that this category of data was described with enough particularity.

For these reasons, the warrant was supported by probable cause; probable cause remained despite the passage of time; a limited, preliminary review of the entire device was justified; and the specific categories of information to be seized were described with enough particularity. The motion to suppress is, therefore, denied.[11]

III. MOTIONS TO COMPEL DISCOVERY AND SET PRETRIAL DISCLOSURE DEADLINES

Defendants move to compel production of many categories of materials under Rule 16, move to compel production of a narrow set of materials under *Brady,* and request that the Court set pretrial disclosure deadlines for exhibits, witness lists, and Jencks Act and *Giglio* material.

A. Rule 16 Discovery

Defendants first seek to compel discovery under Federal Rule of Criminal Procedure 16.

Under Federal Rule of Criminal Procedure 16(a)(1)(E), the Government generally must provide an item to the

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[11] The Government further argues that courts "accord[] great deference to a magistrate's determination," and that, here, the officers acted in good faith reliance on the warrant. *See United States v. Leon,* 468 U.S. 897, 914 (1984). Because the Court finds that the warrant was properly issued, the Court need not reach these arguments.

defendant "if the item is within the government's possession, custody, or control and (i) the item is material to preparing the defense; (ii) the government intends to use the item in its case-in-chief at trial; or (iii) the item was obtained from or belongs to the defendant." Describing which items are "material to preparing a defense," the Second Circuit has said that "[e]vidence is material if it could be used to counter the government's case or to bolster a defense," *United States v. Ulbricht,* 858 F.3d 71, 109 (2d Cir. 2017) (internal citations omitted), or if it would "[e]nable[] the defendant significantly to alter the quantum of proof in his favor," *United States v. Maniktala,* 934 F.2d 25, 29 (2d Cir. 1991). "The defendant must make a prima facie showing of materiality and must offer more than the conclusory allegation that the requested evidence is material. The Government should interpret the language of Rule 16 broadly to ensure fairness to the defendant." *United States v. Urena,* 989 F. Supp. 2d 253, 261 (S.D.N.Y. 2013) (internal citations omitted).

However, Rule 16(a) (2) excludes from the scope of Rule 16(a) (1) (E) "reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case," as well as "statements made by prospective government witnesses except as provided in 18 U.S.C. § 3500," also known as the Jencks Act. Grand jury materials are also excluded from the scope of Rule 16(a) (1)(E), per Rule 16(a) (3).

In their instant motion, defendants cast a wide net, seeking eleven categories of material under Federal Rule of Criminal Procedure 16. The Court addresses them in turn

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1. Issuing Bank and Credit Card Company Policies

The defendants argue that marijuana-related policies of issuing banks and credit card companies are "essential" because "without the actual policies, there is no way to drill into questions of, *e.g.,* notice to the Defendants, reliance by a given bank, or how any of the thousands of transactions even connects to any supposed policy or fraud surrounding same." Akhavan Reply in Support of Def'ts' Mots., ECF No. 83 ("Akhavan Reply"), at 9. However, "the Government represents that it has produced all `documents and objects' within the meaning of Rule 16(a)(1)(E) in its possession, custody, and control that bear on these issues." Gov't Response in Opp. to Def'ts' Mots., ECF No. 79 ("Opp."), at 32. In addition, it represents that "to the extent that the Government comes into possession of additional documents or objects reflecting Issuing Bank and/or Credit Card Company policies pertaining to marijuana transactions and related information, the Government will produce them," unless the material is not discoverable under Rule 16(a)(2). *Id.* at 33.

In light of the Government's representations, this request is denied as moot.

2. Evidence Regarding MCCs

Defendants seek "evidence linking merchant banks, their contracts with the Credit Card Companies and/or issuing banks, their communications with Defendants, the assignment of MCCs to transactions, or those MCCs being the cause of the transactions going through." Akhavan Mem. in Support of Mot. to Compel ("Akhavan MTC") 5. Defendants argue that MCCs are "fundamental to the Government's proof" because they

are "the mechanism for the fraud alleged." *Id.* The Government counters that the defendants' focus on MCCs is misplaced because the creation of the Phony Merchants, and not the false MCCs, was the "primary method" by which defendants perpetrated the alleged fraud. Opp. 33. Therefore, "contracts and rules from banks and/or other entities reflecting the particulars of how those codes are typically assigned and who assigns them are not material." *Id.* at 34. The Government contends that what matters here is that "Akhavan and others directed others to apply incorrect MCC codes (however generated) to transactions conducted through the Online Marijuana Marketplace Company." *Id.* at 34.

The Court agrees with defendants. The Government concedes that *some* "electronic communications on this issue . . . bear on the defendants' intent," and the Government says it intends to prove that "Akhavan and others directed others to apply incorrect MCC codes . . . to transactions." *Id.* at 34. Therefore, evidence regarding how MCCs are typically assigned, when, and by whom is relevant. Because the Government seeks to demonstrate that MCCs were assigned in an "incorrect," and thus fraudulent, manner, the defense should receive discovery into the baseline for how a "correct" MCC would be assigned. And because the government seeks to demonstrate that Akhavan directed others to assign incorrect MCCs, it is relevant who assigns MCCs and how they do so.

The Government is ordered to promptly produce to defendants documents in its possession, custody, or control concerning (1) communications between merchant banks, credit card companies, or issuing banks on the one hand and the defendants on the other hand;

(2) how, when, and by whom MCCs are assigned to transactions; and (3) the relation MCCs have, if any, to the approval or rejection of transactions.

3. Transaction Analyses

The defendants claim that the Government must produce analyses linking specific credit card transactions by the Online Marijuana Marketplace Company to specific issuing banks with anti-marijuana policies. These analyses are necessary, defendants contend, to demonstrate materiality and intent to deceive.

The Government responds that this is an indictment for conspiracy, and no actual victim is needed. Therefore, the Government need not offer such an analysis and such an analysis is not material. Nevertheless, "[t]he Government notes that to the extent it generates any transactional analyses that it intends to use in its case-in-chief, it will produce such analyses pursuant to Rule 16 or, if warranted, as an expert disclosure." Opp. 36.

The Government is correct that it need not offer evidence of particular transactions to prove conspiracy. If it chooses to generate such analyses and intends to use them in its case in chief, then it must produce them, as it has represented that it will. This request is denied.

4. Information Regarding the Proportion of Transactions Involving Medical Marijuana

The Government told the defendants by letter that the Online Marijuana Marketplace Company represented, through its attorneys, that before January 2018 100% of the transactions at issue were for medical marijuana; by contrast, after January 2018 99% of the transactions were for recreational

marijuana. ECF No. 74-1, Ex. A. Defendants argue that the calculation is "fallacious" and is attributable to skimpy record-keeping at dispensaries. Akhavan Reply 8. They move to compel additional information on this point, arguing that it is essential, primarily given their argument under the Rohrabacher-Farr Amendment.

However, as noted above, the Rohrabacher-Farr Amendment is inapplicable. *See supra* Section I.C. The relative proportions of medical and recreational marijuana might be relevant for other reasons – *e.g.,* in showing materiality, if issuing banks would be willing to process medical marijuana transactions but not recreational ones. Still, the Government has represented that it has no additional information to support or refute the company's purported figures, and that it will share additional information if it acquires any. The request is therefore denied as moot.

5. Data Collected During Searches and Seizures

The Government concedes that it possesses data collected during searches and seizures (specifically, the contents of two cell phones belonging to Akhavan and two cell phones and a laptop belonging to Weigand). It says that it is conducting forensic analyses and will produce the entirety of the analysis to the device's owner and the responsive documents to both defendants.

Because all parties agree that each defendant is entitled to all date seized from him, and that each defendant is entitled to responsive data seized from the other defendant, this request is granted. If the Government has not already done so, it must share the entire contents of each seized device with the device's

owner by no later than 5:00 pm on September 2, 2020. The Government must share responsive documents with both defendants by no later than 5:00 pm on September 14, 2020.

6. Documents Produced by Third Parties

Defendants speculate that, because of the "extensive lists of unindicted co-conspirators and potentially allegedly victimized banks" recently disclosed, the Government may have additional relevant material in its possession that was produced by third parties. Akhavan MTC 17; *see also* Weigand Mem. in Support of Mot. to Compel ("Weigand MTC") 7. Defendants also point to the Government's June 22, 2020 letter, which disclosed exculpatory information shared with the Government by attorneys for the Online Marijuana Marketplace Company. ECF No. 74-1.

The Government responds simply that "[t]he Government has produced documents gathered from third parties consistent with the obligations imposed by Rule 16," Opp. 38-39, and that defendants' speculation that the Government possesses other such material discoverable under Rule 16 is unfounded. Because the Government represents that it has produced all Rule 16-responsive documents in this category, and defendants have offered no persuasive reason to doubt this representation, this request is denied as moot.

7. Taint Protocols

As noted above, the Government seized evidence from the defendants. That evidence contains potentially privileged material, so defendants request that the Court order the Government to produce the protocols it has applied to ensure that the prosecution

team is not exposed to privileged material. Akhavan MTC 17; *see also* Weigand MTC 8.

The defendants cite no authority for this request.[12] The Government notes that the "prosecution team is attuned to avoiding exposure to privileged information" and represents that the Government "will take action to ensure that the prosecution team is screened from reviewing privileged communications that may be contained on [Weigand's] devices," now that Weigand has provided a list of attorneys. Opp. 39-40. The Government also requested that Akhavan provide a list of his attorneys, but he had not yet done so when the Government filed its Opposition. *Id.* at 40 n.19.

Under these circumstances, a "taint protocol" is not "material to preparing the defense" and so does not fall within the scope of Rule 16(a)(1)(E). Accordingly, this request is denied. Further, to facilitate the application of a proper privilege screen by the Government, Akhavan, if he has not yet done so, must produce to the Government by no later than 5:00 pm on September 2, 2020, a list of attorneys with whom he may have engaged in attorney-client privileged communications.

8. Grand Jury Materials

Defendants contend that "the Indictment is subject to dismissal for lack of specificity," so "the grand jury testimony should be disclosed." Akhavan MTC 18.

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[12] The Government cites one district court case in Texas denying a similar request, *United States v. Sledziejowski,* 2018 WL 2288962 *9 (N.D. Tex. May 18, 2018), on the basis that there was no authority to support such a request.

In order to pierce the veil of secrecy provided by Federal Rule of Criminal Procedure 6(e), a defendant must demonstrate a "particularized need" for disclosure. *United States v. Procter & Gamble Co.,* 356 U.S. 677, 683 (1958). Usually, this means "specific allegations of government misconduct." *United States v. Torres,* 901 F.2d 205, 233 (2d Cir. 1990), *abrogated on other grounds as recognized by United States v. Marcus,* 628 F.3d 36, 41 (2d Cir. 2010). Defendants do not come close to meeting the high burden for overcoming grand jury secrecy, and so the request is denied.

9. Memoranda Regarding Witnesses' Statements or Interviews

Defendants request memoranda regarding interviews or meetings in this matter to aid in the preparation of their defense. Akhavan MTC 21; *see also* Weigand MTC 10. Defendants invoke Rule 16 but do not otherwise provide any authority for this request, which the Government calls an "end-run around the Jencks Act." Opp. 36-37. The Government cites circuit precedent that production of non-exculpatory Jencks Act statements cannot be ordered prior to witness testimony, *United States v. Coppa,* 267 F.3d 132, 145 (2d Cir. 2001), and that the Jencks Act "is the exclusive vehicle for disclosure of statements made by government witnesses," *United States v. Percevault,* 490 F.2d 126, 131 (2d Cir. 1974). The Government represents that it will produce the requested documents as needed to satisfy its obligations under *Brady, Giglio,* and the Jencks Act. Opp. 37.

The Court addresses *Giglio* and Jencks Act materials separately below, but insofar as defendants seek this material under Rule 16, the Government is correct that the request is barred both by Rule 16(a) (2) and by the Jencks Act. This request is therefore denied.

10. Defendants' and Co-Conspirators' Statements

Defendants seek their statements, and the statements of alleged co-conspirators, under Rule 16(a)(1)(A)-(C) & (E). The Government responds that it has provided each defendant with his own statements in accordance with Rule 16(a) (1) (A) & (B). To that extent, therefore, this request is denied as moot.

Insofar as defendants seek each other's statements and other co-conspirators' statements, they invoke Rule 16(a) (1)(C) & (E). Rule 16(a) (1) (C) on its face applies only to "organizational defendants," and not to defendants who were merely part of organizations; thus, it does not apply here. Rule 16(a) (1) (E), as described above, imposes a broad set of disclosure obligations on the Government. Defendants offer no specific rationale for the request for co-conspirators' statements under Rule 16(a) (1)(E), and the Government offers no response. Therefore, the request is denied without prejudice.

11. Criminal History Records

*D*efendants request criminal history records under Rule 16(d). The Government represents that it has produced any such record "that it knows exists within its possession, custody, and control." Opp. 41. Therefore, this request is denied as moot.

B. Brady Material

Defendants next seek materials, and a representation that the Government will comply with its obligations, under *Brady v. Maryland,* 373 U.S. 83, 87 (1963).

Under *Brady* and its progeny, the Government has a constitutional duty "to disclose favorable evidence to

the accused where such evidence is 'material' either to guilt or to punishment." *United States v. Coppa,* 267 F.3d 132, 139 (2d Cir. 2001) (quoting *Brady v. Maryland,* 373 U.S. 83, 87 (1963)). Favorable evidence can be exculpatory or impeaching. *Strickler v. Greene,* 527 U.S. 263, 281-82 (1999); *see United States v. Mahaffy 6*93 F.3d 113, 131 (2d Cir. 2012) ("Aside from exculpatory material, *Brady* applies to material that would be an effective tool in disciplining witnesses during cross-examination.") (quotations marks and citation omitted). Evidence becomes material if "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Youngblood v. West Virginia,* 547 U.S. 867, 870 (2006) (quotation marks omitted).

"Unlike Rule 16 and the Jencks Act . . . *Brady* is not a discovery rule, but a rule of fairness and minimum prosecutorial obligation . . . ." *United States v. Maniktala,* 934 F.2d 25, 28 (2d Cir. 1991) (internal quotation marks omitted). Accordingly, the purpose of *Brady* "is not to provide the defendant with complete disclosure of all evidence in the government's file which might conceivably assist him in the preparation of his defense, but to assure that he will not be denied access to exculpatory information known to the government but unknown to him." *United States v. Ruggiero,* 472 F.2d 599 (2d Cir. 1973).

In light of these standards, the Government sent a letter on June 22, 2020, ECG' No. 74-1, which disclosed to defendants that the attorneys for the Online Marijuana Marketplace Company made several representations to the Government. One of those representations was that those attorneys learned from employee interviews that Akhavan purportedly said

during a March 2018 meeting, *inter alia,* that he does not "miscode," that he would use the closest MCC code for what is being processed, and that to that end he considered using a medical-related MCC code for marijuana transactions. *Id.* Defendants argue that this was important and potentially exculpatory information and that the Government provided only a terse summary. Weigand MTC 9-10.

The Government appears to believe that *Brady* might not have required this disclosure, claiming that the Government sent the June 22, 2020 letter "out of an abundance of caution." Opp. 43 n.20. The Government did not otherwise respond to defendants' arguments that, under *Brady,* it must produce more detailed information regarding the Online Marijuana Marketplace Company's attorney proffer, nor did the Government represent that it does not have such information. This Court's Individual Rules require disclosure of Brady materials within two weeks of the indictment being filed or, for *Brady* material that becomes known to the Government following filing of the indictment, "within two weeks of when it becomes known and, in any event, no later than four weeks prior to any trial or guilty plea." Hon. Jed S. Rakoff, Individual Rules of Practice, R. 13. Therefore, the deadline to disclose additional *Brady* materials received from, the Online Marijuana Marketplace Company's attorney proffer, if the Government has additional such materials, has long since passed.

The Government does argue, generally, that it has acknowledged its *Brady* obligations and its intent to abide by them. Opp. 43. It claims that, "[b]ecause the defendants have made no particularized showing that materials exist requiring disclosure, the Government need do no more than acknowledge its obligations." *Id.*

at 44. The Government cites cases in which a court denied specific discovery requests under *Brady* in light of an apparent good-faith representation from the Government that it recognized and intended to comply with its *Brady* obligations.

If the Government had represented that it recognized its *Brady o*bligations with respect to information regarding the March 2018 meeting, has complied with them, and has no further exculpatory information on the topic, then the Court would take no action. But it has not done so. Instead, the Government's brief seems to imply that the Government believes it had discretion regarding whether to share the information it received from the Online Marijuana Marketplace Company attorneys regarding the March 2018 meeting. If so, the Government misapprehends its *Brady o*bligations. The statements attributed to Akhavan during the March 2018 meeting, as described in the June 22, 2020 letter, speak directly to significant components of the Government's theory of the case and are potentially exculpatory.

Therefore, the Court orders that, to the extent the Government has additional details regarding that meeting – including, without limitation, the meetings' attendees – the Government must immediately produce that information in accordance with its *Brady* obligations.

C. Pretrial Disclosure Schedule

Finally, defendants request a pretrial disclosure schedule. (The trial of this case is currently set for December 1, 2020.) The Court sets the following schedule:

- *Giglio* material: the Government must comply with the Court's Individual Rules, which will be

strictly enforced *(i.e., Giglio* material (with certain specified exceptions) must be disclosed four weeks prior to trial).

- *E*xhibits and witness lists: exhibits and witness lists must be disclosed four weeks prior to trial, with subsequent changes permitted for good cause.
- Jencks Act material: all parties agree that the Court lacks power to compel pretrial production of Jencks Act material. That said, the Government has an obligation to disclose Jencks Act material to defendants sufficiently early to permit them to adequately prepare a defense. As noted at oral argument, the Court would be pleased if the Government produces this material four weeks in advance of trial, which the Court strongly believes would be in the interests of justice in this case. The Court directs the Government to file a notice on the docket by no later than 5:00 pm on September 4, 2020 stating by when it will disclose Jencks Act material.

The Court determines that the foregoing schedule offers adequate time for defendants to prepare a defense. Insofar as defendants' motion requests earlier disclosures, it is denied.

* * *

For the foregoing reasons, defendants' motions to dismiss are denied and Weigand's motion to suppress is denied. Defendants' motion to compel and to set pretrial disclosure deadlines is denied, except as follows:

- The Government is ordered to promptly produce to defendants documents concerning (1) communications between merchant banks, credit card companies, or issuing banks on the one hand and the defendants on the other hand; (2) how, when, and by whom MCCs are assigned to transactions; and (3) the relation MCCs have, if any, to the approval or rejection of transactions.
- For devices seized from defendants, if the Government has not already done so, it must share the entire contents of each device with the device's owner by no later than 5:00 pm on September 2, 2020. The Government must share responsive documents with both defendants by no later than 5:00 pm on September 14, 2020.
- If he has not yet done so, Akhavan must produce to the Government a list of attorneys with whom he may have engaged in attorney-client privileged communications during the relevant period by no later than 5:00 pm on September 2, 2020.
- The Court orders that, to the extent the Government has additional details regarding the March 2018 meeting described in the Government's June 22, 2020 letter -including, without limitation, the meetings' attendees – the Government must immediately produce that information in accordance with its *Brady* obligations.
- *Giglio* materials must be produced as specified in the Court's Individual Rules.

- Exhibits and witness lists must be produced four weeks prior to trial, subject to change for good cause.
- The Government must file a notice on the docket by no later than 5:00 pm on September 4, 2020 stating by when it will disclose Jencks Act material.

SO ORDERED.

Dated: New York, NY
August 31, 2020

/s/ Jed S. Rakoff
JED S. RAKOFF, U.S.D.J.

APPENDIX E

[1] UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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20 CR 188(JSR)

UNITED STATES OF AMERICA,

v.

RUBEN WEIGAND and HAMID AKHAVAN

Defendants.

New York, N.Y.
February 19, 2021
11:45 a.m.

Oral Argument

Before:

HON. JED S. RAKOFF,

District Judge

APPEARANCES

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DECHERT, LLP
Attorneys for Weigand
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[3] (Telephone Conference; case called)

THE COURT: Will counsel please identify themselves for the record.

MS. LAMORTE: Good morning, your Honor. This is AUSA Tara LaMorte for the government.

MR. TAYBACK: Good morning, your Honor. You have Christopher Tayback and Sara Clark on behalf of Mr. Akhaven, and also our co-counsel Ira Rothken of the Rothken Law Firm and Jared Smith.

MR. GILBERT: Good morning, your Honor. Michael Gilbert on behalf of Defendant Wiegand.

MR. ASNER: Good morning, your Honor. Marcus Asner and Michael Russell on behalf of third-parties Visa and Martin Elliot.

Your Honor, with the Court's permission if you will be hearing oral argument, I am requesting that Mr. Russell, my associate, be allowed to argue today.

THE COURT: That's fine.

Thank you all for calling and thank you for your papers.

The first subpoena of this witness, if I have this right, came from the defense. So let me ask Mr. Akhaven's counsel or Mr. Weigand's counsel – I can't remember if it was Akhaven who was the initial subpoenaing party – what testimony are you planning to elicit from this witness?

[4] MR. TAYBACK: We didn't actually subpoena this witness, your Honor.

THE COURT: That's right. Thank you for reminding me. You subpoenaed Visa and then they said this is the person who would meet your requirements.

So what testimony are you planning to elicit?

MR. TAYBACK: Our view is so the extent the government – Visa was identified on the government's witness list. Thereafter, we subpoenaed the company itself. What we would intend to elicit are to the – to the extent the government doesn't elicit this sort of information from the unnamed witness that was originally on their witness list, our goal would be to have the witness testify about the policies and procedures related to Visa's interaction with the issuing banks and the merchant banks with respect to transactions that are illegal under federal law but legal in the jurisdiction in which the transactions are occurring and what the process is.

THE COURT: Let's assume in my unlikely hypothetical that the government does not call this

person. So only you would be calling this person. You wouldn't have a Confrontation Clause argument if you were the person calling this witness; right?

MR. TAYBACK: That's correct. I am not sure we would call the witness if the government doesn't call the witness. THE COURT: Now let me go to the more likely scenario.

[5] What is the government planning to elicit from this witness?

MS. LAMORTE: Your Honor, in general the government would be eliciting from this witness information regarding how the payment processing system works. The government would be eliciting questions or information concerning Visa's policies and practices and procedures in this regard both on the merchant side and on the acquiring side.

THE COURT: This is something that this witness has personal knowledge of?

MS. LAMORTE: Through the course of his job and experiences at Visa, yes.

THE COURT: Is there no one else at Visa who doesn't have that knowledge?

MS. LAMORTE: That's a question for Visa, your Honor. In our conversations with Visa, Visa has indidated that this would be the appropriate witness for these types of topics.

THE COURT: Well, has anyone put to Visa the question the Court in my hypothetical is considering requiring this witness to travel here, notwithstanding potential health risks, is there someone with less health problems who you can supply to give this testimony?

Has anyone asked Visa that?

MS. LAMORTE: Yes, your Honor. The government has asked Visa that, and Visa has indicated that it believes that [6] the witness that they identified is the appropriate witness; but that question was posed, yes.

THE COURT: Appropriate meaning there is no one else?

MS. LAMORTE: Honestly, your Honor, I don't believe that we got into that level of detail with regards to why there would not be another appropriate witness. It could be that there is not or that there may be but that those individuals aren't located in the vicinity of New York either. I really don't know the answer to that.

MR. TAYBACK: Your Honor, on this topic we did look and our understanding is that the chief risk officer for Visa is in New York. His name is Paul Fabara. Though, I don't know and I cannot speak for Visa his health concerns or anything else related to him other than what I was able to find out from publicly available information.

THE COURT: Does the government know anything about that?

MS. LAMORTE: No, your Honor, we don't.

THE COURT: So what is it this witness is going to be testifying to that is not already embodied in a business record?

MS. LAMORTE: Your Honor, I think the explanation of payment processing system and Visa's rules and regulations and its interactions with issuing banks and merchant banks are topics that will be more understandable to a jury out of the [7] mouth of a witness that is able to explain the policies, why they

are the policies and how they apply that is not necessarily captured in these types of documents. Sitting here right now, I can't tell the Court – I would have to look – whether or not all the documents that we would plan to use with this witness are covered by a certification or not.

THE COURT: Well, let's just take a for instance. I assume that one of the key policies you want to have him testify about is the policy of not handling marijuana purchases, yes?

MS. LAMORTE: Yes.

THE COURT: Is that policy written down? Is this a business record of Visa?

MS. LAMORTE: I believe that under the standard Visa policies, this is framed more in terms of legality and illegality. And then Visa then has statements that I don't know qualify as formal policies that elaborate on that as it would apply for a marijuana scenario in light of the fact that the conduct remains unlawful under federal law but is lawful under certain state law.

THE COURT: How does the witness know about the latter other than through hearsay?

MS. LAMORTE: Because the witness was involved in the review and application of these policies, your Honor. That is his job.

[8] THE COURT: Is that not also the job of that fellow in New York?

MS. LAMORTE: The government is not aware of that, your Honor.

THE COURT: All right. The way I look at it is this: I think there is enough issue of a health risk to this

witness to warrant the application of the witness to give his testimony by video; but at the same time if there is another witness who is available, such as someone in New York who can give the same testimony or something very close to it for all practical purposes, then I think the Confrontation Clause concerns would mandate that in those circumstances the alternative witness be called. So I think what we need to know, which apparently no one on this phone knows, is whether there is available either someone in New York who can give essentially the same testimony. Maybe not perfectly, but 90 percent. Or someone in other parts of the country presumably –

MR. RUSSELL: Your Honor.

THE COURT: Yes.

MR. RUSSELL: This is David Russell on behalf of Visa. We would like to note that it is Visa's position that Martin Elliot is the only appropriate person to testify related to the types of material questions on the subpoenas.

THE COURT: Okay. What is your basis for saying that?

MR. RUSSELL: Our basis for saying that is that we [9] have been in contact with the government and with –

THE COURT: No. No. I don't want to know about that. There is a gentleman in New York who is his chief as I understand it. Why can't that guy testify?

MR. RUSSELL: This is the first time we are aware –

THE COURT: Right. So you don't know. So you don't know. I would have called on you sooner if I thought you did know.

What you are telling me – forgive me if I have this wrong – is that the government has told you we would like someone who could testify to A, B, C, D and E and this is the person who best fits that. Great. I understand that. It doesn't sound to me that no one has seriously explored whether there is someone else who can testify to A, B, C, D and just not E.

MR. RUSSELL: Your Honor, respectfully we have asked Visa and Visa's position is that there is no one in New York who is available to testify, but we're happy to ask again.

THE COURT: What inquiry did you make in that regard?

MR. RUSSELL: We asked them repeatedly whether there was anyone in the New York, East Coast –

THE COURT: Who is they?

MR. RUSSELL: The legal department and Visa.

THE COURT: How can that be? So these were practices and policies that were company policies but only one person in [10] Visa knew about them?

MR. RUSSELL: Your Honor, we are happy to ask again if there is someone available in New York; but we have asked repeatedly before and their position is that there is no one.

THE COURT: Who is the person at Visa who you're primarily communicating with on that kind of question?

MR. RUSSELL: We communicate through senior members of OB Gold department within Visa.

THE COURT: Can you get one of them on the phone right now?

MR. RUSSELL: We can try to get them on the phone.

THE COURT: While you're doing that, I will go on with other questions that I have for other counsel, but see what you can do in that regard.

MR. RUSSELL: Thank you.

THE COURT: So at least where I am leaning as you can see is that I think the Confrontation Clause is not in the end a total impediment to this witness testifying by video; but I think part of that analysis has to be that as a practical matter there is no one else who can give such testimony. I am sorry that because this was all done on such an expedited basis that I didn't have the chance to reach out to you and have inquiries made about that sooner, but to me it's a material part of my decision.

So I am happy to hear from anyone who wants to say [11] anything further while we're trying to reach counsel at Visa.

MR. TAYBACK: Your Honor, the only two points that I would make are, one, this is not a sudden issue. This is not a situation where his health has taken an immediate turn for the worse. Visa has long been known to be a central part of the government's case.

THE COURT: Again forgive me for interrupting.

I agree with you that it should have been raised sooner, but I don't see that that really is material in the long run. Because if he is the guy and the only guy, this issue would be here whether it would have been raised sooner or later.

MR. TAYBACK: I understand, your Honor.

The second point that I would raise during this pause while we're waiting is to be clear we would object to any video testimony presented by a witness for Visa on the grounds of *Crawford.*

THE COURT: No, no. Your objections are fully preserved. The only nuance on that as I understand it is if for some reason the government didn't call this guy or didn't call his equivalent, sounds like a very unlikely you don't have any *Crawford* objection to calling him yourself. Although, you probably wouldn't call him yourself. With that nuance, your *Crawford* objections are fully preserved.

Well, I think where we end up for today's purposes – [12] I take it counsel didn't have any luck reaching someone at Visa?

MR. RUSSELL: Your Honor, we are still attempting to reach them. They are headquartered in San Francisco so they are three hours behind us. So it is possible that it is a little early to get ahold of them.

THE COURT: 9:15?

MR. RUSSELL: I don't know how they do it in San Francisco.

THE COURT: Well, if you had said something like Pebble Beach, I could understand.

MR. RUSSELL: Perhaps, your Honor.

THE COURT: Okay.

MR. ASNER: Your Honor, I have gotten ahold of him and I am sending him the dial-in information right now.

THE COURT: Good.

MR. ASNER: If you can give us a minute.

THE COURT: Absolutely.

There was another issue that we can talk about while we're waiting that the government dumped a million pages on the defense last night or something like that?

MS. LAMORTE: Your Honor, we received a production from the company –

THE COURT: I am sorry. Forgive me for interrupting.

Did we just get the person from Visa? I thought I [13] heard an interruption. Maybe not.

Go ahead.

MS. LAMORTE: I think I did, too.

We received a production from the company. It was in my inbox on Tuesday morning. It was sent overnight on Monday and we produced it to the defense on Thursday.

THE COURT: I am sorry. Who was this production?

MS. LAMORTE: From Ease to the government.

THE COURT: Okay.

MS. LAMORTE: So obviously the government turned it around and produced it to the defense last night. The defense then reached out to the government to indicate that it was a large production and wanted to raise it to the Court's attention. I then spoke with counsel for the company who indicated that this material was largely the result of a privilege review that had been ongoing and these materials were – a substantial part of them had been determined to be nonprivilege and that is why they were produced when they were. So that explains the timing.

THE COURT: Whoa, whoa.

That doesn't to me explain the timing. This case was supposed to go trial months ago and but for the pandemic it would have. So the government has had many, many months to subpoena documents, enforce those subpoenas.

MS. LAMORTE: Your Honor, may I?

[14] THE COURT: Yes.

MS. LAMORTE: This is pursuant to a subpoena that we issued a year ago. We were unaware until very recently – although, I don't exactly know when – that there was going to be an additional production. So this is not the result of the government issuing subpoenas late.

THE COURT: Wait. So that is a good point.

It is the result of Ease never filing a privilege law?

MS. LAMORTE: We had not received a privilege log, your Honor, I don't believe.

THE COURT: We don't have Ease on the phone, but that sounds like something that maybe I should consider imposing sanctions.

MS. LAMORTE: Your Honor, frankly I am not prepared to address whether the government has a position on sanctions. I am just relaying the facts of when we issued the subpoena, which was over a year ago, and when we received this particular production and why the defense is only receiving it on Thursday.

THE COURT: My understanding is from what my law clerk told me you are not sure whether you are going to introduce any of these documents?

MS. LAMORTE: Correct, your Honor. I have a little bit more information from when the defense contacted us this morning until now, and not that much, but our understanding is [15] that the production is actually if the range of several hundred thousand pages and that a significant part of that is Excel spreadsheets that reflect sales data from marijuana dispensaries. So for what that is worth, it is not that there is 700,000 pages of emails for example.

THE COURT: Although, it also suggests once again that any even colorable claim of privilege was frivolous on its face and should never have prevented the production; but of course I haven't heard from Ease on that so I cannot make a final determination.

Go ahead.

MS. LAMORTE: Your Honor, the government –

THE COURT: Sorry. Someone just interrupted?

MR. ASNER: Sorry, your Honor. I interrupted. I thought there was a pause.

Bennett Miller, who is legal counsel at Visa, is on and is prepared to answer questions of the Court. I will say just one point that the name Paul Fabara, Mr. Tayback never raised that with us and I think also that Mr. Miller can explain what his role is and whether he has the knowledge. I will be quiet now and let you speak.

MR. TAYBACK: To be clear, I only Googled him. I found out last night.

THE COURT: Anyway, Mr. Miller, thank you for joining us on such short notice.

[16] MR. MILLER: Certainly, your Honor.

THE COURT: So the witness, Mr. Elliot, has expressed a desire not to travel to New York in light of the pandemic and in light of his own health issues but to testify by video. I may yet approve that or I may not, but it certainly raises certain constitutional Confrontation Clause issues that would be nice to avoid if we can. My understanding from the parties is that what the government wants him to testify about, and for that matter the defense may want to have him testify about, is Visa's policies and practices with respect to marijuana purchases. I am finding it hard to believe that no one else in the domain of Visa knows about that.

MR. MILLER: Your Honor, I think there are certainly people at Visa who know about marijuana, but my understanding is that the focus will be on Visa Global Brand Protection Program, which is our program whereby we look for merchants that may be engaged in either illegal or brand-damaging transactions, which would include cannabis or marijuana transactions. Mr. Elliot is uniquely positioned to speak on those topics and with respect to that program.

THE COURT: That's interesting. Forgive me for interrupting.

Let me go to the government for a second.

What is it exactly that you expect this witness to say about that program?

[17] MS. LAMORTE: About the Global Brand Protection Program?

THE COURT: Yep.

MS. LAMORTE: Well, our understanding is that that witness's situation in that program is what gives him the knowledge to speak about the various Visa's

rules, policies and application of those policies that would apply in this particular case.

THE COURT: Like what?

MS. LAMORTE: For example, the case we have involves acquiring banks that are located in foreign jurisdictions. It involves falsified phony merchants that were also created in foreign –

THE COURT: Whoa, whoa. That is not my question.

I want to know what is it that you expect Mr. Elliot to say was the policy or practice that he knows that relates to that program that the counsel from Visa just referenced?

MS. LAMORTE: I think part of that, your Honor, would include the enforcement of the various policies and applications of policy that we have been talking about.

THE COURT: Why is that relevant?

MS. LAMORTE: Because one of the defense arguments is that no one in this ecosystem, the payment processing system, cares whether marijuana transactions are going through or not, including Mastercard and including issuing banks. So my [18] understanding is that the Brand Protection Program – someone in the Brand Protection Program like Mr. Elliot can describe how they monitor these transactions, how they look for these transactions to be able to enforce the policies in that situation. Further, what happens and what actions Visa takes if it does discover fraud in that way in their system. For those reasons, we think it is important that the witness be able to speak to all of that especially in light of the defense arguments in this case.

THE COURT: Let me turn to defense.

Are you saying that you think there is a materiality argument here or lack of materiality argument?

MR. TAYBACK: No, this testimony would be very material.

THE COURT: No. No.

The government says that you are going to defend on the ground that no one cared. Now, translating that into legal terms, that is only relevant as near as I could tell in a criminal case to the question of materiality.

MR. TAYBACK: It does go to the question of materiality.

THE COURT: Any other question it goes to?

MR. TAYBACK: I believe that there will be some line of questioning on cross-examination that goes to the intent of the parties. I am not sure what Visa's witnesses actually will [19] be able to say about this.

THE COURT: Wait. The intent of Visa?

MR. TAYBACK: No, the intent of the defendants.

THE COURT: Right. How could they comment on that at all?

MR. TAYBACK: I think it would be inferential with things that they have visibility into from the merchant banks, whether, what, if anything, they can conclude from that. I think it is very limited. I think it reflects favorably on the defendant's intent, but I think the principal argument goes to materiality.

THE COURT: On the question of materiality, let me ask counsel from Visa, either outside counsel or inside counsel, does Visa have a written policy vis-á-vis marijuana per se or only about illegal transactions or something like that.

MR. ASNER: Your Honor, the policy is against illegal transactions. There has been training given to the financial community that marijuana transactions are illegal, and those are documents that we have produced.

THE COURT: Why do you need testimony at all? It is all in business records.

MR. ASNER: Your Honor, I don't think that is a question for Visa. We are a third-party. We have been subpoenaed.

THE COURT: You are right. That is a question for the [20] government.

MS. LAMORTE: Yes, your Honor. I don't think that the bare words on these policies are sufficient for just the obvious reasons that ordinarily it is very helpful to have a witness to be able to explain these things.

THE COURT: I would understand that, but since the only real issue, as near as I can tell, is that this all relates to materiality. That is why I was asking defense counsel about it. I must say I think you may be entitled to an instruction from the Court that refusing to honor illegal transactions or transactions that are derived from an illegal transaction is as a matter of law material.

Assuming it is a jury question, what more do you need?

MS. LAMORTE: This witness, your Honor, is in a position also to talk about the enforcement of these policies. So, for example, what Visa does if it catches something like this or how they catch something like this. And that is not in the policies and that is what this witness can speak to that I think would add a

dimension to this that would be helpful for the jury to know.

In addition, the witness is going to provide background information about how payment processing works, which is also something I think everyone would agree is important for the jury to understand in evaluating the disputed issues in the case.

[21] THE COURT: Well, I am not going to second guess either side of what they think is important. Being simply a simpleminded barefoot judge I always believed that it was important to keep things as simple as possible and that the jury benefited from having clarity and simplicity as opposed to endless detail about outside matters. But that is not my call; it's yours.

So going back to the inside counsel from Visa. Again, thank you very much for being available on such short notice.

So I just want to be sure that it's your statement to the Court that there is no one who can testify to those matters with the directness and personal knowledge that Mr. Elliot has?

MR. RUSSELL: I would say that is correct, sir, with the caveat that he has one person on his team who is also based here in California, who would also have experience that might satisfy the testimony.

THE COURT: Does that person have health issues that Mr. Elliot has?

MR. RUSSELL: She – I am not sure if she does, your Honor, quite frankly; but she also doesn't have quite the experience that Mr. Elliot does with these matters. She is much more junior than Mr. Elliot. Why she could speak to the day-to-day GBPP issues that I

referenced earlier, I don't know that she could speak to Visa's general practices over a period of time with respect to illegal transactions, which is [22] marijuana transactions.

THE COURT: All right. I think I have heard all that I need to hear. I am going to grant the motion of Mr. Elliot to allow him to testify by video. I will issue a written opinion prior to the start of trial giving the reasons for that. I will want to reflect in that some of the things that have come out today.

Let me ask the court reporter how quickly can you get me an expedited transcript?

COURT REPORTER: Your Honor, I can have it to you tonight.

THE COURT: That would be terrific. Thank you so much.

Mr. Elliot's counsel and Visa's counsel, you don't have to stay on the phone. You are welcome to if you want to. There was another matter counsel had raised about some document production from another company that I was going to address so you are welcome to sign off if you prefer.

MR. ASNER: Thank you very much, your Honor.

THE COURT: As I say, Ease is not here. At some point I may want to have – who represents Ease?

MS. LAMORTE: Nixon Peabody.

THE COURT: I am extremely distressed, but I haven't heard their side, to think that with respect to documents that were subpoenaed over a year ago there is any excuse whatsoever [23] for their belated production of these hundreds of thousands of pages. However, all of this doesn't require a ruling from the Court until

we know whether the government is going use any of it. So I think the government has got to determine in the next few days whether it is going to use any of it. If so, tell defense counsel what it is that you plan to use. If there is still an objection based on untimeliness, then convene a call with the Court and I will want counsel from Nixon Peabody representing Ease on that call.

Anything else that we need to take up today?

MS. LAMORTE: Not from the government, your Honor.

MR. TAYBACK: Not on behalf of Mr. Akhaven, your Honor.

MR. GILBERT: No, your Honor, on behalf of Mr. Weigand.

THE COURT: Very good. Thank you very much. Bye-bye.

APPENDIX F

[1] UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

20-cr-188 (JSR)

UNITED STATES OF AMERICA,

v.

RUBEN WEIGAND and HAMID AKHAVAN,

Defendants.

New York, N.Y.
March 1, 2021 9:15 a.m.

Trial

Before:

HON. JED S. RAKOFF

District Judge

[2] APPEARANCES

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* * *

[59] AFTERNOON SESSION

1:30 p.m.

(Jury not present)

THE COURT: Anything counsel needs to raise with the Court?

(Jury present)

THE COURT: I want to remind counsel and the parties that you need to stay in exactly where the marker is for your seats. There was some movement earlier this morning between various people that unfortunately is not permissible because of the pandemic requirement social distancing. So just be sure you keep in your seats.

OK. Ladies and gentlemen, we are about to hear opening arguments of counsel. I want to caution you at the beginning that nothing that counsel says is evidence. The evidence will come, as I mentioned downstairs, from testimony, and it will be from this little box here next to me. And the witnesses can remove their mask because this is designed to allow that.

It will come from documents, which you will see on your screen. And at the very end of the case we will give you a thumb drive or some equivalent so you can access any and all documents as well as an exhibit of the documents.

And occasionally there may be what's called a stipulation where the parties agree on a particular fact, and [60] you can take that as evidence as well.

Those are the only sources of evidence. Nothing that counsel says, nothing that I say is evidence.

So why do we have opening arguments at all? The reason is because the evidence, as again I mentioned before, is going to come in one little bit at a time, and it may be a while till you see the whole picture. So opening statements are the opportunity that's given to counsel to give you a preview of what they expect the proof will show, or will fail to show, as the case may be. So it's kind of an overview.

Each side gets a half – each party gets a half hour. So the government will have a half hour. Then each of the defendants will have a half hour.

The government goes first because, as I mentioned earlier, the burden of proof is always on the government. The defendants are presumed innocent until and unless the government has proven that they are guilty beyond a reasonable doubt. So for that reason the government gets the opportunity to open first, because they have the burden of proof.

So we'll begin with the opening statement from the government.

And you can take down your mask too. That box is also designed to allow you to take down your mask.

MS. DEININGER: I'm sorry. Can everyone hear me?

[61] THE CLERK: I'm sorry. I have to change the microphone cover. Sorry, everybody.

MS. DEININGER: These two men, Ray Akhavan, Hamid Akhavan, and Ruben Weigand, for years, they

built a business of lies, in exchange for millions of dollars. They offered a unique set of services creating fake companies, fake products, fake websites, and even ginning up fake web traffic for those websites, all in the service of pushing money through U.S. banks for illegal products. With that multilayered web of lies they duped the banks into approving more than $150 million in debit and credit card transactions. That's why we're here today, because these two men, they made it their business to commit bank fraud.

So let's talk about what the evidence is going to show. You're going to learn that from 2016 to 2019, the defendants made millions tricking U.S. banks into approving illegal purchases.

I'm going to explain how the defendants pulled this off. But before I do that, I want to talk to you about two things that I think you're going to hear a lot about at trial. The first thing that you're going to hear a lot about is the companies the defendants were paying to lie for, their clients, a company called Eaze. Eaze was a marijuana delivery company. It had an online application that its customers in California, where marijuana is legal under state law, could use to order

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[103] UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

20-CR-188 (JSR)

UNITED STATES OF AMERICA,

v.

RUBEN WEIGAND and HAMID AKHAVAN,

Defendants.

New York, N.Y.
March 2, 2021 9:30 a.m.

Trial

Before:

HON. JED S. RAKOFF

District Judge

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* * *

[137] (In open court)

THE COURT: Okay. Are we ready to proceed?

MICHAEL TASSONE,

called as a witness by the Government, having been duly sworn, testified as follows:

THE DEPUTY CLERK: State your name and spell it slowly for the record. Please angle the microphone so you're speaking directly into it.

THE WITNESS: My name is Michael Tassone, M-i-c-h-a-e-l, T-a-s-s-o-n-e.

DIRECT EXAMINATION

BY MS. LA MORTE:

Q. Good morning, Mr. Tassone.

A. Good morning.

Q. How old are you?

A. Thirty-two years old.

Q. Where do you live?

A. I live in Joshua Tree, California.

Q. Are you currently employed?

A. Yes, I am.

Q. Where do you currently work?

A. Eaze Technologies.

Q. What is Eaze Technologies?

A. Eaze is a marijuana marketplace platform that allows for the sale of marijuana products through its platform.

* * *

[163] A. I'm sorry. Can you repeat that or rephrase that?

Q. Sure. I asked more specifically what is your understanding of the role that Ray and Keith played in the credit card operation?

A. My understanding is that their role was to be able to successfully process high-risk transactions, and in this case specifically for marijuana transactions.

Q. And just generally speaking, what does it mean to process a card transaction?

A. For basically when a customer uses their credit card, having the company that is able to process and complete that transaction so that their card has been charged, and – their card has been charged and then those funds are held in another bank.

Q. How did you refer to Ray's team internally at Eaze?

A. Which time period?

Q. Let's – well, just tell me, how – did that change at all or the various means by which you referred to them.

A. Sure. In – over the course of 2016, 2016, we referred to them internally as the company Clearsettle, and then sometime in 2018 and through 2019, we referred to them as EU or EUP or EUprocessing.

Q. OK. Just to clarify, what period of time was Clearsettle a processor for Eaze card transactions?

A. 2016 and 2017.

[164] Q. And EUP or EUprocessing?

A. 2018 and 2019.

Q. Now, during the course of that time, from 2016 and 2019, would you say you became more involved, less involved, or equally involved in the operation over time?

A. More involved over time.

Q. OK. So let's take a step back and talk about how this began. So in 2016, how did you initially learn that Eaze was interested in providing a card payment option for its customers?

A. I initially learned through our former CEO Keith McCarty.

Q. What did Keith say to you?

A. He said that he has found a solution that may be able to find a way to successfully process credit card transactions for, for a marijuana company.

Q. Did he say anything specifically about the solution?

A. Only that it was with a credit card processing company that typically deals with high-risk processing and that they, you know, would be experienced in order to do this.

Q. Around this time period, what if anything did Keith McCarty tell you about Ray Akhavan?

A. Just that, you know, he led me to believe that he was in charge of the company.

Q. Did Keith McCarty ask you to do anything?

A. Yes, he did.

* * *

[176] so there was discussion around that, as well as the fees that would be associated with that process.

Q. And what did you understand, based on this meeting, Ray's role to be in this process?

A. I understood him to be leading the process.

Q. Why do you say that?

A. I was led to believe by Keith McCarty prior to the meeting, as well as just from the demeanor that he had in the meeting held.

Q. So earlier you mentioned that one of the topics discussed during the meeting was high-risk processing?

A. Yes, that's correct.

Q. Who discussed high-risk processing?

A. Ray primarily did.

Q. What did he say about that topic?

A. He said that he has experience with processing high-risk industries and that, you know, they would possibly have a solution for the marijuana industry for us.

Q. And I believe you also mentioned that one of the issues that was discussed during this meeting was fees; is that correct?

A. Yes, that's correct.

Q. So what was said during the meeting regarding fees?

A. It was said that there would be higher fees than normal, than you would normally have for payment processing due to the

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[296] UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

20-cr-188 (JSR)

UNITED STATES OF AMERICA,

v.

RUBEN WEIGAND and HAMID AKHAVAN,

Defendants.

New York, N.Y.
March 3, 2021 9:00 a.m.

Trial

Before:

HON. JED S. RAKOFF

District Judge

[297] APPEARANCES

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* * *

[425] MR. GILBERT: Thank you.

THE COURT: Mr. Witness, come on up. You can take your mask off once you're in that box.

JOHN VERDESCHI,

called as a witness by the Government, having been duly sworn, testified as follows:

THE DEPUTY CLERK: Please be seated. State your name, spell it slowly for the record.

THE WITNESS: My name is John Verdeschi. It's spelled J-o-h-n; last name, V-e-r-d-e-s-c-h-i.

THE COURT: Counsel.

MR. FOLLY: Thank you, your Honor.

DIRECT EXAMINATION

BY MR. FOLLY:

Q. Mr. Verdeschi, where do you work?

A. I work for MasterCard.

Q. How long have you worked at MasterCard?

A. I started at MasterCard in 1999.

Q. Can you describe what MasterCard is?

A. MasterCard is a global payments company.

Q. When you say global payments company, can you explain what you mean by that?

A. We are a global payments brand and a global payments network. So the easiest way to think about it is we have a brand in the interlocking circles that's recognized around the

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[434] Q. And the example that you just gave, what is the responsibility of the issuing bank for that credit card transaction?

A. Likewise, the issuer is responsible for managing the cardholder, the account holder account. They are responsible for knowing their customer, for routing the transaction, for proving or declining the transaction. That's their role.

Q. And in this example that you just gave, would the acquiring bank's customer be McDonald's?

A. Yes.

Q. Focusing on merchants who are based inside of the United States, where would the acquiring banks usually be located for those merchants?

A. So typically an acquiring bank's merchants would typically be located in the same country. We have a rule and a standard in our network that an acquiring bank must operate within their area of use. "Area of use" means it's the area that they have the right types of licenses and registrations to operate legally. So typically that would be the same country.

Q. When a cardholder makes a card purchase, what, if any, information about the cardholder is transmitted from the merchant bank to the issuing bank?

A. Okay. So there's quite a bit of information, but I'll break it down to some of the kind of essential elements. So there's information about the card. So

going back to the [435] example I gave, if I'm a cardholder and I have a Citibank card and I'm making a transaction at McDonald's, the point-of-sale terminal, the terminal that you insert your card into, is going to read the card number, the expiration date and other data about the card. It will capture the amount of the transaction. That's certainly important.

And it also captures information about the merchant themselves. The merchant name, the merchant location, and something we call the merchant category code, which is sometimes referred to as the MCC code. Most times it's referred to as an MCC code. It is a code that signifies the general business that the merchant is engaged in.

There is many other data elements that are passed through authorization, but those are some of the significant ones.

Q. How is that information transmitted to the issuing bank?

A. Through the MasterCard network.

Q. Is it important to MasterCard that that information about the merchant be accurate?

A. The MasterCard network relies upon, and our customers as a result, rely upon accurate information. That's the entire value of our network. The issuing bank, at the moment of the transaction, is making a decision. They're making a decision based on the customer they know, and they're trying to make a decision on whether or not to approve or decline that

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[437] Q. What volume of MasterCard credit card transactions are there approximately in a given year?

A. In 2020 there were 90 billion.

Q. I'm sorry, how many?

A. 90 billion.

Q. Are you familiar with the term merchant descriptor?

A. Yes.

Q. What is a merchant descriptor?

A. A merchant descriptor is the merchant's name, the merchant's business name, and it's the name that passes through our network and ultimately will end up on the cardholder's statement.

So when you open up your cardholder statement at the end of the month and you see that, oh, I made a $10 transaction at McDonald's, the word that says McDonald's that's the merchant descriptor and that's passed through our network.

Q. When that information is passed through the network, as you just described, what entities receive the merchant descriptor information from the merchant's bank?

A. Well, certainly MasterCard sees it. The issuing bank sees it, and then ultimately it appears on the cardholder statement or on your online account you will see it. So it's visible to MasterCard, to the issuer and to the cardholder.

Q. Now, you also mentioned MCC codes earlier. Can you explain how MCC codes work?

[438] A. Sure. An MCC code, as I said earlier, is a merchant category code. So as the name specifically states, it's a code that represents a merchant. It is a category, meaning that it's meant to convey the

category that the merchant operates in, the type of business that they have, and it's a code. It's typically a four-digit code.

MCC codes are industry-level codes. They are not codes that are created by MasterCard. They are codes that are created by ISO, which I believe stands for the International Standards Organization. I believe that's what the acronym stands for. They are an independent body, and they write many more standards than just MCC code standards. But those MCC codes are used by payment industry at large; so they're used by MasterCard and our competitors as well.

Q. Who is responsible for assigning the MCC codes to a particular merchant?

A. The acquiring institution is responsible for assigning the merchant and MCC code when they onboard the merchant. So when they begin that relationship with the merchant, it's their responsibility to conduct due diligence, understand the business that the merchant is in, and then choose, select the appropriate MCC code that represents the primary source of that merchant's business.

Q. Are there MCC codes included with each credit card transaction?

[439] A. Yes.

Q. What entity or entities receive the MCC code information from the acquiring bank?

A. The MCC code, again, will be visible to MasterCard and it will also be visible to the issuing bank.

Q. Does every merchant account have to have an MCC code?

A. According to MasterCard standards, yes, an acquirer must assign an MCC code for each merchant account.

Q. What is your understanding of the purpose of that requirement?

A. The purpose of the requirement is to provide the issuer with visibility into each and every transaction, the type of merchant that the cardholder is interacting with. Issuers will use that data to – you know, depending on the MCC code, they may run fraud checks, they may run money laundering checks. It enables them to conduct a refined risk decision, and it ultimately is one of the data elements that enables the issuer to either approve or decline the transaction.

Q. Is there an MCC code for marijuana transactions?

A. No.

Q. Why not?

A. Well, a few reasons. No. 1, we use the ISO standards, and the ISO standards do not specify an MCC code for marijuana. No. 2, MCC codes, as I said earlier, are category codes. They are codes that define the primary business that a

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[461] Q. Does MasterCard have a direct relationship with the merchant?

A. No, we do not.

Q. Who has the direct relationship with the merchants?

A. The acquirers.

Q. If MasterCard discovers illegal activity on its network, does it typically reach out to the acquiring banks or the issuing banks?

A. The acquirers.

Q. Can you explain why that is.

A. Well, the illegal activity is emanating from a merchant who's selling product or services that is illegal, and since the acquirer owns the merchant relationship, our way of rectifying the problem is to contact the owner of the relationship, who is the acquirer.

Q. What role if any does your group at MasterCard play in the enforcement of MasterCard's rules on illegality?

A. That is one of the roles we play. My group enforces MasterCard's standards.

Q. Mr. Verdeschi, I want to direct your attention to approximately April of 2019. Did you become aware of an incident involving the alleged sale of marijuana on MasterCard's network?

A. I did.

Q. How did that come to your attention?

[462] A. My team was having a meeting, and they just mentioned this particular case about, you know, illegal marijuana.

Q. And what was brought to your attention at that time?

MR. BURCK: Objection, your Honor. Hearsay.

THE COURT: Clearly it is hearsay if it's being offered for its truth. If it's being offered for action he then took, it would be admissible. Which is it?

MR. FOLLY: Your Honor, it's not being offered for its truth. It's being offered to demonstrate an action that an employee at MasterCard took in response to learning of this violation of MasterCard's rules, and that action was informing Mr. Verdeschi –

THE COURT: Was that an action which this witness initiated?

MR. FOLLY: No, your Honor. This witness was – witnessed the action, which was the sharing of the information to that witness.

THE COURT: All right. I will hear the answer to the next few questions, but we may have to strike this. I'm not sure.

So the question was: "And what was brought to your attention at that time?"

THE WITNESS: What was brought to my attention was kind of the unique qualities of this case. There were two. Number one, there was a MasterCard employee who notified us of [463] this merchant who seemed to be selling marijuana. So that was kind of unique, that, you know, a MasterCard employee brought it forward, and it was interesting. And also the fact that this merchant seemed to be using a mobile application to sell marijuana, again, that was just something that was unique at the time. And so that's why it was brought up in the course of one of our meetings.

THE COURT: What happened next?

THE WITNESS: In the context of that discussion, there was – they were just alerting me to that. But I knew what they were doing. I knew they were conducting an investigation.

THE COURT: Well, was any action taken?

THE WITNESS: Yes.

THE COURT: What?

THE WITNESS: My team had engaged the acquiring bank, as we were talking about earlier, engaged this particular acquirer to, to try to confirm that this was their merchant and confirm that illegal activity was occurring, and once that was confirmed, the acquirer was instructed to cease the activity. And that is what had occurred. The acquirer terminated those merchant accounts.

THE COURT: All right. So all of that will be received on the issue of materiality, but not for its truth.

MR. BURCK: Your Honor, just for the record, we object to the –

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[488] UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

20-CR-188 (JSR)

UNITED STATES OF AMERICA,

v.

RUBEN WEIGAND and HAMID AKHAVAN,

Defendants.

New York, N.Y.
March 4, 2021 9:30 a.m.

Trial

Before:

HON. JED S. RAKOFF

District Judge

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* * *

[571] Q. Yes. But the network MasterCard has assigned an existing MCC code for marijuana purchases in Canada, yes?

A. I – I don't recall what we announced on how to treat Canadian transactions. I don't recall.

Q. Mr. McLeod, can you please pull up what's been marked Akhavan Exhibit 4013, which has previously been admitted into evidence.

What is this, Mr. Verdeschi?

A. MasterCard rules manual.

Q. And the date is?

A. December 18, 2018.

Q. Mr. McLeod, can you please turn to page 183, rule 5.7.1. Can you blow up the – can you highlight the second paragraph beginning with "A Canada" and ending with "recreational cannabis"? Thank you.

Mr. Verdeschi, can you read that?

A. Certainly. "A Canada region acquirer must use MCC 5912 (drug stores, pharmacies) to identify transactions arising from a Canada region merchant or submerchant whose primary business involves the legal sale of recreational cannabis."

Q. Mr. Verdeschi, this rule was in effect when these rules were in effect, which was in 2018, yes?

A. Yeah, I'm going to assume that they would be in effect at the time the manual was published.

Q. And what this rule means is that Canadian marijuana [572] purchases must carry the MCC code 5912, yes?

A. Yes.

Q. Mr. Verdeschi, as you testified, the network, the MasterCard network, is a global payments network?

A. Yes.

Q. And credit and debit cards issued by U.S. banks do work in Canada, yes?

A. They do work in Canada.

Q. So let's say one of us took a credit or debit card and went to Canada on vacation –

A. Mmm, hmm.

Q. – and then we went to a Canadian pharmacy and bought Advil, some kind of legal pharmaceutical product. That transaction would be coded the code for drug stores, pharmacies, 5912, yes?

A. I would assume so.

Q. And the U.S. issuing bank would see that code, 5912, yes?

A. Yes.

Q. Let's say one of us went to Canada with a U.S. issued credit or debit card, and we used that card to buy marijuana, which we've established was legal in Canada. The U.S. issuing bank would see the same code 5912, yes?

A. I presume they would.

Q. In other words, using MCC codes, it is practically – it is impossible for a U.S. issuing bank to distinguish between an [573] Advil purchase in Canada and a marijuana purchase in Canada, through Canada, yes?

A. Using MCC codes on their own, yes.

Q. So if a U.S. issuing bank relied entirely on MCC codes to monitor transactions, in the second scenario I described involving marijuana, it would be facilitating a processing of a marijuana transaction, yes?

MR. FOLLY: Objection.

THE COURT: Sorry. I'm sorry. I lost my LiveNote; so Ms. Reporter, can you read the last question, please.

(Record read)

THE COURT: Sustained.

BY MR. HARID:

Q. Mr. Verdeschi, I'd like to talk to you about the merchant descriptors that you testified about yesterday. Unlike MCC codes, there is no finite set of merchant descriptors that a merchant is required to use, yes?

A. It's – a descriptor is meant to be in the merchant's name; so that it could be – it's sort of a free-form field. They could populate it how they see fit. However, we do have standards around ensuring that, for the cardholder's benefit, that they have an accurate description.

Q. But a single merchant is allowed to use more than one descriptor at any point in time, yes?

A. Yes.

* * *

[649] MR. HARID: No, your Honor.

MS. CLARK: No, your Honor.

THE COURT: Very good. Thank you very much. You are excused.

(Witness excused)

THE COURT: Please call your next witness.

MS. LA MORTE: The government calls Oliver Hargreaves.

(Pause)

THE COURT: Law school training is a wonderful thing.

You can take off your mask, Mr. Hargreaves. You can take off your mask now, and raise your right hand.

OLIVER HARGREAVES,

called as a witness by the government, having been duly sworn, testified as follows:

THE COURT: Please be seated, speak directly into the mike, and state and spell your first and last name.

You have to get closer to the mike.

THE WITNESS: Oliver Hargreaves, O-l-i-v-e-r H-a-r-g-r-e-a-v-e-s.

THE COURT: Counsel.

DIRECT EXAMINATION

BY MS. LA MORTE:

Q. Mr. Hargreaves, how old are you?

A. I'm 41 years old.

[664] UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

20-CR-188 (JSR)
Corrected

UNITED STATES OF AMERICA,

v.

RUBEN WEIGAND and HAMID AKHAVAN,

Defendants.

New York, N.Y.
March 8, 2021 9:40 a.m.

Trial

Before:

HON. JED S. RAKOFF

District Judge

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(Trial resumed; jury not present)

THE COURT: The last of the 13 jurors is being tested right now. We will have the results, we are told, about 10:00. Assuming everyone is negative, we will start the trial at 10:00.

In the meantime, counsel has favored me with a number of evidentiary questions, so I will take them up with whatever order you like. Let me ask defense counsel, which one do you want to start with?

MR. ARTAN: I'll defer to Mr. Tayback.

MR. TAYBACK: Your Honor, I do think this witness is on the stand, and I'm not sure the timing that this will occur, but I do believe there are open issues –

THE COURT: I'm asking, which one do you want to start with. I know there is more than one issue regarding

Mr. Hargreaves.

* * *

[814] mistakes and so we know they're right before they're submitted," what do you understand that to mean?

A. He's – the message is directed to a gentleman called Christian Chmiel, and he's asking them to review the application. Ray is asking him to review the application packs to make sure there's no stupid mistakes before they're submitted.

Q. Okay. Now, let's go to page 55 of Government Exhibit 4004. Okay. Let's start, do you see the first full comment that begins with "regardless"?

A. Yes, I do.

Q. Whose comment bubbles are these?

A. They are Ray's.

Q. Can you read that comment and the following comments?

A. "Regardless we just need Christians to decide what we think is best. We take Kalixa's input, but this going to WC and has to be tailored for them. But I do think it's important to give them absolutely no reason to look due to anything not matching."

Q. Okay. So when Ray says in the comment above the one that was highlighted, "we take Kalixa's input

but this is going to WC," what do you understand that to mean?

A. He's referring to the fact that these are two different acquiring banks with two different sets of views, sets of criteria for reviewing and deciding whether to approve or

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[845] UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

20-CR-188 (JSR)

UNITED STATES OF AMERICA,

v.

RUBEN WEIGAND and HAMID AKHAVAN,

Defendants.

New York, N.Y.

March 9, 2021 9:00 a.m.

Trial

Before:

HON. JED S. RAKOFF,

District Judge

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(Trial resumed; jury not present)

THE COURT: Please be seated. All right. Mr. Akhavan is not yet here?

MR. TAYBACK: He is not here yet, your Honor.

THE COURT: But I assume we can discuss evidentiary issues even in his absence, yes?

MR. TAYBACK: Yes.

THE COURT: All right. Very good.

All right. So first, there is the defense motions regarding the alleged spoliation of Hargreaves' phone data, and I don't need further argument on this because it's been fully briefed, and I thank both sides for their briefs. The part of the motion that gives the defense leave to re-call

Mr. Hargreaves on their case, but as a hostile witness and, therefore, subject to effectively cross-examination on direct at that point, regarding – and solely regarding – the iPad

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[931] Q. A lot of what you were doing was illegal business?

A. Yes, sir, that's correct.

Q. In that context the acquiring banks were collecting their fees just as though the business was legal, correct?

A. Well, I would say that 99 percent of the bank was of the opinion that it was legal.

Q. It is your belief, sir, isn't it, that the acquiring banks wanted some level of plausible deniability about the work that they were doing to process illegal payments, correct?

MS. LA MORTE: Objection.

THE COURT: Sustained. When I sustain an objection, you don't answer.

THE WITNESS: Thank you.

MR. ARTAN: Your Honor. Was it the form? I might be able to restate it.

THE COURT: That was an additional problem. But the main problem is this that you haven't laid a

foundation, and I doubt that you can, that he had personal knowledge that would warrant his being able to say whether or not the banks wanted some level of plausible deniability. There is also the ambiguity in what's meant by plausible deniability. I understand you were getting at his understanding of that. I am not sure you've yet established that the relevance of his understanding of that, even if he could, even if he had that understanding. Those are the starting problems. There are

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[992] UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

20-CR-188 (JSR)

UNITED STATES OF AMERICA,

v.

RUBEN WEIGAND and HAMID AKHAVAN,

Defendants.

New York, N.Y.
March 10, 2021 10:40 a.m.

Trial

Before:

HON. JED S. RAKOFF,

District Judge

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* * *

[1030] level of substantial assistance to the government will be measured, at least in part, by how you do as a witness at this trial?

A. No.

Q. You consider your testimony at this trial part of your cooperation with the government, correct?

A. Yes, sir.

Q. I will ask you some questions now on a different topic.

You testified yesterday and used the term "high-risk businesses;" do you recall that?

A. Yes.

Q. By high-risk you do not necessarily mean illegal, correct?

A. No.

Q. Well, you referenced gambling, which can be legal or illegal, correct?

A. Correct.

Q. You mentioned Forex trading, which you said can be legal or illegal, depending on licensing, right?

A. Correct.

Q. And you mentioned the travel industry?

A. Yes.

Q. How is the travel industry high-risk?

A. Well, if you have an airline and an airline – and you can cancel your tickets – you know, book your ticket four months in advance, cancel it – we look at it from the standpoint of [1031] chargebacks. And also, if an airline was to go bust, which is not uncommon, it's a hell of a liability.

Q. And so businesses that have a risk of bankruptcy would constitute high risk?

A. One of them, yeah.

Q. And businesses that are in – where the business is one to likely generate chargebacks or returns, that's also high risk?

A. Again, it's another thing that's taken into consideration.

Q. Now, is it your understanding that – let me back up.

You used the term sometimes acquiring banks?

A. Yes, sir.

Q. And is that the same as a merchant bank?

A. No, it's not.

Q. What's the merchant bank?

A. Do you mean a merchant bank account?

Q. Yes.

A. It's an account given to a merchant that is typically housed with an acquiring bank.

Q. The term you use for the banks that would open accounts on behalf of merchants was acquiring bank?

A. Yes, sir.

Q. And is it your understanding that acquiring banks monitor the chargebacks from their merchants?

A. Not only, but yes.

Q. Isn't it true that regardless of – even in the legal world

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[1115] Q. Yes, and I'm sorry. I'll repeat it, and if it's still confusing, just tell me.

So on cross-examination you were asked a number of questions about whether the acquiring banks that were involved in the Eaze scheme knew that it was a transaction laundering scheme; do you remember questions like that?

A. Yes.

Q. So based on your participation in the Eaze scheme, was it your understanding that Ray and Ruben were working with insiders at these acquiring banks?

A. Yes, it was.

Q. Now, you also testified on cross-examination that words to the effect of 99 percent of the acquiring bank thought that what was happening was legal, can you explain what you meant by that?

A. Yes. Only a few – you wouldn't have a blanket-wide understanding of what was going on within an acquiring bank. What you would have is somebody, hopefully, in a position of power – sorry, "power" is the wrong word – knowledge or insight or access to what was going on in the bank, to provide guidance or, in a better situation, actually just push the applications through, but obviously, that would depend on, you know, the relationship and the position of that person.

Q. Okay. Mr. Hargreaves, do you have knowledge of anyone in the Eaze scheme working with insiders at U.S. issuing banks?

* * *

[1124] MR. ARTAN: Your Honor, that might be something we could stipulate to.

THE COURT: Right.

MS. LA MORTE: Yes.

THE COURT: So when was Mr. Hargreaves –

MS. LA MORTE: September 27th. We can stipulate September 27th, 2018.

THE COURT: Okay. Very good.

MR. TAYBACK: Thank you.

THE COURT: All right. Anything else from anyone?

MS. LA MORTE: No, your Honor.

THE COURT: You are excused. Thank you very much.

(Witness excused)

Please call your next witness.

MS. LA MORTE: The government calls Richard Clow.

THE COURT: Okay. You can step into that box. And once you're in there, you can take off your mask. Don't sit down yet.

RICHARD CLOW,

called as a witness by the Government, having been duly sworn, testified as follows.

THE COURT: Please be seated. And state and spell your name for the record.

THE WITNESS: My name is Richard Clow, R-i-c-h-a-r-d, C-l-o-w.

* * *

[1139] UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

20-CR-188 (JSR)

UNITED STATES OF AMERICA,

v.

RUBEN WEIGAND and HAMID AKHAVAN,

Defendants.

New York, N.Y.
March 11, 2021 9:39 a.m.

Trial

Before:

HON. JED S. RAKOFF,

District Judge

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* * *

[1159] been marked as Government Exhibit 3706.

Mr. Clow, do you see that exhibit in front of you?

A. Yes.

Q. Would Government Exhibit 3706 assist you in explaining how card transactions are processed?

A. Yes.

MS. LA MORTE: Your Honor, the government requests permission to publish Government Exhibit 3706 as a demonstrative.

THE COURT: Yes.

MS. LA MORTE: Mr. Levine is that published? Thank you.

BY MS. LA MORTE:

Q. So, Mr. Clow, using Government Exhibit 3706, can you walk us through how this process unfolds, step by step, when a Bank of America cardholder uses their card to make a purchase?

A. Yes. So the cardholder in this example is just like everyday people, you and I. We go to a merchant and we, let's say, fill a basket, whether it's online or in person, and then there's a total of a purchase price that were asked to pay. When you choose to use your credit card, that merchant takes your credit card information, and then they integrate that with a little bit of information that they send to their merchant acquiring bank. That information includes the merchant name, it includes the address of the merchant. It includes a couple [1160] of things about the security of the card, were you there in person, did you use a mobile payment, and those types of things.

It also includes what's called a merchant category code, which classifies the kind of business that that merchant does, and then it has the amount and the little bit of information about the cardholder. That information is shared with the merchant bank, and the merchant bank's responsibility is to collect that information and then send it over one of the card networks, Visa or MasterCard. That's determined by the cardholder's card itself.

Then the cardholder bank or, in this case, Bank of America as the issuing bank, would receive all of that information, and we would be asked to make a decision, will we authorize or permit this transaction on behalf of our client or will we decline it? So typically, that timeline that we're required to operate on the network is less than a second.

So we take the merchant name, the amount, the address that they're at, the way that the category – the merchant category is defined, and the amount that's due for our client, and we see is this an okay transaction and okay for the cardholder is do, they have that money in their account or do they have access to it, if it's a credit line, and then we would authorize.

So when we send the authorization it sends a [1161] confirmation and authorization code back through the merchant bank to the merchant, and that's when typically the cash register rings and it opens and you know the sale is completed. So that would complete the transaction from an authorization perspective.

Q. Thank you. So you listed some categories of information that Bank of America, as an issuing bank, receives in connection with a decision whether to authorize the transaction or not, correct?

A. Correct.

Q. I believe you said merchant name, address, security features, MCC code and the amount, and the date of the purchase?

A. Correct.

Q. Is it important to Bank of America that this information be accurate?

A. Yes.

Q. Why is that?

A. Well, it's critical for us to make a decision about that transaction and whether it's within our rules and compliance, as well as if it's lawful or not.

Q. Okay. With we can take that down, Mr. Levine.

So you mentioned merchant category code. Can you just remind us briefly what that is?

A. Merchant category code is used to describe what kind of [1162] business the merchant is in. The merchant acquiring bank sets that up as they take a new merchant on, and it helps us identify the difference between a grocery purchase or, you know, let's say an online subscription or travel, like an airline ticket.

Q. And I believe you just said there that the merchant acquiring bank is the entity that assigns the MCC code; is that right?

A. That's correct.

Q. Is an issuing bank – does Bank of America have any role in assigning MCC codes?

A. No, an issuing bank does not.

Q. As an issuing bank, does Bank of America have any role in creating MCC codes?

A. No, we do not.

Q. Now, is it important to Bank of America that the MCC code that it receives in connection with a transaction is accurate?

A. Yes, it is.

Q. Why is that?

A. Well, I think the first thing is it's important so that we know how to treat that transaction. The second thing is there are actually some benefits on the card where we may provide more reward points or cash back or other types of things. So there are a number of features based upon the MCC code.

Q. Okay. So you also mentioned merchant name as a piece of

* * *

[1167] group of people that use some tools to look at all of the transactions that we've processed in a month, and what they do is they use a couple of key words, like for instance "cannabis," to see if any of the merchants are suspected of supporting a marijuana- or cannabis-based business.

Those transactions are then identified, and we can identify the merchants. So then once the merchants are identified, we have a running list that we manage. First, we'll see if that merchant's been identified in the past.

Let's say the merchant is new, that team would do a very simple publicly available information search, typically like a Google search, to see if they have a website, if it looks like they're advertising that they accept credit or debit cards. If they do, then we put them on the list that we use, where we share those names with the network, either Visa or MasterCard or both, and we ask the networks to go do the investigation and due diligence with the acquiring bank because that's really who manages the information about the merchants.

Q. Okay. Just to make sure that everyone is clear, you said that if Bank of America identifies a particular

merchant that may be suspicious for selling marijuana products, you would refer that to the network. When you say that, do you mean Bank of America's own compliance team, or do you mean Visa and MasterCard?

A. Yes, the network compliance team creates a list of [1168] suspected marijuana businesses that we report to the Visa team and/or the MasterCard team to conduct the investigation.

Q. Now, do you recall instances, Mr. Clow, where, through the process you just described, Bank of America identified merchants in the network that may be prohibited U.S. direct marijuana-related businesses?

A. Yes.

Q. And just generally, what happened in those circumstances?

A. In those circumstances, through an update process that we have with the networks, the networks reported back that they've terminated some business relationships, meaning that that merchant was indeed accepting credit and debit cards for marijuana transactions, and now they were eliminated from the network so they can't do it going forward.

And in some cases, it was identified that they actually weren't using the cards for marijuana-related businesses or products, that it was actually not related to a marijuana business.

Q. So, okay. A moment ago you outlined for us the procedure that the Bank of America's network compliance team uses to try and identify prohibited marijuana transactions.

MS. LA MORTE: Your Honor, at this time, the government offers Government Exhibits 2424, 2427,

2428, 2423 and 2425 pursuant to rules 8036 and 902.11.

MR. GILBERT: No objection.

* * *

[1193] A. Yes.

Q. And you testified about the point at which the issuing bank comes into that process, right? I think you said that the issuing bank, once they receive the information from the merchant, merchant bank, the network, will then authorize or decline a transaction, right?

A. Correct.

Q. Now, when the issuing bank is making that decision, it has the following information. It has the merchant's name, right?

A. Yes.

Q. The location –

A. Yes.

Q. – of the merchant.

Yes?

A. Yes.

Q. I'm sorry. You have to say it so the record –

A. Sure.

Q. It also has the name of the cardholder?

A. Yes.

Q. The cardholder's card number?

A. Yes.

Q. You said there was some security features it has?

A. Yes.

Q. It doesn't have, for example, though, the descriptor information, correct?

[1194] A. Correct.

Q. And it doesn't have anything about what the specific product is, right?

A. Correct.

Q. So when you receive that information, you either will either authorize it or decline it, based on the information you receive, correct?

A. Correct.

Q. When the issuing bank is making decisions, sometimes it will call the cardholder once the cardholder submits the card, correct?

A. There are certain strategies we have where we can do that.

Q. And that happens, correct?

A. Periodically.

Q. If somebody submits a card for a purchase and there is a question the issuing bank has about it, the issuing bank can and sometimes does call the cardholder, correct?

A. Yes. The majority of the cases, when it's about a fraud, it's actually when we suspect it's not the client making the transaction.

Q. Exactly. So when you do that, when you call the customer, the cardholder, what types of questions are asked of the cardholder about the transaction?

A. Generally, it's, is this merchant the merchant transaction that you want to authorize or not. Are you there. Do you have [1195] your card. Basic questions like that.

Q. You do not ask if it is an illegal transaction, correct?

MS. LA MORTE: Objection. Foundation.

THE COURT: No. I'll allow that.

A. Not to my knowledge.

Q. You don't ask what product are you buying, do you?

A. Only for a deep investigation.

Q. That's not my question.

When somebody from Bank of America calls the customer in the circumstance we are talking about, do they ask what product are you buying?

A. Not to my knowledge.

Q. When Bank of America as the issuing bank makes the decision about whether or not to authorize or decline, it doesn't have any information about what the product is, the specific product that's being purchased, correct?

A. Correct.

Q. And it doesn't have any information about the merchant other than the merchant's name, isn't that correct?

A. The merchant category code also describes the business that the merchant is in.

Q. The merchant category code, the merchant name, and the location. That's what you have?

A. Yes.

Q. But you don't have the descriptor information, correct?

[1196] A. Correct.

Q. And the descriptor information has more information about the merchant than just the merchant name, correct?

A. Correct.

Q. It has more information than the MCC code does, correct?

A. Correct.

Q. Let's talk briefly about the payment structure for cardholders with the issuing bank, with Bank of America.

I am going to show, just for the witness, Government Exhibit 2407. I don't believe this is in evidence.

Do you recognize this document?

A. Yes, I do.

Q. What is it?

A. It's a credit card agreement for a consumer.

MR. BURCK: Your Honor, we would offer Government Exhibit 2407.

MS. LA MORTE: No objection.

THE COURT: Received.

(Government Exhibit 2407 received in evidence)

MR. BURCK: Thank you, your Honor.

Publish that to the jury, please.

Q. Now, you testified that this is a credit card agreement between Bank of America and a consumer?

A. Correct.

Q. When you say consumer, you mean the cardholder?

* * *

[1242] marijuana business, right?

A. Correct. And legally we can't.

Q. Legally you can't, but you also don't want to be?

A. Correct.

Q. Having the Bank of America logo used to make a marijuana purchases is harmful to the reputation of the bank in the bank's view, correct?

A. If we knowingly supported the transaction it would be.

Q. If you don't know about it, it's fine.

A. I'm saying, if we are using our practices and the tools and the contracts we have on our network to authorize the transaction and our card member thinks that it's permissible, it doesn't necessarily put us in a brand risk or reputational risk.

Q. If your cardholder thinks it's permissible, it doesn't put you at risk?

A. Again –

Q. I'm sorry. Reputational risk.

A. Reputational risk.

MR. BURCK: Can we show the witness Akhavan Exhibit 10037. We can just use either one. Perfect. Thank you, Mr. McLeod.

Q. The card on the right is one we just looked at. It's a credit card?

A. Yes.

* * *

[1258] MR. BURCK: Your Honor –

THE COURT: I've run out of fingers to count them.

MR. BURCK: Your Honor, I am done with this document.

I'm moving on to my last three questions.

THE COURT: All right.

MR. BURCK: Now, maybe five questions, just two to preface.

THE COURT: In all seriousness, I'm going to – we have three minutes until we give the jury their lunch break.

That will conclude your examination.

MR. BURCK: Okay. Thank you, your Honor.

BY MR. BURCK:

Q. So you testified that cardholders are the customers, the clients of the bank with these card transactions, right?

A. Yes.

Q. You have a contract with them, right?

A. Yes.

Q. And you tell them they can't do illegal transactions, right?

A. Yes.

Q. And that includes marijuana sales, correct?

A. We don't tell them that that includes marijuana sales, but marijuana sales is included.

Q. Exactly right. Thank you. Has Bank of America terminated a single, a single cardholder's card because they have used [1259] their cards to buy marijuana, to your knowledge?

A. Not to my knowledge.

MR. BURCK: That's it, your Honor. Thank you.

THE COURT: Okay. We'll take our lunch break and then continue with this witness after lunch. So we'll take an hour for lunch.

(Jury not present)

THE COURT: Please be seated. The witness is excused. (Witness temporarily excused)

I received an e-mail last night in which defense counsel kindly brought to my attention that they had probably underestimated their case when they said two days; that depending on my rulings on various other witnesses, it might be as much as three days. So I think it's important that we get those rulings made. Most of them regarded, if I recall, experts. So are those experts all in New York?

MR. BURCK: No, your Honor. Some are – we have to bring to New York imminently in order for them to meet the –

THE COURT: All right. So what I'm thinking is that maybe after we excuse the jury tomorrow afternoon, we might have, if it can be arranged, a hearing where those witnesses could appear by Zoom, and that way, they would know if they're going to have to come or not.

But in terms of setting that up, I remind both sides that whenever we have any of the Zoom stuff, it's the

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[1340] UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

20-CR-188 (JSR)

UNITED STATES OF AMERICA,

v.

RUBEN WEIGAND and HAMID AKHAVAN,

Defendants.

New York, N.Y.
March 12, 2021 9:25 a.m.

Trial

Before:

HON. JED S. RAKOFF,

District Judge

APPEARANCES

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* * *

[1427] A. That amount appeared to have a beneficiary of Senjo Payment Asia.

Q. And same for J42?

A. Yes.

Q. And the same for J55?

A. Yes, that amount is correct.

Q. And scrolling up, the same for J18?

A. Yes. I don't remember the exact numbers now but that sounds right.

MR. HARID: One minute, your Honor.

(Pause)

Nothing else, your Honor.

THE COURT: Very good. Anything from counsel for Mr. Akhavan?

MS. CLARK: No, your Honor. Nothing from us.

THE COURT: Anything further from the government?

MS. DEININGER: No, your Honor.

THE COURT: Very good, you may step down. Thank you very much.

(Witness excused)

Please call your next witness.

MR. FOLLY: The government calls James Patterson.

THE COURT: In case you're wondering, ladies and gentlemen, my law clerk does windows also.

Remain standing but take off your mask.

[1428] JAMES PATTERSON,

called as a witness by the Government, having been duly sworn, testified as follows:

THE COURT: Please be seated. State and spell your full name.

THE WITNESS: My name is James Patterson, J-a-m-e-s, P-a-t-t-e-r-s-o-n.

(Pause)

THE COURT: Counsel?

MR. FOLLY: Thank you, your Honor.

DIRECT EXAMINATION

BY MR. FOLLY:

Q. Good afternoon, Mr. Patterson.

A. Good afternoon.

Q. How old are you?

A. I'm 41 years old.

Q. Where do you live?

A. I live in Los Angeles, California.

Q. Who are the members of your immediate family?

A. I live with my wife, Jessica, and two children.

Q. Are you currently employed?

A. No.

Q. What was your last paid position of employment?

A. I was the CEO of Eaze.

Q. What is Eaze?

* * *

[1443] United States or overseas?

A. Overseas.

Q. Why did Eaze process cards overseas as opposed to processing through a processor based in the United States?

A. Because no U.S. banks would open merchant accounts for cannabis businesses.

Q. Did the credit and debit card operation through Ray's organization stay the same or change over time?

A. It changed over time.

Q. What were some of those changes?

A. Initially, I knew it as a Clearsettle. So when it was operating as Clearsettle, there was a single descriptor and descriptor website so that all the transactions across all of the dispensaries Eaze worked with were associated with a single website descriptor.

Eventually, that changed to – from Clearsettle to something I knew as EUprocessing. During EUprocessing the way the descriptors worked also changed. So instead of having a single descriptor across all of the dispensaries, multiple descriptors were used. All in all, there were probably 15 – 12 or 15 total descriptors being used at any one time.

Q. Focusing first on Clearsettle, did Ray operate Clearsettle alone or did he work with others?

A. He worked with others.

Q. Who were some of the other individuals involved in the [1444] Clearsettle operation?

A. People I knew as Medhat, Ozan, and Hussein.

Q. You also just mentioned that eventually the operation came under the name that you knew as EUprocessing, is that right?

A. Yes.

Q. Approximately when was that change?

A. That was in April of 2018.

Q. What was your understanding of who was involved in the EUprocessing phase of the operation?

A. So Ray and Medhat from the Clearsettle, and then some new people that became involved, people I knew as Ruben and Martin.

Q. Going back to Clearsettle, when did you first hear about Clearsettle.

A. A few weeks after I joined the company, after I joined Eaze.

Q. Who told you about Clearsettle at that time?

A. Keith McCarty, the then CEO.

Q. At that point in time what forms of payment were available to Eaze's customers?

A. It was cash only.

Q. What was the role of Clearsettle in Eaze's credit and debit card processing?

A. Clearsettle acted as the payment gateway, so Eaze's systems would integrate into their payment gateway so when a customer wanted to input their credit card information, as well as make

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[1728] UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

20-CR-188 (JSR)

UNITED STATES OF AMERICA,

v.

RUBEN WEIGAND and HAMID AKHAVAN,

Defendants.

New York, N.Y.
March 16, 2021 9:15 a.m.

Trial

Before:

HON. JED S. RAKOFF,

District Judge

APPEARANCES

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* * *

[1751] MR. FOLLY: No, your Honor.

THE COURT: Thank you very much. You may step down.

(Witness excused)

THE COURT: Please call your next witness.

MS. DEININGER: The government calls Chuck Brown.

CHARLES BROWN,

called as a witness by the government, having been duly sworn, testified as follows:

THE COURT: Counsel.

DIRECT EXAMINATION

BY MS. DEININGER:

Q. Good morning, Mr. Brown.

A. Good morning.

Q. Can you hear me OK?

A. Yes, I can.

Q. OK. Please tell me if you are not able to at any point.

Mr. Brown, where do you work?

A. I work at Actors Federal Credit Union.

Q. Do you mind if for the purpose of our conversation I call it Actors?

A. Yes. That's fine.

Q. How long have you worked at Actors?

A. Since 2008.

Q. And what is your current role there?

A. I'm the chief compliance and risk officer.

* * *

[1786] Q. That should be the word "annual," correct?

A. Yes.

Q. You can take that down. So you describe how the bank relies upon Visa for a variety of aspects of its credit and debit card processing?

A. We rely on Visa to provide the network for the transactions to follow.

Q. And I believe I understood you to say that if Actors was not part of the Visa network, Actors might very well go out of business; is that right?

A. Yes.

Q. And that's not just because of the fees that it earns whenever any customer uses a credit or debit card, correct? For other reasons as well?

A. Yes, it is for other reasons.

Q. In fact, it's in part because you want to please your customers, correct?

A. Yes.

Q. Having access to a credit and debit card you can use around the country is important to your customers, right?

A. It would be, yes.

Q. And you want to please them, correct?

A. Yes.

Q. Because you're a full – you endeavor to be a full-service credit union, like a full-service commercial bank?

[1787] A. That's correct.

Q. Now, for this trial you were asked about some documents that the government subpoenaed; do you remember that?

A. Yes.

Q. And you testified about a few of them. I'm going to ask you about some of those and some others. You

produced to the government files for individual customers, correct, individual consumers of the bank?

A. That's correct.

Q. If you could put up for the witness only GX2712.

I'd ask if you recognize this – and maybe flip through it – as a portion of the file for one of those customers. Do you see that?

A. Yes.

Q. And then I'm going to have – just if you can recall the name of this particular –

MR. TAYBACK: At this point, your Honor, I would offer Exhibit GX2712.

MS. DEININGER: I believe it's already in evidence.

MR. TAYBACK: Okay.

BY MR. TAYBACK:

Q. If this is in evidence, this is the particular customer I'm going to show you. I'm going to ask you, there are an additional – you produced all the bank statements for this particular customer, correct?

* * *

[1797] A. Yes.

Q. In that intervening year or 13 months, did you do anything to investigate any of the entries that the government asked you about, until last week?

A. Yes, we did.

Q. And what did you do?

A. We looked up the merchants online to see if we could determine anything, any additional facts, about what the nature of the case was, and then, when we

had a little bit more information, when we learned – this was sometime later that we learned it was related to marijuana, we contacted our payment processor and asked them if there was a way for them to block marijuana purchases.

Q. You didn't contact the customers, correct?

A. That is correct.

Q. And you haven't terminated their cards, correct?

A. That is correct.

Q. And you haven't warned them not to engage in such transactions in the future, correct?

A. That is also correct. They are not all still currently cardholders with us.

Q. But those who are, you haven't warned them not to engage in those transactions in the future, correct?

A. That is correct.

Q. Now, if you could take a look at – let me back up here.

[1798] MR. TAYBACK: If you could bring up Exhibit GX 2705, which is in evidence.

Q. If you would look at the name of this particular cardholder for Actors Bank. You produced bank records for this particular customer as well, in response to the subpoena, right?

A. I believe so, yes.

Q. Now, I want to ask you some questions about how descriptors are used. If I understood you correctly, there's no one at Actors who actually looks at the descriptors to decide whether or not to approve a transaction, correct?

A. Not at the time of the transaction.

Q. And in fact, is it your experience that the descriptors don't always describe what it is that was purchased, correct?

A. They don't describe what's purchased. They describe the business.

MR. TAYBACK: If you could put up, just for the witness, Exhibit HAX10057.

Q. And you recognize this as the additional bank – or bank records for one of the customers that you produced bank records for, correct?

A. Yes.

Q. And we looked at some of the account paper work for this customer earlier, correct, in your direct?

A. I believe so, yes.

Q. If I could ask you to direct your attention to –

* * *

[1842] MS. LA MORTE: I would say probably through the morning and then we would probably free up after lunch.

THE COURT: So defense counsel should be ready with their first witness for later on Thursday.

MR. BURCK: Yes, your Honor.

MS. LA MORTE: Has your Honor decided when it wants to hold a charging conference?

THE COURT: I think probably Friday evening.

MS. LA MORTE: OK.

(Jury present)

THE COURT: Ladies and gentlemen, can everyone see the witness?

Mr. Elliott, just raise your hand again to make sure everyone can see him.

Very good. Please raise your hand once more.

MARTIN ELLIOTT,

called as a witness by the government, having been duly sworn, testified as follows:

THE COURT: OK. Counsel.

DIRECT EXAMINATION

BY MS. DEININGER:

Q. Good afternoon, Mr. Elliott.

A. Good morning.

Q. You're right. You're in California. It's morning. Right?

Good morning.

* * *

[1893] (At the side bar)

THE COURT: I never would have allowed this to begin after lunch if I had realized it was going to go over to another day, which is what, in effect, you're telling me.

MS. DEININGER: Probably including cross.

THE COURT: How long do you have on cross?

MR. BURCK: Your Honor, I'll try to keep it very short, maybe 45 minutes.

THE COURT: We only have 25 minutes until the jury leaves for the day. How long does the co-counsel have?

MR. HARID: I think we can keep it to under a half hour for our events.

THE COURT: And we can't start – well, maybe we can, if he wants to get up at 5:00 a.m.

MS. DEININGER: I've been told he is available to start at the start of the court day.

THE COURT: I'm sorry, do you know that, or are you just guessing?

MS. DEININGER: No, I certainly know today he was. MS. LA MORTE: We can finish with Darcy Cozzetto, if that's what your Honor prefers, and we can verify –

THE COURT: No, we're going to finish this witness. How much more do you have?

MS. DEININGER: I think it should be about – I will certainly finish before the end of today.

[1894] THE COURT: Okay. I will hold you strictly to that.

MS. DEININGER: Understood.

THE COURT: 45 minutes?

MR. BURCK: 45 minutes, your Honor.

MR. GILBERT: Half an hour.

THE COURT: No more than five minutes on redirect. No recross.

MR. BURCK: No problem, your Honor.

MR. FOLLY: Your Honor, we'll also make your sure that we'll do everything to have him available

tomorrow morning so we don't interrupt again the order of witnesses.

THE COURT: I really cannot tell you how disappointed I am. Let's go.

(Continued on next page)

* * *

[1913] UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

20-CR-188 (JSR)

UNITED STATES OF AMERICA,

v.

RUBEN WEIGAND and HAMID AKHAVAN,

Defendants.

New York, N.Y.
March 17, 2021 9:20 a.m.

Trial

Before:

HON. JED S. RAKOFF,

District Judge

APPEARANCES

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* * *

[1931] and gentlemen, and welcome back. So getting down to the important things, juror No. 6 is more muted today but, by contrast, juror No. 5, for example, is in a wonderful green outfit; so that will make my day sufficiently.

All right. We are ready to continue.

MR. BURCK: Thank you, your Honor.

CROSS-EXAMINATION

BY MR. BURCK:

Q. Mr. Elliott, good morning. I know it's very early for you.

Can you hear me okay?

A. I can, yes. Thank you.

Q. And you can see me as well?

A. I can, yes.

Q. Okay. And is there anything changed with your ability to see the various people that you testified that you could see yesterday?

A. I can see everyone clearly, yes.

Q. Okay, great. And if there's a problem with hearing me, please let me know. And one last thing, I may have to ask you sometimes to repeat things because the court reporter may have a hard time hearing you. Okay?

A. That's fine.

Q. Okay. Thank you.

Let me start with showing the witness Government Exhibit 2218, just for the witness. And can you show him the [1932] second page as well.

Mr. Elliott, do you –

A. Am I supposed to look in the binder or is it going to be on the screen?

Q. It should be in the binder.

A. I see 2217.

Q. You don't see 2218?

A. Oh, okay. Okay, yes. I do see it now. Thank you.

Q. Do you recognize that document?

A. I do, yes.

Q. What is it?

A. It's a summary of the Visa payment network.

MR. BURCK: Your Honor, we'd offer Government Exhibit 2218.

MS. DEININGER: No objection.

THE COURT: Received.

(Government's Exhibit 2218 received in evidence)

BY MR. BURCK:

Q. So, Mr. Elliott, as you said, it's a schematic of Visa's processing system; is that right?

A. It is, yes.

Q. Now, on the far right-hand corner there's merchants and acquiring banks, right?

A. There are merchants and acquiring banks, yes.

Q. Okay. And in that scheme, the merchant's point of contact

* * *

[1935] A. They gather a lot of that from the merchant application.

Q. And the merchant application is something that is submitted to the acquiring bank, correct?

A. It's submitted to the – well, it depends. It depends on how that acquiring bank is set up. If the acquiring bank does not use any agents, then it goes directly to the acquiring bank. If they use agents, it

may go to the agents, and then ultimately the acquiring banks should look at it, but they may not in every case. They may have set some type of established allowable merchants and prohibited merchants, and if it's an allowable merchant, they may not look at everything on that application.

Q. Okay. But –

A. They may have given the agent authority to sign certain low-risk merchants, and certain high-risk merchants may need to be reviewed by the bank, or what we say, they must concur on the approval.

Q. The acquiring bank receives the application file or these other third-party agents, right, receive the application file, correct? Yes or no?

A. Can you say that again? I'm sorry.

Q. The acquiring bank or the agents that you just testified about, receive the application file from the merchant; yes or no?

A. Yes, they do.

[1936] Q. And the application file does not go to the Visa network or to the issuing bank; yes or no?

A. It does not go to Visa or the issuing bank.

Q. So the application file, as far as you know, remains with the merchant bank or the acquiring bank or the agents; yes or no?

A. It does, yes.

Q. Now, all of these on-boarding responsibilities are with the acquiring bank or its agents, correct?

A. Yeah, the on-boarding responsibilities are definitely with the acquiring bank or its agent, yes.

Q. And the acquiring bank can't delegate or assign those responsibilities to someone else in the network, right?

A. Can you say that again? I didn't quite hear if you said "can" or "can't."

Q. Can't, cannot.

A. Well, look, I think, as I described earlier, the acquiring bank, if they're working with an agent, may set out parameters that allow an agent to on-board certain types of merchants.

And so it's common place that an acquirer might say that you can sign a restaurant that does less than 100,000 a month without our concurrence. But if you're signing a higher-risk merchant or an entity above a certain volume, then we want to see all the paperwork.

Q. Okay.

* * *

[1945] transaction fees, I'm not an expert on all of them, but yes, we do earn revenue from the operation of our network.

Q. And you want Visa cards to be used more, rather than less, in the network, of course, right?

A. Well, yes. You know, widespread acceptance is a positive thing for our business, yes.

Q. So higher volume of use of cards means more revenue ultimately for Visa, correct?

A. Higher volume generates higher revenue, yes.

Q. All right. Let's please put up for the witness what's in evidence as Government Exhibit 2203, and we go to page 18. And – sorry, one second.

So if you look at the very top of that page, Program Violations – and you can highlight for the jury.

Are you there, Mr. Elliott, page 18 of 2203?

A. I'm lost. One moment.

Q. Sure.

A. Sorry, I have to get used to your tab system here. Okay. Under B, I think I have it.

Q. Is it page 18 of the lower right-hand side of the page?

You know what, just to speed this along, why don't you just put it down, and I'll ask you a couple of questions, since you testified about this yesterday.

Do you recall that there's a global brand protection guide for acquirers, right?

* * *

[1953] Q. Do you see the person who is the author or presenter of the document?

A. That I see, yes.

Q. Do you recognize the document?

A. I do, yes.

Q. Do you know what – can you tell us what it is?

A. This is a document that – it's a PowerPoint presentation that I gave to one of our risk executive committee meetings. At the top it's one of the marijuana laws and fact that they're evolving and changing.

Q. And this was presented to Visa internally, correct?

A. It was present – it was presented to internal Visa people and clients that are members of our risk

executive council that we meet with to discuss merchant issues.

Q. And clients would include issuing banks, right?

A. Issuing and acquiring banks.

Q. And this presentation occurred in 2019, did it not?

If you turn to the second page and you look at the bottom, I think it will help you understand – or right underneath. Do you see that?

A. Yes. 2018 or 2019, somewhere in that time period.

MR. BURCK: Your Honor, we offer Akhavan Exhibit 5014.

MS. DEININGER: Objection, Rule 403 and government motion in limine 2.

THE COURT: Do you want to give me a hint what motion [1954] in limine no. 2 is?

Here it is.

MR. BURCK: Your Honor, with respect to – I think no. 2 is talking to legislation. I am not going to elicit anything about legislation from this document.

MS. DEININGER: It is in the document, though.

MR. BURCK: Your Honor, we could also redact it before it goes to the jury.

THE COURT: As so redacted, it will be received.

(Defendant's Exhibit 403 received in evidence)

MR. BURCK: Thank you, your Honor.

Can you show the witness Akhavan Exhibit 5014.

Q. Now, sir, this is titled "Cannabis and Hemp Products," correct?

A. It is.

Q. That's the same title as the document that Elizabeth Scofield provided – or presented that you looked at for Government Exhibit 2204, correct?

A. I don't know if it's the same title. I'd have to go back and look at it.

Q. Why don't you take a quick look.

A. I'm just doing that right now.

Q. Sure.

A. Yeah. It's the same title, yes.

Q. So fair to say the same topic, right?

[1955] A. Yes, similar topic.

Q. OK. Now, you testified that this happened in 2018 or 2019, right?

A. It did.

Q. And you testified that there were issuing banks and acquiring banks present, right?

A. I did.

Q. And also Visa executives, right?

A. Yes.

Q. All right. Let's turn to the second page. And the second page, fair to say it's about the terms that you're going to be using, which are cannabis, marijuana, THC and CBD, industrial hemp. Right?

A. Yes.

Q. And the next slide, about global legalization –

MS. DEININGER: Objection.

MR. BURCK: Sorry. We'll skip that slide. Sorry.

We'll skip that slide. Sorry, your Honor. I had missed one part of it.

Go to the third slide, please.

MS. DEININGER: Objection. Motion in limine 2.

MR. BURCK: Your Honor, I'm looking at the slide that says "Legal Landscape of Marijuana in the U.S."

THE COURT: Does somebody have a hard copy of this, so I can see the whole exhibit?

* * *

[1957] THE COURT: What else do –

MR. BURCK: I'm sorry, I couldn't hear?

THE COURT: I want to see everything.

MR. BURCK: Sorry, your Honor. And then the next slide, that slide, your Honor, is the one we really want to talk about. And then that's it, your Honor.

THE COURT: And is the government objecting to all this?

MS. DEININGER: We do not object to the cover or slide 2, but we are objecting to the last two slides that were shown as irrelevant.

THE COURT: Sustained.

BY MR. BURCK:

Q. Mr. Elliott, do you recall – you recall this presentation, correct?

A. I do, yes.

Q. And the purpose of the presentation was what, your Honor – Mr. Elliott?

A. The purpose of the presentation was to educate a group of stakeholders on the requirement that we're shifting in the U.S. marketplace and there has been some states pushing for legalization, there has been some conjecture in Congress about legalization –

MS. DEININGER: Objection. Move to strike.

THE COURT: Yes. So the answer will stand through

* * *

[1962] Q. Yes or no, Mr. Elliott? I'm sorry. Yes or no. I'm just conscious of the time.

A. Restate it?

Q. These teams would go to the website of Eaze? Yes or no.

I'll help you. Why don't you look at –

A. My vendor went to the test site and conducted the test transaction.

Q. Your vendor who works for Visa, correct?

A. Yes.

MR. BURCK: Can we show the witness Government Exhibit 2231 and 2232, which are in evidence.

Q. OK. You recall testifying about this, right?

A. Well, I have to get them.

Q. Sorry. I'm sorry.

A. 2230 – I think you said –

Q. 2231 and 2232.

A. OK. I'm at 2231. Yes, I testified about that.

Q. And then 2232.

A. Yes. I see that. I also testified about that. Yes.

Q. And on 2232, you testified that you can clearly see the URL is eaze.com, right?

A. Yes.

Q. Now let's look at Government Exhibit 2227.

MR. BURCK: Your Honor, I'm conscious that I'm running up on my 45 minutes. Could I beg the Court's indulgence?

* * *

[1964] I should say – let me withdraw the question.

None of those merchants said Eaze. Right?

A. None of the merchant names on this document say Eaze, under that column.

Q. But you understood, and your team understood, that Eaze was behind all these merchants. Correct?

A. We understand that because the test transactions took place at the Eaze website, and the names that came through the payment system were the five different names in that merchant name column.

Q. Are you familiar based on your knowledge and experience in this field with the term "proxy"?

A. Excuse me?

Q. "Proxy," p-r-o-x-y, proxy.

A. I'm not familiar with the way you use that term, no.

Q. I didn't ask the way you use it. I just asked you if you are familiar with the word "proxy."

A. I don't know what you mean by that.

Q. OK. Let's turn to Government Exhibit 2228. And can we highlight, in the middle, and if you could find that document, Mr. Elliott.

A. I found it, yes.

Q. And you see that – you testified about this document as well, right?

A. I believe so, yes.

[1965] Q. And on the far left do you see under "Merchant Name" SonicLogistix, correct?

A. I see that, yes.

Q. And under "Merchant URL," you see eaze.com, correct?

A. I do, yes.

Q. So when we were looking at the prior exhibit, 2227, right – we'll go back to that – the merchants that were terminated were just SonicLogistix, advancedphotovoltaics, advanced-electricity.com, and advanced-dynamic.com – and also, I'm sorry, BTPinternet-trans, right?

A. Those were the merchant names that were terminated, yes.

Q. Eaze was not terminated, right?

A. Our belief was – and very typical –

Q. Sir, before you answer – before you explain, my question was, was Eaze terminated? Yes or no. Then I'll let you explain.

A. My belief was that Eaze was being terminated because they were using a name other than their own. And the purpose of the test transaction was to conduct a test at the Eaze website. But the Eaze name did not

flow through the system. Another name did. And the acquirer responsible for it indicated to us that they have terminated it, which to us meant they terminated Eaze. That's the explanation.

Q So when you say that it meant to you that they had terminated Eaze, did anybody tell you they terminated Eaze?

* * *

[1969] to warn its cardholders, stop using these cards for marijuana sales. Right?

MR. BURCK: You're frozen.

Your Honor, I think the witness is frozen. Not literally frozen, but the screen.

Your Honor, just to speed this along, your Honor, what I could do, if I could have time in my – I know there was supposed to be no more cross, but just this last set of questions, so we don't waste time with the jury.

A JUROR: He's back, he's back.

MR. BURCK: Oh, he's back. I'm sorry.

Q. Can you hear me now, Mr. Elliott?

A. I did, and I answered the question.

Q. We didn't hear it, so you're going to have to answer it again. I'm sorry.

A. That's OK. Go ahead.

Q. So the question was, did Visa ask its issuing banks to warn cardholders to stop using their cards for marijuana sales?

A. We did not make that specific warning to issuers or requests.

Q. Did Visa ever threaten to penalize the issuing banks for not preventing its cardholders from purchasing marijuana using Visa-branded cards?

A. We did not.

THE COURT: All right. That concludes the cross.

* * *

[1979] Can we please turn to page 79. 79. Can we please blow up the section that says 6540, nonfinancial institutions – stored value purchase card.

Q. Mr. Elliott, can you please read the paragraph beginning "this MCC."

A. Sure. One moment.

"Nonfinancial institutions – stored value card purchase/load."

It reads, "This MCC must be used for the initial purchase and/or any subsequent reloads of stored value cards (including Visa prepaid cards) occurring at nonfinancial institutions. This MCC is not applicable for use with staged digital wallet operators."

Q. I'd like to turn to the Visa rules. That's Government Exhibit 2208, which you reviewed yesterday. If we could turn to page 338 of the PDF, table 5-1.

Mr. Elliott, have you seen this table before?

A. I'm not there yet. You said 2208?

Q. Correct, yes.

A. That's 2202. One moment, please.

OK. I'm looking at the Visa core rules of Visa product and service rules?

Q. That's right.

A. Is that it?

Q. That's right.

[1980] A. OK.

Q. Page 338.

A. 338. Sorry. One minute.

I'm looking at something that says "Table 5-1."

Q. Yes. That's right. That's right.

Do you see the column that says "MCC"?

A. I do, yes.

Q. And you see the column that says "Use"?

A. I do, yes.

Q. And can you read what's below "Use."

A. "Funding the wallet before the cardholder makes the purchase."

Q. What this appears to show, Mr. Elliott, is that there are applicable MCC codes for staged digital wallet transactions, right?

MS. DEININGER: Objection. He's testifying.

MR. HARID: A leading question, your Honor.

THE COURT: Well, putting aside that I don't really understand either the objection or counsel's response to the objection, the objection is overruled.

Q. You can go ahead, Mr. Elliott.

A. Do you want to repeat it?

Q. Based on your review of this table, do you agree that there appear to be prescribed MCCs for staged digital wallet transactions?

* * *

[2077] EUprocessing, correct?

A. Yes.

Q. And in 2018, while you were having those communications, isn't it true that it never occurred to you for one second that

Andreas was anybody other than Andreas?

A. That is correct.

Q. And, in fact, the only time that's ever come into your mind was when it was suggested to you by the government?

MS. DEININGER: Objection.

Q. Is that....

THE COURT: Overruled. You may answer.

A. I still believe that I was talking to somebody named Andreas.

MR. GILBERT: Thank you very much, Ms. Cozzetto.

THE COURT: Anything further?

MS. DEININGER: No further questions.

THE COURT: Thank you very much. You may step down.

(Witness excused)

Please call your next witness.

MS. DEININGER: The government calls Michael Steinbach.

THE COURT: Remain standing but take your mask. Please raise your right hand.

MICHAEL STEINBACH,

[2078] called as a witness by the Government, having been duly sworn, testified as follows:

THE COURT: Please be seated. State and spell your full name.

THE WITNESS: Michael Steinbach, M-i-c-h-a-e-l, S-t-e-i-n-b-a-c-h.

THE COURT: Counsel.

DIRECT EXAMINATION

BY MS. DEININGER:

Q. Good afternoon, Mr. Steinbach.

A. Hello.

Q. Can you hear me okay?

A. I can hear you.

Q. Okay. Mr. Steinbach, where do you work?

A. I work at Citi.

Q. How long – is Citi also known as Citigroup or Citibank?

A. It is.

Q. How long have you worked at Citi?

A. Four years.

Q. What is your current role there?

A. I'm the head of the consumer bank's fraud prevention organization.

Q. And what is the global – Citi's global consumer bank?

A. So Citi is actually two entities in general. There's an institutional group, institutional clients group, which is

* * *

[2117] essentially want to know –

Q. Mr. Steinbach, I'm sorry. Could you speak a little closer. I'm having a real hard time hearing you today. I'm sorry.

A. So what you're describing is, at the time of transaction, there are instances where we want to make sure it's the customer, so we will pend the transaction. In other words, we don't approve it until we hear back from the customer. And we generally ask, is that you or is that not you. And then depending on the response, we would –

Q. I'm sorry. You're going to have to speak again. We lost you at the end.

A. All right. Sorry.

Q. Thank you. You said that "we" –

A. So –

Q. It's better, though, loud.

A. So at the time of the transaction, we will either make the decision to approve it or decline it. And there are instances where we're not quite ready to completely decline it, and so we will reach out to the customer a lot of times through a text, perhaps an email, maybe a phone call, where we will say something along the lines of, can you verify this is your transaction, click push 1 for yes or 2 for no. That will help us make a determination as to whether, again, the fraud strategies are all designed around, is it Mike Steinbach or is it not Mike Steinbach. If it's Mike

Steinbach, if I'm within [2118] the credit limit, I can do whatever I want.

Q. Understood. And you don't ask, or the bank, I should say, doesn't ask the customer in those circumstances, what are you buying. Right?

A. There could be instances where the customer calls in and through the course of the scripts, additional questions are asked. I don't have detail on what those questions would be.

Q. You're talking about a circumstance where the customer calls up the issuing bank, right?

A. Yes.

Q. I'm talking about when the issuing bank affirmatively reaches out to the customer through a text or through an email or through a call. Does, in those circumstances, does the bank ask, what are you buying?

A. So there are times, to your point where, although we reach out via text or email or call, customers are wary. They will not respond. They will call in themselves. So to answer your question, I don't have 100 percent insight on all of the questions asked in that particular situation.

Q. Do you know if the issuing bank asks the customer, are you buying a legal or an illegal product or service?

A. The issuing bank, at least in Citi's case, does not ask that question.

MR. BURCK: Your Honor, I see that we only have five minutes left. I'm going to switch to a topic, it's probably

* * *

[2128] UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

20-CR-188 (JSR)

UNITED STATES OF AMERICA,

v.

RUBEN WEIGAND and HAMID AKHAVAN,

Defendants.

New York, N.Y.
March 18, 2021 9:30 a.m.

Trial

Before:

HON. JED S. RAKOFF,

District Judge

APPEARANCES

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* * *

[2135] THE COURT: Well, that's what I wanted to – as I indicated even yesterday, I'm leaning towards excluding this. But, because I didn't have the chance this morning to look at the transcript – and I am grateful to counsel for providing me with the relevant portions of the transcript – I will hold off making a final decision until later today. And I'll look at the transcript.

MS. DEININGER: If I may be heard for just one more minute on that?

THE COURT: Yes.

MS. DEININGER: There were no questions put to Mr. Elliott regarding the purpose of that slide and what he intended to show, and so while the defense is making one argument – obviously they're arguing that it shows that there was a financial motivation to engage in these types of transactions – it could have just as easily have been that Mr. Elliott was trying to warn the council that there was a reason to step up their enforcement efforts because the size of the industry was growing.

THE COURT: I made my ruling at the time, and what the record should reflect is obvious. This is in effect a motion for reconsideration after the witness has gone. And for obvious reasons we're not going to call him back. So that's another potential difficulty with admitting this exhibit.

MR. TAYBACK: Just to make a record, your Honor, we

* * *

[2160] A. Yes.

Q. But Citi does not have a program for ferreting out marijuana sales, does it?

A. On the card business? You're asking me?

Q. Yes.

A. No. From our perspective, the card business wouldn't include marijuana because it's not allowed in the payment system, so we don't have a separate system to ferret out marijuana or any other specific type of transaction.

Q. So – and, again, you are the head of fraud and you don't even know it's legal in California. Right?

MS. DEININGER: Objection. Asked and answered.

MR. BURCK: Your Honor, I can –

THE COURT: Overruled.

Q. You can go ahead and answer the question, yes. You're the head of fraud and you don't know even whether or not it's lawful in California, right?

A. Yeah. So let me clarify. I have not reviewed state by state every state law with respect to marijuana. I can make some assumptions based on what I know. But to testify and say that I know for a fact that I've reviewed state law, that's actually correct; I do not know for a fact that in the state of California marijuana is legal or illegal.

Q. Understood. Now, there's no program at Citi designed to detect marijuana sales when using credit cards branded by Citi, [2161] right?

A. There are no programs designed to identify a marijuana transaction; is that what you're asking?

Q. Yes.

A. No, there's not.

Q. And the 278.9, or 276.9 million dollar budget which you talked about, the $18 million technology, how much of that would you say is dedicated to ferreting out or identifying marijuana sales?

MS. DEININGER: Objection. Asked and answered.

THE COURT: Overruled.

A. None.

Q. You talked a bit about regulatory risk. You remember that?

A. I do.

Q. And you testified that there is regulatory and legal risk to Citibank – or, I'm sorry, I keep on calling it Citibank. I don't know if it's still called that.

A. There's lots of names. Citi works.

Q. Citi. Do you remember that testimony?

A. Yes.

Q. And you testified about some of the U.S. regulators who regulate Citi. Right?

A. Correct.

Q. And you're familiar with the Department of Justice, right?

A. I am familiar with the Department of Justice, yes.

* * *

[2166] there's an unlawful transaction by the cardholder, what you're saying to the cardholder is, "This agreement still applies, and you must pay us for the transaction." Right?

A. Correct.

Q. So you're not off the hook, the cardholder, if you use the card for an unlawful transaction, right?

A. That's what it says, yes.

Q. You still have to pay Citi the balance, correct?

A. Correct.

Q. And it also says that "you also may have to pay the card network and/or us for any damages and expenses resulting from that use." You see that?

A. I do.

Q. Now, are you aware of any cardholders who Citi has demanded pay for damages and expenses for using their cards for marijuana sales?

A. I am not.

Q. Are you aware of any cardholders whose cards have been terminated for using them to buy marijuana?

A. I am not.

Q. And that's the last thing, right? "In addition, we may close your account," right?

A. Correct.

Q. You're not aware of anything happening like that in marijuana sales, right?

[2167] A. I am not.

Q. Are you aware of a warning that Citi has put out to customers who have bought marijuana to stop or face consequences?

A. I am not.

Q. Have you or – you or anyone at Citi – are you aware of anyone at Citi – reported any cardholders to law enforcement for using their cards to buy marijuana?

A. I don't know the answer to that.

Q. Well, how about you? Have you ever done that?

A. Have I ever done that? Personally no.

Q. But when you say you don't know the answer, that means you don't know?

A. We file thousands of suspicious activity reports a year. I have not reviewed them. My guess is there – likely, some of those suspicious activity reports, which go to FinCEN, which go to law enforcement, may have to deal with illegal drug use. But I can't confirm that.

Q. You said "likely, may." You don't know?

A. I don't know, no.

Q. Sitting here today, you can't identify a single time this happened, right?

A. I can't personally, no.

Q. You testified about the losses that Citibank – excuse me, Citi – suffers from fraud. Right?

* * *

[2172] no marijuana transaction that flows through. We don't even have the decision to approve or decline a marijuana transaction. It's not in the U.S. payment system.

Q. So as you sit here today, are you saying that marijuana transactions don't go through the U.S. banking system?

A. What I'm telling you is that if we see it's an MCC – there is no MCC for marijuana. So I couldn't provide any clarity to you as to whether we approve, decline marijuana because we don't see it.

Q. Okay. But whether you see it or not, are you saying it doesn't exist?

A. Are you asking me to tell you what I know for a fact, or to guess or suppose?

Q. You are the head of fraud for Citi, correct?

A. Mmm, hmm. Yes. Sorry about that.

Q. Okay. And is it your testimony that you don't have any knowledge as to whether or not marijuana sales transactions occurred through the Citi financial network?

A. As a principal matter, what I'm telling you is there are lots of things that flow through Citi that are, unfortunately, illegal. What I'm saying is I can't clarify or provide any clarity as to that because I don't see it in the system because it's not allowed on the U.S. payment rounds. There is no code for marijuana.

MR. ARTAN: Could I have a moment, please, your Honor?

* * *

[2187] THE COURT: Very good. Anything further from the government? Anything further from the government?

MS. DEININGER: Sorry. No further questions, your Honor.

THE COURT: Thank you very much. You may step down.

(Witness excused)

Please call your next witness.

MS. DEININGER: The government calls Jacob Pechet.

THE COURT: Please remain standing but take off your mask.

JACOB PECHET,

called as a witness by the Government, having been duly sworn, testified as follows:

THE COURT: Please be seated. State your full name and spell it for the record.

THE WITNESS: My name is Jacob Pechet, J-a-c-o-b, P-e-c-h-e-t.

THE COURT: Counsel.

DIRECT EXAMINATION

BY MS. DEININGER:

Q. Good morning, how are you doing?

A. Good morning. Well, thanks.

Q. I think I might have mispronounced your name. Can you spell your last name for me?

A. It's Pechet.

* * *

[2207] says that Visa's policy is not to transact in marijuana. No slide in the presentation, which is contrast to what his subordinate said. So the whole point of that, and your Honor –

THE COURT: So I'm going to receive it for the – and give the jury a limiting instruction as follows: That this was presented by Mr. Elliott to – you'll have to give me the date.

MR. BURCK: We don't know the exact date, your Honor, because I – unfortunately, I wasn't able to –

THE COURT: 2019.

MR. BURCK: 2019, yes.

THE COURT: At a meeting that included representatives of issuing banks, that we don't know which issuing banks. You are – it's being received to complete your understanding of what was presented at various meetings. It's not being presented for its truth, but really for the fact that it was presented to at least some issuing bank representative, something along those lines.

MR. BURCK: That's fine with us, your Honor.

MS. DEININGER: Your Honor, if I may for just one minute?

THE COURT: Yes.

MS. DEININGER: So on the first presentation,

Mr. Elliott did testify that the purpose of that presentation, at the Visa security summit, to which all his clients, issuing

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[2436] UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

20-CR-188 (JSR)

UNITED STATES OF AMERICA,

v.

RUBEN WEIGAND and HAMID AKHAVAN,

Defendants.

New York, N.Y.
March 22, 2021 9:46 a.m.

Trial

Before:

HON. JED S. RAKOFF,

District Judge

APPEARANCES

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* * *

[2441] defendants can take their cut of it.

Now, for this scheme to work, lies had to be told every step of the way, to every participant in the payment processing system, including Visa, MasterCard and those U.S. banks. It cannot work any other way. The plan does not work without pushing lies through the system. So I'll walk through the evidence on that.

Second, we'll talk about the key role that these two men, Ray and Ruben, played to make the Eaze scheme

work and all the reasons that you know that they intended to deceive the card networks and U.S. banks so that the Eaze transactions could be approved. We'll look at their actions, their words, their lies, all the work that they put in to avoid being detected.

And third, we'll talk a little bit more about the single charge in this case, conspiracy to commit bank fraud, and how each and every element of that charge is proven beyond a reasonable doubt.

And finally, we'll talk a little bit more about the element of materiality. Would a reasonable banker want to know that they were being asked to authorize elicit purchases, or would they just not care about being lied to over and over and over again? This is really a matter of common sense, but we'll look at the evidence on that point, too.

So let's turn to the Eaze transaction-laundering [2442] scheme. On the screen in front of you, you have Ray's words. "There is no way all these people can pull this off and we can't. With our brain trust, we should be way ahead of everybody else." Ray was right. He and Ruben were sophisticated businessmen who orchestrated a sophisticated scheme, a massive scheme that they perpetrated for three years to the tune of over $150 million worth of concealed and illicit transactions.

So we all know the backdrop. Eaze was a U.S.-based company selling marijuana products. It didn't want to continue to accept cash only. It wanted to be able to accept debit and credit cards, but there was a problem with that. Visa, MasterCard and many U.S. banks don't allow their cards to be used for the purchase of marijuana because the sale of marijuana is illegal under federal law.

Enter the defendants. To be clear, the defendants, they weren't involved in the marijuana industry. They had no affiliation with Eaze. No, these men were involved in the business of bank fraud, and a number of witnesses told you their knowledge of the payment processing industry was impressive. They were experts in high-risk industries and the ins and outs of the global payment processing system.

And Eaze? Well, Eaze just happened to be their client. Ray and Ruben offered Eaze a solution to the company's legal problems with accepting credit and debit cards, and that [2443] solution was to commit bank fraud.

In the government's opening statement, Ms. Deininger told you how the defendants ran this scheme step by step. And what does the evidence show? Lies at every step of the process. Lies to every single participant. Lies every step of the way. We're going to follow those lies through the payment processing system from the acquiring bank on the left of your screen, through to Visa and MasterCard, and finally to the U.S. issuing banks. And then we're going to follow the money that comes back.

So let's overview the four steps of the Eaze transaction-laundering scheme, which we will go through in detail. Step one, purchase shell companies with no connection to Eaze; step two, use those shell companies to open fraudulent bank accounts with foreign acquiring banks; step three, use the shell companies' accounts to secretly funnel through Eaze transactions; and step four, get that money, get that money from the U.S. banks back to the depots or the marijuana dispensaries.

So let's start with step one. The defendant arranged to purchase shell companies with no connection to Eaze. What is a shell company? Well, remember Oliver Hargreaves? He told you what a shell company is. It's a company on paper, no employees, no operations, no services, nothing. Paper only. No relation to Eaze.

* * *

[2446] look: Merchant name, false. The merchant name on here is not Eaze; it's Linebeck Limited.

Merchant location, false. The merchant location is nothing in the United States but in Manchester in the UK.

Merchant activity, which translates into an MCC code, false. Not anything on any of these applications pertaining to cannabis or anything related. Instead, we have custom skincare products.

And fourth, merchant descriptor, false. Eaze.com isn't on here anywhere. Instead, we see Organikals. store.

These four lies are found in every single fraudulent application submitted to every single one of the foreign acquiring banks. No mention of Eaze whatsoever, no mention of Eaze.com, no mention of Eaze's true U.S. location, no mention of Eaze's actual business.

So why am I asking you to focus on these four lies? As we're about to see, the evidence shows you that these four lies were critical. These four lies made their way from the foreign acquiring banks to Visa and MasterCard and finally to those issuing banks in the United States. So that's step two, open foreign merchant processing accounts in the name of shell companies, with a bunch of lies.

So now, let's go to step three. What's step three in the process? Now, what we're going to do is use the shell company accounts at the foreign merchant acquiring banks to

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[2448] linked to the NewOpal, shell company merchant processing account. Look at the one below, Hometown Heart, another marijuana dispensary linked to the processing account Linebeck.

So remember, the four lies passing through the system, merchant name, merchant business, merchant location, billing descriptor. Because of that, because of those four lies, the defendants at Eaze knew that U.S. banks would not be told truthful information about the transactions, but that the lies would be passed to them through the system, lies from these fraudulent shell company accounts.

And so Eaze told its customers that credit and debit purchases through its website were going to show up as something completely different. Let's look at what you have on your screen now. On the left we see Government Exhibit 686. That's a receipt for the purchase of a product, a marijuana product, through the Eaze website. And what's being told to the customers? You will see a charge, on the right-hand side of the slide, from Soniclogistix for $57.51 on your statement. That's because lies are being passed to the U.S. issuing banks. That's why this is appearing on their statement, and that's exactly what happened.

So let's go back to the slide with the four-party model. Again, I want to focus on the four key lies that were used to disguise the Eaze transactions and that made their way through the payment processing system,

false merchant name, [2449] false descriptor, false merchant location, false merchant activity or MCC.

When the Eaze card transactions got up and running, these four lies flowed from the foreign acquiring bank housing the shell company accounts, through the credit card networks and then finally to the U.S. issuing banks. How do you know this? The witnesses told you that and the records prove it.

Ladies and gentlemen, look on your screen now. This is an excerpt from MasterCard data pertaining to transactions in the MasterCard systems. Look at this, ladies and gentlemen. What you're looking at are the lies. These are the disguised Eaze transactions in MasterCard and Visa's systems. So let's take a quick look at a couple.

You can see, going down, Organikals.store, about a third of the way down. Merchant category code, 5977. Merchant category name, cosmetic stores. Organikals.store is the lie. The merchant category number, cosmetic stores, is the lie. The location in the UK is the lie. All of those are lies. These are the lies. This is what disguised the Eaze transactions, and this is telling you that these lies, these are the lies that MasterCard sees. These lies are in the MasterCard systems.

Let's go to the next slide.

And again, same thing with Visa. We have all the U.S. issuing banks on the left, and this is in the excerpt.

* * *

[2460] at this meeting. So he, meaning Ray, started by just talking generally about how the credit card money flowed. So starting with the credit card owner and the issuing banks in the United States, money would then

flow to the merchant banks that he worked with in Europe, and then from there, the money would come back to the United States to be deposited into the dispensary's bank accounts.

So he talked about the money flow, and then he talked specifically how, in this case, the merchant bank accounts that were being set up were not going to be in the dispensaries' names. They couldn't be because Visa and MasterCard didn't allow for marijuana transactions. He was going to take care of that part of it.

Follow the lies and follow the money.

Now, as I said, Ruben was there, too. He was there with Ray in that meeting in Calabasas with Eaze and the dispensaries, where this scheme was planned. Ruben was there with the insiders when they met to plan this conspiracy and he was also there when it was planned with Eaze. Ruben was there every step of the way.

So can we go back one slide? Here we go.

Here is a Telegram chat between Ray Akhavan and others at Eaze, including Ruben, and he says: We went over this. Martin and Ruben have both agreed to be actively involved with helping us out. You all met Ruben in LA.

[2461] Next slide. And we also know, if you look on the right, this is a stipulation or an agreement between the parties. Weigand traveled from Germany, Frankfurt, Germany, to Los Angeles on March 14th, 2018, and returned from Los Angeles to Frankfurt on April 1st, 2018.

On the left-hand side, Patterson told you that: Nick Fasano said that Ray's German's banker showed up. I

took that to mean Ruben. Ruben was there. So, ladies and gentlemen, EUP took over, and the scheme became even more deceptive, more sophisticated and more lucrative.

Let's look at this slide. On the left-hand side you see the descriptors that were used in the scheme, HappyPuppyBox, TheHiddenKitten, Soniclogistix, feel-kvell. And let's look at what Patterson says on cross-examination about these descriptors. Question, on cross: "Was it your understanding – was it ever your understanding that a goal of the descriptor is to make the customer be able to recognize a transaction?

"A. Yes. That's the goal of the descriptor, but just not in this case, wasn't the goal of the descriptors."

What was the goal here? What was the goal of the descriptors? Not to help out the customers in identifying their purchase. It was to deceive, hear the lie, to make sure that the banks, Visa and MasterCard, didn't figure this out.

And look what Oliver Hargreaves told you on

* * *

[2469] call:

Who participated in the call?

Ruben W. and myself. Which topics did you discuss?

We talked about which dispensaries should be tied with which merchant accounts based on transaction and limit volumes.

Ruben worked with the money, he worked with the banks, and he worked with Eaze. He knew exactly what was going on.

Ruben also knew when Mastercard discovered the lies in this scheme. You may recall hearing from Mastercard, as well as Visa, that they discovered that they were fake merchants going through the system and that these merchants were really disguised marijuana transactions. So look at the left. The left is an email from Andrea Bricci at PXP Financial, formerly known as Kalixa, one of the merchant acquiring banks of the scheme. She's writing to Mastercard and writing about merchants that they discovered and terminated and says at the bottom: These merchants have been referred to us by an ISO, Esepa. If you go back and look at the fraudulent applications in this scheme, these same applications, the ISO referenced on those applications is this ISO, Esepa. That's on April 26.

Then on April 28, two days later, after this email, Euprocessing writes: Hi John, to John Wang as Eaze. I guess you weren't informed about the Mastercard issues. Please disable the Mastercard processing for this channel as well.

Then on the bottom, a few days later, we have a

* * *

[2476] All right. Let's talk about avoiding getting caught because Ray and Ruben took a number of measures, significant efforts, significant time to avoid getting caught.

Here we go. This is what Ray says in that 011iebaba chat: The bank, Visa, and Mastercard do tests and mystery shopping, so we need to be careful of them.

They knew that these entities – Visa, Mastercard, and banks – could uncover and expose the scheme. So

they took every measure that they possibly could to avoid that.

Here we go, measure one: Fake websites and fake clicks. Here is Ray explaining to Eaze about the fraudulent website. This is in the Clearsettle days, the fraudulent website that was used was Webconsultations. Here's what he says about this fraudulent website, Ray to Eaze:

The Webconsultations page is super critical as that is the website on file with the bank, which means Visa and Mastercard monitor it. We absolutely cannot ever mess or change that page in any way. It has very strict compliance issues and is currently compliant. So please, please make sure no one ever messes with that page, as it must stay compliant and functioning. If that site goes down or is broken for any reason, it will blow up the entire project.

Again, they know they are fooling and tricking Visa, Mastercard, and the banks, and here is their effort to ensure that they are not discovered by those entities.

* * *

[2479] bottom: These idiots don't know that they're creating chargebacks, but we do, Ruben.

So why was this a concern? Why were chargebacks such a concern in this scheme? Again, because if there are chargebacks, there is a real risk that the banks and Visa and Mastercard would find out what the defendants were doing, that they were disguising the Eaze transactions. Jim Patterson explained this to you on direct:

"Q. What is your understanding of why it's important that they not escalate the complaint to their bank?"

This is talking about customers who received their billing statement from the bank, something like Greenteacha, and don't recognize it. So they're going to call their U.S.-issuing bank to figure out what's going on. So why is this important?

"A. At some point Ray said that the reason was that if a customer complained to their bank, as part of that interaction, they could mention they bought cannabis on their credit card. If they said that to their bank, then the bank could reach out to Visa or Mastercard, and that could cause the account to be under investigation.

"Which banks did you understand Ray to be referring to when Eaze referring to customers complaining to their banks?

"The card-issuing banks, so the banks in the United States where the customers have their credit card accounts."

* * *

[2481] getting caught: customer service. Customer service was vital, as Ray and Ruben recognized. Ray says on the left in this Olliebaba chat: Ruben, Eaze is saying the numbers aren't working, the ones we put up, and they want those forwarded to their own customer service numbers. Do you have that, and is that in progress, brother?

Again, the concern is people are confused by their credit card statements and don't recognize the charge, and they try to call customer service and don't get anyone. What's their next call going to be? To their U.S.-issuing bank to dispute the charge.

On the right, this is now Ray talking to Eaze. Mick Frederick is one of the customer service people at

Eaze, and he's explaining to them why this is so important with customer service. Ray says – this is interesting – And it's critical that they don't answer, meaning the Eaze customer service, saying it's Eaze. They have to be generic and say that they are a CS center for many companies. Ask for the person's info to pull them up. Once you see that they're a legit Eaze customer, they can be transferred and dealt with as Eaze but not before.

Why is that? Why does Eaze's customer service have to verify it's an Eaze customer before saying that they're Eaze customer service? Ray tells you at the very bottom: The bank, Visa, and Mastercard do tests and mystery shopping, so we have [2482] to be careful. You have to be careful because it could be someone from Visa making that call, trying to figure out what this transaction is, and so you have to determine, Eaze, that they are real customer before you let on that you are, in fact, the Eaze company. Again, avoiding getting caught.

Then we have this Pixel redirect. This is another way to avoid Visa, Mastercard, and the banks, mystery shopping, and Jim Patterson, explained to you how had worked. Eaze was a complicated, technical project. So if you're an Eaze customer and you get your receipt, it says Happypuppybox, and you go to Happypuppybox, the system will know that you're an Eaze customer, and you'll be transferred to Eaze site. You won't go to Happypuppybox. But if you're not an Eaze customer, if you want and you just found Happypuppybox or if you're a Visa or Mastercard or mystery shopping and you type in Happypuppybox, you're not going to be redirected to the Eaze site. You're going to be directed to Happypuppybox. So, again, this is an effort to avoid having Visa,

Mastercard, and banks discover that they're really dealing with Eaze. Ray explains this again in this chat, which is the Eaze customer service chat.

He says: Also, we have a really cool trick with cookies. We cookie the users when they sign up on Eaze, and when those users go to the customer service URLs in the descriptor, they will see Eaze; whereas if anyone else goes there – read Mastercard, Visa, the bank – they just see the [2483] normal page, ha, ha, ha, ha.

Now, let's look at the final set of lies. That's Ruben postarrest. You heard that tape in evidence during this trial. Ruben lied to law enforcement when he was arrested, and that is a real window into his thinking. He lied because he was covering it up and he knew he did wrong, and he knew what he did was a crime. So here are the lies.

FBI: You heard about the company – and this is taken from the transcript – and then take me through your involvement and what happened there.

Ruben Weigand: I have no involvement. I just –

FBI: You have no involvement with Eaze?

Weigand: No.

Ladies and gentlemen, that's ridiculous. We just went through a mountain of evidence showing that Ruben was very much involved in Eaze. He lied to the government. He lied when he was arrested. He lied because he knows he's guilty.

Here, here's about the EUP email address.

Ruben says: It's not my email address.

FBI: Whose is it? You've never heard of it? Have you ever heard of it?

Ruben: I might have heard of it.

FBI: Yeah. Exactly, man, you've heard of it.

Then at the bottom we see an email from Euprocessing, signed "All my best, Ruben." And on the right you see Ruben [2484] telling Oliver Hargreaves: Please don't send to Gotthardus but to Euprocessing. As soon as we have them, referring to fraudulent application packs, we'll submit.

Ladies and gentlemen, maybe that wasn't – maybe Ruben did not own that EUprocessing address, but he clearly used it, he clearly controlled it, he clearly knew everything that was going there. He monitored it. He lied again to the FBI to cover himself up.

Now, you know what else, ladies and gentlemen, the people, the people that Ray and Ruben worked with to operate this scheme, people that you've heard from in this case, they all knew, all of them got up there and told you that what they were doing was wrong. They all got up there, each one of them, and told you that they were passing lies to Visa, Mastercard, the banks. All of them, all of them, told you that they were doing that to disguise the Eaze transactions so that the U.S. banks would approve them.

These witnesses, they played different roles in the conspiracy. Hargreaves, who pled guilty to bank fraud and money laundering for this case, was in Europe. Jim Patterson, who also pled guilty to conspiring to commit bank fraud in this case, was the former CEO of Eaze in the United States. Wang, John Wang, admitted that what he was doing was wrong. He was the tech guy. Darcy said she thought she was committing bank fraud. She was the vice president. And Tassone, too, knew [2485] that lies was being passed through the system. He was dealing with

communications from the marijuana dispensaries. They all knew. All these different people playing different roles in the operation, they all knew, they all knew what they were doing was wrong.

So let's take a look:

Mr. Hargreaves, do you understand that passing lies to banks is wrong, is that right?

Yes, I do.

And in this case, you pled guilty to bank fraud and money laundering in connection with the Eaze scheme, is that right?

Yes.

Hargreaves is based in Europe.

Next, Jim Patterson:

"Q. Why did you decide to start cooperating with the government at that time?

"A. Because I knew what we had done was wrong, and I didn't want to pretend otherwise."

On cross:

"You believed as of 2018 you were involved in bank fraud?

"A. Yes."

Wang, John Wang, the tech guy, he said, he testified:

I knew what we were doing was wrong on some way, misleading Visa and Mastercard.

* * *

[2488] others, to get money from a federally insured bank or credit union.

So one of those elements, the first element, is a scheme to use lies to obtain money from a federally insured bank or credit union. Now, we went through this. The evidence has shown that the defendants perpetrated a massive transaction laundering scheme, and that scheme, as we just went through, was designed to get U.S.-issuing banks to approve card transactions and release funds.

Now, just as to this element, there's one thing that I want to point out to you. As I will expect Judge Rakoff will tell you, the defendants' lies, they don't need to be made directly to the U.S. Bank or credit union. It's enough if the lies were initially made to someone else and those lies then served as the means to induce the U.S. bank or credit union to authorize the transactions and release the funds. And we went through that four-prong model, and that's exactly what happened: Ruben introduced those lies to the acquiring banks, they went to Mastercard, and then they went to the issuing banks.

And why did that happen? Why did those lies – merchant name, merchant category code, merchant location, descriptor, why is that important? Because that's what – in order to ensure that the U.S. banks would approve the Eaze transactions and release the money from which the defendants

* * *

[2491] Ladies and gentlemen, one of the great things that you bring to the table as a jury is your common sense, and this is exactly where your common sense comes in. Of course, the answer is yes. Of course the reasonable banker cares. Whether it's a big bank or a small credit union, just like everyone else, they're

entitled to know who they're doing business with. How is it possible to make an informed decision otherwise?

And, of course, you heard the bank and the credit card witnesses. They want to know the truth. They need to know the truth. It's important to them to know exactly what they're being asked to approve, especially when it's something that remains illegal at the federal level. Every bank witness who took the stand told you this, every single one. You can look at the transcripts if you want. These bank witnesses told you that their banks aren't willing to take on the risks associated with approving transactions from a U.S. marijuana merchant such as Eaze. Regardless of the state laws, it's still illegal on the federal level. That's the law, and it's not in dispute. So it matters to them to know. To take just one, Mike Steinbach from Citibank told you that Citi, they just didn't want to be lied to, period, full stop, regardless of what's being covered up. Obviously, this is reasonable.

And the bank witnesses, they gave you another reason that they need to know the truth about what they're being asked to authorize. They don't want to get kicked off the Visa and [2492] Mastercard networks. Visa and Mastercard have rules that prohibit their networks from being used for illicit purchases. Actors and Citi told you that it would literally be devastating to their businesses to get kicked off the networks. They don't want to risk it. So they decided that they are not going to knowingly approve these transactions. This is reasonable. And on the screen you have excerpts of their testimony.

How would it impact Citi business if it wasn't able to participate in Mastercard and Visa's payment system?

We would not be able to have a credit card business and make any money. It matters.

Actors, a small federal credit union in New York: Is it important for Actors to remain in compliance with Visa' rules?

Yes, it is.

Why?

Not remaining in compliance could result in sanctions, either from our federal regulators or from Visa themselves.

Question: And what impact would it have on Actors' business if it wasn't able to participate in the Visa network?

It could be a huge impact. We would likely no longer be in existence.

This is reasonable, ladies and gentlemen. It's obvious and it's common sense. But even beyond the common sense, beyond the witness testimony, there's even more. The [2493] testimony of these witnesses is corroborated in so many ways. You saw the Visa and the Mastercard rules that prohibit their networks from being used for illegal transactions. You also saw bank policies explicitly prohibiting the banks from engaging in activities involving the sale of marijuana products in the United States.

But, wait, there's even more than that. You may remember in the beginning of the case Mr. Burck told you, "Actions speak louder than words." Well, that's an oldie but goody expression for good reason, and on this front there's plenty of action, plenty of action proving that the banks care about knowing what they're being asked to authorize. Here we have Bank of America's – snippets of their marijuana transaction monitoring

policies. Exhibits show that they refer suspicious merchants to the Visa and Mastercard network. They follow up with that to see what happened to them if they're terminated. And the time that they spend in this, investing in this, they spend hours of time and money in transaction monitoring policies, network escalation policies, reporting policies. They have a whole group, the Network Compliance Team, that's dedicated to this. Why would they do this if they didn't care about identifying potentially prohibited marijuana transactions? Why would they refer suspicious merchants to Visa and Mastercard and routinely follow up if it didn't matter to them? It doesn't make sense. [2494] And Citibank, Citibank talked about the resources they invest in their fraud monitoring engine. $276 million a year and $18 million in technology investments. Why is the bank investing hundreds of millions of dollars to detect fraud if they just don't care about being lied to?

Wells Fargo, Wells Fargo shut down marijuana dispensary accounts and accounts that relate to Keith McCarty and Eaze. Here's an example, Green Coast Management. That was one of the marijuana dispensaries in this scheme. Wells Fargo shut them down because they discovered that it was in fact a marijuana company.

Here we have a slide from Steven Pearce, who was the owner of a marijuana dispensary involved in this case, and he writes to Michael Tassone: Any wires from or to Eaze raises a red flag because your name is synonymous with cannabis. This has resulted in two account closures for us. The last bank closure, the manager came right out and said: We cannot do any business with Eaze.

Ladies and gentlemen, it matters. These are actions. These are actions that the bank take. They care. And in addition, ladies and gentlemen, we also learned that Visa and Mastercard, they discovered the fake merchants. They discovered the fake merchants were actually selling marijuana products. So what did they do? They shut them down. Here are the fake merchants that Visa identified operating through the [2495] Eaze.com website. Visa discovered that, and they shut it down. Why would they shut it down if they didn't care? Why wouldn't they just let the transactions go through? No, they shut it down.

Same thing for Mastercard. Mastercard, from an internal tip, started investigating Eaze, and they found, if you look on the right, the shell companies that Eaze was using to funnel, secretly funnel, through their marijuana transactions. What did Mastercard do? Did it look the other way? Did it decide not to do anything because it just didn't care? No, they found out, and they shut it down.

And Mr. Burck was right on this point, actions do speak louder than words. That's just common sense. These lies matter to the bank. Like everyone else doing business, it matters to them to know who they're dealing with, especially if it involves illicit transactions. It's just common sense. Trust your instincts.

And you know who knew that? Do you know who knew that? The defendants. The defendants knew that as well.

Could we go to the next side.

Here's some examples.

Ray: The banks, Visa, and Mastercard do tests and mystery shopping, so we have to be careful.

Ray: These idiots don't know that they're creating chargebacks, but we do, Ruben.

[2496] And look at this one on the bottom. It's an email from Ray. He says: Let's say Wells Fargo customers complain about not liking the weed or the weed-issuing doctors. The higher the chance that Wells Fargo knows that weed is being sold and then reaches out to Visa and Mastercard saying this bank in the UK is doing processing for weed.

The defendants know. Of course, now the defense attorneys are trying to tell you that none of this mattered to the U.S. Banks. That the U.S. banks, they just don't care.

Now, before I go further, I want to repeat that the government always bears the burden of proof, as Judge Rakoff has told you. The defense never has to do anything in a criminal case. But here, the defense chose to make opening statements, they chose to cross-examine witnesses, and they chose to put on their own case. You are entitled to scrutinize all of that.

And just like the defendants tricked the banks, their attorneys are trying to pull one over you. Who are you going to believe, the words and actions of the defendants at the time or the arguments of their attorneys now? Back to common sense, ladies and gentlemen. Don't let them trick you. This case is about the defendants' conduct and the defendants' conspiracy, but the attorneys want to make it about somebody, anybody else.

You may remember that Mr. Burck promised to show you this supposed grand conspiracy of the global financial system.

APPENDIX G

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

M10-468

IN RE: CORONAVIRUS/COVID-19 PANDEMIC

THIS MATTER RELATES TO: Restrictions on Entry to the Courthouses

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Chief Judge
Colleen McMahon

AMENDED STANDING ORDER

In the interest of public health and safety, and after consideration of public health guidelines issued by the Centers for Disease Control and Prevention, New York State, New York City, Westchester County, and other public health authorities, the United States District Court for the Southern District of New York hereby orders that, effective immediately and until this order is rescinded,

IT IS HEREBY ORDERED that the following persons may not enter any courthouse in the Southern District of New York:

- Persons who have tested positive for COVID-19, or been told by a health-care provider to assume they have COVID-19 due to symptoms or other factors, in the past 14 days.

- Persons who have been tested for COVID-19, and are awaiting their test results.
- Persons who have experienced symptoms of COVID-19 within the past 14 days that are not explained by allergies or an underlying condition, including fever, cough, shortness of breath or difficulty breathing, extreme fatigue, nausea or vomiting, congestion or runny nose, muscle or body aches, headache, sore throat, new loss of taste or smell, and diarrhea.
- Persons who have had close contact within the past 14 days with anyone with COVID-19 during the time period starting 48 hours before the onset of the infected person's symptoms or positive COVID-19 test. (Note: "close contact" is defined as less than 6 feet apart for more than 15 cumulative minutes in a 24-hour period.)
- Persons who have had close contact within the past 14 days with anyone experiencing any of the symptoms of COVID-19 that are not explained by allergies or an underlying condition, including fever, cough, shortness of breath or difficulty breathing, extreme fatigue, nausea or vomiting, congestion or runny nose, muscle or body aches, headache, sore throat, new loss of taste or smell, and diarrhea. (Note: "close contact" is defined as less than 6 feet apart for more than 15 cumulative minutes in a 24-hour period.)
- Persons who live with someone who has been instructed to quarantine in the past 14 days due to close contact with an individual who tested positive for COVID19.

- Persons who have been on a cruise ship or river voyage in the past 14 days.
- Persons who have traveled in the past 14 days from: (1) a state that is noncontiguous to New York; (2) a US territory; or (3) a CDC Level 2 or higher country, unless proof of compliance with the Court's test-out protocol has been provided. The Court's test-out protocol can be accessed at https://www.nysd.uscourts.gov/sites/default/files/2020-11/Entry%20Protocol%20for%20Domestic%20Travelers%2011-20.pdf.
- Persons who have attended a large gathering (more than 50 people) where people within 6 feet were forcefully exhaling (e.g., singing, shouting, chanting) and either the person or those around them were not wearing masks.
- Persons who have attended an indoor or outdoor gathering of more than 10 people at a private residence in the past 14 days, including but not limited to parties, celebrations or other social events.
- Persons who have been released from a federal, state or local jail, prison or other correctional institution within the last 14 days, except those who are reporting to be fit with a location monitoring device.
- Persons who do not meet the criteria for entry as determined by the SDNY COVID-19 entry questionnaire, which can be accessed at https://www.nysd.uscourts.gov/covid-19-coronavirus.

Anyone attempting to enter in violation of these protocols will be denied entry by a Court Security Officer.

Anyone who has business in one of the courthouses of the Southern District of New York, but who cannot enter because of this order, should do the following:

- Persons who are represented by an attorney should contact their attorney;
- Attorneys or pro se litigants who are scheduled to appear in court before a judge should contact the judge's chambers directly (contact information may be found in the Judges' Individual Practices on the court's public web page);
- Persons who are scheduled to meet with a Pretrial Services Officer should contact the Office of Pretrial Services at (212) 805-4300;
- Persons who are scheduled to meet with a Probation Officer should contact the Probation Office at (212) 805-0040;
- Jurors should contact the Jury Department at (212) 805-0179;
- Employees reporting to work at the courthouse should contact their supervisor;
- Persons having any other business with the United States District Court for the Southern District of New York should contact the Clerk of Court at (212) 805-0140;
- Persons having business with the United States Court of Appeals for the Second Circuit should contact Catherine Wolfe, Clerk of Court, at (646) 584-2696;
- Persons having business with the United States Bankruptcy Court for the Southern District of New York should contact Bankruptcy Court Services at (212) 284-4040;

- For all other matters, please contact the District Executive's Office at (212) 805-0500.

IT IS FURTHER ORDERED that every visitor who comes to one of the courthouses of the Southern District of New York for any reason must pass through the following entry screening process:

- Have their temperature taken, using a contact-less thermometer. A person with a temperature of 100.4 degrees or higher will not be permitted to enter the courthouse.
- Answer screening questions about COVID-19 status and possible recent COVID-19 exposure. A person whose answers indicate that they are at increased risk of being contagious with COVID-19 will not be permitted to enter the courthouse.
- Wear either one N95 mask or double masks that cover the person's nose and mouth. Bandannas, gaiters and masks with valves are not permitted. If a person does not have approved masks, a screener will provide them.
- Apply hand sanitizer, which will be available at all courthouse entrances.
- Place items that need to be screened through an x-ray machine in a single-use plastic bag, which will be discarded after each use. Court staff will not handle personal belongings.
- Place any electronic device that must be checked in a single-use plastic bag that will be handed to a Court Security Officer.

IT IS FURTHER ORDERED that while in the courthouse, all persons must comply with the following rules:

- Face Coverings: You must wear either an N95 mask or two approved masks that cover your nose and mouth in all public areas of the courthouse (including hallways, public counters, elevators and courtrooms.) You must also wear either an N95 mask or double masks in all shared space/common areas where more than one person is assigned to work unless an SDNY staff member has granted you permission to remove your masks. You must also wear either an N95 mask or double masks any time you are interacting with any other person(s) regardless of social distancing.
- Social Distancing: You must adhere to safe social distancing rules, by standing or sitting at least six feet away from other individuals. You must abide by markings on floors and benches indicating where you may stand or sit. If you are standing in line, you must keep six feet away from the person in front of you and behind you, unless you are taking care of a small child or assisting someone with special needs. Elevator capacity will be limited as posted. All elevator occupants must wear either an N95 mask or double masks.
- Instructional Signage: You must abide by all health and hygiene signage throughout the courthouses, including signage regarding masks, social distancing, occupancy restrictions, and hand washing.

Anyone who fails or refuses to abide by these rules will be required to leave the courthouse immediately.

This order supersedes and replaces the Standing Order on Restrictions to Entry to Courthouses that

was entered on January 29, 2021, and will remain in place until further notice.

People who think they may have been exposed to COVID-19 should contact their healthcare provider immediately.

ENTERED this 8th day of February, 2021, at New York, New York

/s/ Colleen McMahon
COLLEEN McMAHON
Chief United States District Judge

APPENDIX H

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Filed: March 31, 2020]

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53 20 Cr. 188 ( )

UNITED STATES OF AMERICA

-v.-

HAMID AKHAVAN, a/k/a "Ray Akhavan," and
RUBEN WEIGAND,

Defendants.

SEALED INDICTMENT

COUNT ONE
(Conspiracy to Commit Bank Fraud)

The Grand Jury charges:

OVERVIEW OF THE SCHEME

1. From at least in or about 2016, up to and including in or about 2019, HAMID AKHAVAN, a/k/a "Ray Akhavan," and RUBEN WEIGAND, the defendants, principals at one of the leading on-demand marijuana delivery companies in the United States (the "Online Marijuana Marketplace Company"), and other co-conspirators, engaged in a scheme to deceive United States banks and other financial institutions into processing in excess of one hundred million dollars in credit and debit card payments for the purchase and delivery of marijuana products (the "Transaction Laundering Scheme"). Because many United States

banks are unwilling to process payments involving the purchase of marijuana, the Online Marijuana Marketplace Company used fraudulent methods to avoid these restrictions and to receive in excess of one hundred million dollars from customers located in California and Oregon who purchased marijuana through the Online Marijuana Marketplace Company.

2. To effectuate the Transaction Laundering Scheme, HAMID AKHAVAN, a/k/a "Ray Akhavan," and RUBEN WEIGAND, the defendants, and several of the principals of the Online Marijuana Marketplace Company, arranged for the money received from the Online Marijuana Marketplace Company's customers to be disguised as payments to over a dozen phony online merchants and other non-marijuana businesses (the "Phony Merchants"), including transactions that appeared to be for stenographic services, music stores/pianos, and cosmetic stores. To accomplish this deceit, the Online Marijuana Marketplace Company relied on third party payment processors (the "Payment Processors") who worked with AKHAVAN, WEIGAND, and other co-conspirators to create phony offshore corporations and websites (i.e., the Phony Merchants) and open offshore merchant bank accounts. AKHAVAN, WEIGAND, and other members of the conspiracy used the Phony Merchants' offshore bank accounts to disguise payments made to the Online Marijuana Marketplace Company for the purchase of marijuana products and to deceive United States banks about the true nature of the financial transactions they were processing. Working together, AKHAVAN, WEIGAND, other Payment Processors, and principals of the Online Marijuana Marketplace Company deceived United States banks and financial institutions—including federally insured institutions—into processing in excess of one hundred million dollars in marijuana

purchases made through the Online Marijuana Marketplace Company.

BACKGROUND ON THE ONLINE MARIJUANA MARKETPLACE COMPANY

3. At all times relevant to this Indictment, the Online Marijuana Marketplace Company was a California-based company that arranged for on-demand sale and delivery of marijuana products to customers located in California and Oregon. Through the Online Marijuana Marketplace Company's mobile application and website (collectively, the "Applications"), customers could order marijuana from different dispensaries listed on the Applications. Specifically, customers used the Applications to select the marijuana product(s) of their choice, and to receive delivery of their selection shortly thereafter. Although the Online Marijuana Marketplace Company operated the technology platform through which users purchase marijuana (i.e., the Applications), it was not the actual retailer of the marijuana. The actual retailers, referred to as "dispensaries," contracted with the Online Marijuana Marketplace Company to fulfill orders placed by customers through the Applications.

4. To request and receive a delivery of marijuana through the Applications, a user created an Online Marijuana Marketplace Company account through the company's website or mobile application. Once the customer selected his or her product(s) for purchase, the Application generated a check-out screen for the order where the customer could select a payment option. At various points from in or around 2016, through in or around 2019, one of the payment options offered by the Online Marijuana Marketplace Company for purchases of marijuana were credit cards and debit cards. For purchases with credit cards or debit cards,

the Applications allowed customers to enter their card information and then complete the payment using that information.

5. Once a customer placed an order, a delivery driver would deliver the order to the customer shortly thereafter. Once the delivery was complete, the Online Marijuana Marketplace Company generated and transmitted via email a receipt for the purchase. When customers made purchases by credit cards or debit cards, those purchases would appear on the customers' card statements as though they were from merchants other than the Online Marijuana Marketplace Company (e.g., a merchant from whom the customer had not in fact purchased the marijuana).

6. The Online Marijuana Marketplace Company stopped accepting credit card payments in or around mid-2019.

BACKGROUND ON CREDIT AND DEBIT CARD PROCESSING

7. Credit and debit card transactions are usually processed through payment networks (the "Payment Networks"), run by entities such as MasterCard or Visa (the "Credit Card Companies"), that provide authorization, clearing and settlement services for credit and debit card transactions. Financial institutions, as members of these payment networks, can offer payment processing services directly to merchants, but more commonly partner with non-bank third parties — including payment processors, Independents Sales Organizations ("ISOs"), and Merchant Service Providers ("MSPs," collectively with ISOs and payment processors, the "Processors") — for such third parties to process payments on behalf of the sponsoring

financial institutions. These processors are typically required to be registered with the Payment Networks.

8. Processors typically use Payment Networks set up by the Credit Card Companies. The Credit Card Companies have rules that prohibit their credit cards from being used for marijuana purchases. Violations of these rules can lead to penalties and ultimately to a merchant being terminated. Debit cards that are issued by banks often fall under the same rules because the Processors typically use the Credit Card Companies' Payment Networks.

9. When purchases are made with a credit or debit card, merchant category codes ("MCCs") are assigned to each transaction that are specific to the category of product or service being purchased. Because the Credit Card Companies do not support marijuana transactions, they do not have marijuana merchant codes. As a result, in order to process a marijuana transaction through a Credit Card Company, a false merchant code — i.e., a merchant code associated with a different product or product category — would have to be used. HAMID AKHAVAN, a/k/a "Ray Akhavan," and RUBEN WEIGAND, the defendants, and their co-conspirators, used merchant codes for other products — typically referred to as "miscoding" — in order to get around these rules.

10. Online credit card and debit card payment transactions typically consist of two steps: (1) an authorization; followed by (2) clearing and settlement. Card authorization for online purchases generally works as follows:

a. A cardholder (i.e., the individual making the purchase online) initiates a transaction by entering a credit or debit card number, card expiration date, and

other security features required by the merchant, such as the Card Verification Value ("CVV") number or the cardholder's zip code.

b. The merchant uses its payment software or gateway[1] to transmit the cardholder's information and the details of the transaction, including the name and location of the merchant, the MCC, a description of the goods and services purchased (sometimes referred to as the "descriptor"), the amount of the transaction, and the transaction date, to its partner Processor (or directly to the merchant's bank, which is often referred to as the "acquiring bank").

c. The Processor captures the transaction information and routes it through a Payment Network to the cardholder's "issuing bank," as defined below, to be approved or declined.

d. The bank issuing the credit or debit card to the customer ("issuing bank") receives the transaction information from the Processor and responds by approving or declining the transaction. Issuing banks in the United States generally will not extend credit (i.e., approve) transactions that involve unlawful activity under federal law, such as the sale of marijuana.[2]

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[1] A payment gateway is a technology used by merchants to accept debit or credit card purchases from customers. For online sales, this typically refers to the "checkout" portals used to enter credit card information or credentials.

[2] Although the personal use of marijuana has been legalized under state law in several states, including California and Oregon, marijuana is a Schedule I Controlled Substance under the Controlled Substances Act, and the possession, distribution, and use of marijuana is unlawful under federal statutes, including Title 21, United States Code Sections 841 and 844.

e. The issuing bank sends a response code back to the Processor, and that code reaches the merchant's payment gateway and is stored in a batch file pending settlement, which is described below.

f. If the merchant receives authorization, the issuing bank will place a hold for the amount of the purchase on the cardholder's account pending settlement.

g. Finally, the merchant typically provides the customer a receipt to complete the sale. This entire authorization process usually takes place within seconds.

h. In order to accept transactions on behalf of the Credit Card Companies, the acquiring bank must be a registered member of the Credit Card Companies.

11. Step two of the credit card and debit payment card process is clearing and settlement, which pertains to the recording of the movement of funds ("clearing"), and the actual flow of funds ("settlement"). Clearing and settlement generally works as follows:

a. During the clearing stage, the issuing bank posts to each cardholder's account the transaction information that it received from the merchant (or from the Processor after receiving it from the merchant), including the name of the merchant and the amount for each transaction. However, in the clearing stage, there is no exchange or transfer of funds.

b. The acquiring bank then credits the merchant's account and submits the transaction to the respective Credit Card Company's Payment Network for settlement.

c. In the settlement stage, the Credit Card Companies use their Payment Networks to forward each transaction to the appropriate issuing bank, which ordinarily will transfer funds for the approved transaction, less a fee.

d. The Credit Card Companies typically use their Payment Networks to pay the acquiring bank (and sometimes the Processor) its respective percentages from the remaining funds, after which the Processor pays the merchant an amount equal to the cardholder purchases, minus a fee charged to merchants for processing the debit and credit card transactions (i.e., the "merchant discount rate").

e. The final step is for the issuing bank to use the information it has received from each transaction to prepare monthly cardholder statements, which are distributed to cardholders. These statements typically identify each credit or debit card purchase made by the cardholder, the amount of the purchase, and the name associated with the merchant.

THE TRANSACTION LAUNDERING SCHEME

12. During the time period charged in this Indictment, because most banks in the United States were unwilling to process credit and debit card transactions involving marijuana, HAMID AKHAVAN, a/k/a "Ray Akhavan," and RUBEN WEIGAND, the defendants, and other members of the conspiracy, used several strategies to trick United States issuing banks into authorizing marijuana transactions for the Online Marijuana Marketplace Company. The primary method used by AKHAVAN, WEIGAND, and other co-conspirators, involved the creation and use of the Phony Merchants. These fraudulent companies were used to open offshore bank accounts with merchant

acquiring banks and to initiate credit card charges for marijuana purchases made through the Online Marijuana Marketplace Company. Because of the high risk associated with processing transactions that involved unlawful activity (i.e., the sale of marijuana), employees at some of the acquiring banks charged high fees for the acquiring banks to process these transactions.

13. HAMID AKHAVAN, a/k/a "Ray Akhavan," and RUBEN WEIGAND, the defendants, worked with other co-conspirators to create the Phony Merchants — including phony online merchants purportedly selling dog products, dive gear, carbonated drinks, green tea, and face creams — and establish Visa and MasterCard merchant processing accounts with one or more offshore acquiring banks. AKHAVAN, WEIGAND, and their co-conspirators arranged for more than a dozen Phony Merchants to be used by the Online Marijuana Marketplace Company. For example, some of the website names for the Phony Merchants included: absolutsoda.com; diverkingdom.com; fly2sky shop.com; goodegreenbazaar.com; greenteacha.com; happypuppybox.com; outdoormaxx.com; and soniclogi stix.com. The Phony Merchants also typically had web pages suggesting that they were involved in selling legitimate goods, such as carbonated drinks, face cream, dog products, and diving gear. Yet, as noted above, these companies were actually being used to facilitate the approval and processing of marijuana transactions. Furthermore, the Phony Merchants were not based in the United States, and many of them had the same address listed as their company address. In addition, while these entities claimed to be based outside the United States, their customer service telephone numbers were American phone numbers.

14. Between at least in or about 2017 and at least in or about July 2019, more than approximately $100 million in credit and debit card transactions were processed for several of the Phony Merchants that were being used by HAMID AKHAVAN, a/k/a "Ray Akhavan," and RUBEN WEIGAND, the defendants, and other co-conspirators, to process marijuana purchases involving the Online Marijuana Marketplace Company. Some of the merchant websites listed for those transactions include: greenteacha.com, medicalstf.com, organikals.store, and soniclogistix.com. AKHAVAN, and others, also worked with and directed others to apply incorrect MCCs to the Online Marijuana Marketplace Company marijuana transactions in order to disguise the nature of those transactions and create the false appearance that the transactions were completely unrelated to marijuana. Some of the MCCs/categories listed for the transactions listed above included stenographic services, music stores/ pianos, and cosmetic stores. None of the merchant website names listed for those transactions referred to the Online Marijuana Marketplace Company or to marijuana.

STATUTORY ALLEGATIONS

15. From at least in or about 2016, up to and including in or about 2019, in the Southern District of New York and elsewhere, HAMID AKHAVAN, a/k/a "Ray Akhavan," and RUBEN WEIGAND, the defendants, and others known and unknown, willfully and knowingly combined, conspired, confederated, and agreed together and with each other to commit bank fraud, in violation of Title 18, United States Code, Section 1344.

16. It was a part and object of the conspiracy that HAMID AKHAVAN, a/k/a "Ray Akhavan," and

RUBEN WEIGAND, the defendants, and others known and unknown, willfully and knowingly, would and did execute, and attempt to execute, a scheme and artifice to defraud a financial institution, the deposits of which were then federally insured, and to obtain moneys, funds, credits, assets, securities, and other property owned by, and under the custody and control of, such financial institution, by means of false and fraudulent pretenses, representations, and promises, in violation of Title 18, United States Code, Section 1344, to wit, AKHAVAN and WEIGAND participated in a scheme to deceive financial institutions and other financial intermediaries—including federally insured banks—into processing and authorizing payments to and from marijuana sale and delivery businesses and their customers in the United States by disguising the transactions to create the false appearance that they were unrelated to the purchase of marijuana, and thereby obtain money of, or under the custody and control, of those financial institutions and intermediaries.

(Title 18, United States Code, Section 1349.)

FORFEITURE ALLEGATION

17. As a result of committing the offense alleged in Count One of this Indictment, HAMID AKHAVAN, a/k/a "Ray Akhavan," and RUBEN WEIGAND, the defendants, shall forfeit to the United States, pursuant to Title 18, United States Code, Section 982(a)(2)(A), any and all property constituting, or derived from, proceeds obtained directly or indirectly, as a result of the commission of said offense, including but not limited to a sum of money in United States currency representing the amount of proceeds traceable to the commission of said offense.

Substitute Assets Provision

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

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

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

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

d. has been substantially diminished in value; or

e. has been commingled with other property which cannot be subdivided without difficulty; it is the intent of the United States, pursuant to Title 21, United States Code, Section 853(p) and Title 28, United States Code, Section 2461(c), to seek forfeiture of any other property of the defendants up to the value of the above forfeitable property.

(Title 18, United States Code, Section 981;
Title 21, United States Code, Section 853; and
Title 28, United States Code, Section 2461.)

[Illegible]

Foreperson

/s/ Geoffrey S. Berman
GEOFFREY S. BERMAN
United States Attorney

Southern District of New York

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

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

v.

HAMID AKHAVAN, a/k/a "Ray Akhavan," and
RUBEN WEIGAND,

Defendants.

SEALED INDICTMENT

S3 20 Cr. 188

(18 U.S.C. § 1349.)

GEOFFREY S. BERMAN
United States Attorney.

A TRUE BILL

[Illegible] 3/9/20
Foreperson.

APPENDIX I

21-1678(L)
21-1708(CON), 21-2214(CON) 21-2466(XAP)

To Be Argued By:
EMILY DEININGER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Nos. 21-1678(L), 21-1678(CON),
21-2214(CON), 21-2466(XAP)

UNITED STATES OF AMERICA,

Appellee-Cross-Appellant,

-v.-

RUBEN WEIGAND, also known as Sealed Defendant 1,

Defendant-Appellant,

HAMID AKHAVAN,

Defendant-Appellant-Cross-Appellee,

JAMES PATTERSON,

Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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NICHOLAS FOLLY,
TARA M. LA MORTE,
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* * *

other financial institutions into processing over one hundred and fifty million dollars in credit and debit card payments for the purchase and delivery of marijuana products (the "Scheme"). (A. 1729-1730).[2] Because many United States banks, as well as Visa and MasterCard, are unwilling to process payments involving marijuana products, Akhavan, Weigand, and their co-conspirators utilized the Scheme to avoid these restrictions and facilitate Eaze's credit and debit card processing. (A. 1729). The defendants' Scheme involved the unlawful processing of roughly $156 million in debit and credit card transactions.

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[2] "[Defendant] Br." refers to the named defendant's brief on appeal; "A." refers to the appendix jointly filed by the defendants with their briefs; "[Defendant] SPA" refers to the named defendant's special appendix; "GX" refers to a Government exhibit admitted at trial (which can be found in the supplemental appendix filed with the Government's brief); and "Dkt." refers to an entry on the District Court's docket for this case. Unless otherwise noted, case text quotations omit internal quotation marks, citations, alterations, and footnotes.

To prove its case, the Government called fourteen witnesses, including the former CEO of Eaze, James Patterson; one of Akhavan's and Weigand's key co-conspirators, Oliver Hargreaves; several additional co-conspirator who worked for Eaze, Darcy Cozzetto, John Wang, and Michael Tassone; representatives of issuing banks and credit unions in the United States, who were victims of the defendants' Scheme;

* * *

during the period of the Scheme. The jury received a legal instruction on this issue early in the trial. (See A. 824).

- *Second*, representatives of three Issuing Banks testified, in substance and in relevant part, that those banks would not have knowingly processed credit and debit card transactions that involved the purchase of marijuana. (A. 1429, 2068, 2382).
- *Third*, testimony and bank records from the same three Issuing Banks showed that the rules governing those banks prohibited the processing of illegal transactions. (A. 1500, 2067, 2389).
- *Fourth*, testimony and policy documents from Visa and MasterCard established that both companies prohibited marijuana transactions on their card networks and that issuing banks could be kicked off of the card networks for violating those rules. (GX 2217, GX 2312; A. 745-746, 2179).
- *Fifth*, testimony and documentary evidence showed that when Visa and MasterCard had uncovered the Scheme (i.e., that Eaze

> transactions were being processed on their networks through Phony Merchants), both companies took steps to terminate those merchants; the evidence also showed that those merchants were
>
> * * *

the defendant acted "with the intent to obtain funds under th[e] [financial] institutions' custody and control," rejecting the defendant's argument that "the government failed to prove he committed bank fraud because he did not intend to defraud either the bank of the customers." *Lebedev*, 932 F.3d at 49.[7] Here, too, there was sufficient evidence that the defendants intended to obtain bank property.

The defendants also contend that the evidence was insufficient to show that their misrepresentations affected an "essential element" of the U.S. banks' bargain. (Akhavan Br. 33-36). Once again, this argument relies on inapposite case law concerning a fraudulent intent element that does not apply to Section 1344(2). But even if such proof were required (and it was not), the defendants' claim would fail. As Judge Rakoff found, the testimony at trial "demonstrated that Visa and Mastercard were completely unwilling to process payments for illegal goods and services." (A. 3157; see also A. 739-40, 742, 746, 2158, 2180, 2182, 2188-89). Moreover, as discussed above, Visa, Mastercard, and the U.S. banks took extensive steps to ensure that merchants' illegal goods and

---

[7] Thus, the Supreme Court and this Court have rejected the argument that the bank fraud "statute always requires an intent to harm '*someone*.'" (Akhavan Br. 31 (quoting *United States v. Nkansah*, 699 F.3d 743, 757 (2d Cir. 2012) (Lynch, J., concurring))).

services, including marijuana, were identified and removed from their networks. (A. 752-54, 2184-89). Misrepresentations concealing the illegal nature of the transactions therefore certainly implicated an "essential element" of the bargain between the U.S. banks and those credit card networks. *See United States v. Schwartz*, 924 F.2d 410, 420-21 (2d Cir. 1991) (defendant's false promises to counterparty that it would not distribute product to restricted nations, which would violate export laws, were "misrepresentations that went to an essential element of the bargain").

For his part, Weigand argues that he did not have the intent to obtain funds from U.S. banks, as opposed to foreign banks. (Weigand Br. 12-18). This argument is meritless. The misrepresentations were not initially directed to U.S. issuing banks, but they were conveyed by the foreign merchant banks through the card payment networks to those U.S. issuing banks. (A. 731-35, 2151-53). Not only did the false information "naturally reach the [U.S.] bank," Loughrin, 573 U.S. at 365 n.8, but it was necessary for the transaction information to reach the U.S. banks for the transactions to be authorized and for money to flow from those banks back to the defendants and Eaze.

The evidence overwhelmingly established that both defendants knew that they were processing credit card transactions for Eaze, which they were well aware was based in California, as were Eaze's customers and dispensary partners. (See generally GX 4004 (discussing processing of Eaze transactions)). Weigand, for example, flew in late 2017 to California to meet with Akhavan and Hargreaves, where they discussed the scheme to process Eaze transactions in depth. (A. 1009 (overall purpose of meeting in Calabasas was "[t]o plan and discuss and plan the transaction-laundering scheme

its discretion. Even if the District Court erred, however, any such error certainly would not have had a "substantial and injurious effect" on the jury's verdict given the overwhelming evidence of intent and materiality introduced at trial and the highly speculative link between the opinions Weigand sought to offer and the conclusions he wanted the jury to draw.

The Government subpoenaed Martin Elliott, the Head of Visa's Franchise Risk Management Group, to testify at trial. (A. 125, 139). In addition, Akhavan subpoenaed Visa (A. 126-38), which intended to offer Elliott as a witness in satisfaction of that subpoena. (A. 120, 139, 246).

On February 17, 2021, Elliott and Visa filed a motion requesting that Elliott be permitted to testify at trial by two-way video conference. (A. 120-24). At the time of the trial, Elliott resided in California, was 57 years old, and suffered from hypertension and atrial fibrillation, a heart condition. (A. 120, 139-40, 246). Elliott lived with his wife, who was 55 years old and suffered from hypertension. (A. 120, 139-40, 246). In addition, Elliott and his wife were primary caregivers for his mother-in-law, who lived alone nearby and was 83 years old. (A. 120, 139-40, 246-47). Elliott, his wife, and his mother-in-law had not previously contracted COVID-19; and while his mother-in-law had received one dose of a COVID-19 vaccine, neither Elliott nor his wife had yet been vaccinated. (A. 120, 140, 246-47). Elliott stated that given their ages and medical histories, Elliott, his wife, and his mother-in-law had "diligently heeded the CDC's public health guidance to minimize [the] risk of contracting COVID-19." (A. 140). For example, they had not traveled outside California since the onset of the

pandemic in early 2020, and Elliott had not traveled by airplane since flying to see his daughter (elsewhere in California) in the summer of 2020. (A. 140). Elliott and Visa argued that permitting Elliott to testify by two-way video was warranted in light of the pandemic and his personal circumstances, including the fact that his age and medical conditions made him "significantly more vulnerable to COVID-19." (A. 123). The Government took no position on the motion. (A. 246). The defendants opposed the motion, arguing that Elliott was required to testify in person under the Confrontation Clause. (Dkt. 175).

The District Court granted the motion, ruling that Elliott would be permitted to testify remotely under this Court's governing Confrontation Clause precedent for testimony by two-way video. *See United States v. Gigante*, 166 F.3d 75 (2d Cir. 1999). Observing that "Elliott's age and preexisting conditions place him at increased risk of serious illness or death if he were to contract COVID-19" and that the CDC had recommended that people not travel in light of the pandemic (A. 247-48), the District Court concluded that Elliott was unavailable and there were "exceptional circumstances" warranting the use of two-way video testimony:

* * *

APPENDIX J

21-1678-cr(L),
21-1708-cr(CON), 21-2214-cr(CON), 21-2466-cr(XAP)

———

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

———

UNITED STATES OF AMERICA,

Appellee,

– v. –

JAMES PATTERSON,

Defendant,

RUBEN WEIGAND, AKA Sealed Defendant 1,
HAMID AKHAVAN,

Defendants-Appellants.

———

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF NEW YORK

———

JOINT APPENDIX FOR DEFENDANTS-
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Volume 1 of 12 (Pages DJA1 to DJA196)

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* * *

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February 17, 2021

VIA ECF

The Honorable Jed S. Rakoff
United States District Judge
Southern District of New York
500 Pearl Street, Room 1340
New York, New York 10007

Re: *United States v. Akhavan et uno*, 20-cr-0188 (JSR)

Dear Judge Rakoff:

We write respectfully on behalf of third parties Visa Inc. ("Visa") and Martin Elliott, pursuant to Rule 2 of Your Honor's Individual Rules of Practice, to request that Mr. Elliott be allowed to testify at trial via live two-way video from a federal courthouse in the

Northern District of California. The parties have discussed this request with chambers. Defendants Akhavan and Weigand object to the request, while the Government takes no position. Set forth below are Mr. Elliott's personal circumstances, the risks posed by the ongoing COVID-19 pandemic, and the relevant law that we believe together demonstrate that Mr. Elliott should be allowed to testify via live two-way video.

Mr. Elliott's Relationship to the Case and Personal Circumstances

Visa and Mr. Elliott have been served with two subpoenas pertinent to this motion—one by the Government and one by Defendant Akhavan—which together require Mr. Elliott and Visa to testify at trial. *See attached* Gov't Subpoena to Martin Elliott (Feb. 17, 2021); Akhavan Subpoena to Visa (Feb. 11, 2021). Mr. Elliott was Visa's Global Head of Franchise Risk Management during the time period relevant to the indictment. As such, he is the individual at Visa who has the necessary experience to testify about the full range of required topics outlined. Mr. Elliott has no firsthand knowledge of the specific transactions at issue in this case. Rather, he is expected to provide process-type testimony about the workings of the Visa payment network.

Mr. Elliott resides in the San Francisco Bay area. *See* Elliott Decl. ¶ 2. He is 57 years-old and has a number of [redacted]. *See id.* at ¶ 3. Mr. Elliott and his wife are the primary caretakers of his 83-year-old mother-in-law. *See* Elliott Decl. ¶ 2. His wife is 55 years-old and [redacted]. *See id.* at ¶ 4. No one in his household has contracted COVID-19, nor been vaccinated for it. *See id.* at ¶ 5.

* * *

[DJA139] UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Case No. 20 Crim. 0188 (JSR)

UNITED STATES,

Plaintiff,

v.

HAMID AKHAVAN, *et uno*,

Defendants.

DECLARATION OF MARTIN ELLIOTT

Martin Elliott hereby declares as follows:

1. During the time period 2016 19, I served as the Global Head of Franchise Risk Management at Visa Inc. The Government has served a trial subpoena for me to testify in the upcoming trial in the above-captioned case. I understand that Defendant Hamid Akhavan also has served a trial subpoena for a witness to appear on behalf of Visa, and that I am to be that witness. I make this declaration to place certain information before the Court related to my medical history and living circumstances.

2. I currently reside in Redwood City, California, and am 57 years-old. I live with my wife, who is 55 years-old. My wife and I are the primary caregivers for my mother-in-law, who is 83 years-old and lives alone in nearby Belmont, California.

3. I have been diagnosed with a number of medical conditions. These [redacted].

[DJA140] 4. My wife also has been [redacted] In 2020, my mother-in-law [redacted]

5. Neither I, my wife, nor my mother-in-law have previously contracted COVID-19. My wife and I have not been vaccinated against COVID-19 and—[redacted].

6. Given my health and age, as well as the health and age of my wife and mother-in-law, we have diligently heeded the CDC's public health guidance to minimize our risk of contracting COVID-19. To this end, neither I, my wife, nor my mother-in-law have traveled outside of California since COVID-19 started to take off in early 2020. Furthermore, though I did travel by airplane for a short visit to my daughter in Orange County, California, in the early summer, when the rates of new COVID-19 infections were relatively low, I have not traveled by airplane since then and certainly have no plans to travel by airplane since the significant uptick in COVID-19 cases started in the fall of 2020.

7. I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 17, 2021.

/s/ Martin Elliott
Martin Elliott

* * *

[DJA246] testimony would violate their rights under the Confrontation Clause of the Sixth Amendment. The Government takes no position. Following expedited briefing and oral argument, the Court granted the motion on February 19, 2021. This Opinion explains the basis for that ruling.

A. Background

The Government has subpoenaed Elliott, commanding that he testify at this trial. Akhavan has also subpoenaed Visa for trial testimony, and Visa intends to offer Elliott as its witness to discharge that obligation. Elliott was Visa's Global Head of Franchise Risk Management during the relevant period. Although he represents that he "has no firsthand knowledge of the specific transactions at issue in this case," he is expected to provide, in his counsel's words, "process-type testimony about the workings of the Visa payment network." Elliott Ltr. Motion, ECF No. 174, at 1. The defendants do not contest this description, although they maintain that "questions about what Visa's policies did (or did not) require and how Visa did (or did not) enforce those policies are among the most critical questions in this case." Ltr. Opp., ECF No. 175, at 5.

Elliott is 57 years old and has been diagnosed with hypertension and atrial fibrillation (a heart condition). His wife is 55 and has been diagnosed with hypertension. To his knowledge, no one in his household has contracted COVID-19, and no [DJA247] one has received the coronavirus vaccine. He and his wife are also the primary caretakers of his 83-year-old mother-in-law, who has received the first dose of the COVID-19 vaccine. Elliott lives in the San Francisco Bay area

and would need to travel by commercial flight to testify in this trial. He avers that he and his wife have diligently complied with Centers for Disease Control and Prevention ("CDC") guidance during the pandemic. They have not left California since early 2020 and have not flown on an airplane since the early summer.

Elliott's age and preexisting conditions place him at increased risk of serious illness or death if he were to contract COVID-19. The CDC has found that people aged 50-64 are 400 times more likely to die and 25 times more likely to be hospitalized from COVID-19 than children aged 5-17 years, and are more than 25 times more likely to die and 3 times more likely to be hospitalized than young adults aged 18-29.[7] On top of that, "adults of any age" with "heart conditions, such as heart failure, coronary artery disease, or cardiomyopathies" "are at increased risk of severe illness" from COVID-19, and "adults of any age" with hypertension "might be at an increased risk for severe illness."[8]

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[7] CDC, Older Adults and COVID-19, https://www.cdc.gov/coronavirus/2019-ncov/need-extraprecautions/older-adults.html (last accessed Feb. 28, 2021).

[8] CDC, Certain Medical Conditions and Risk for Severe COVID-19 Illness, https://www.cdc.gov/coronavirus/2019-ncov/need-extra-

* * *

[DJA2141] MS. LA MORTE: I would say probably through the morning and then we would probably free up after lunch.

THE COURT: So defense counsel should be ready with their first witness for later on Thursday.

MR. BURCK: Yes, your Honor.

MS. LA MORTE: Has your Honor decided when it wants to hold a charging conference?

THE COURT: I think probably Friday evening.

MS. LA MORTE: OK.

(Jury present)

THE COURT: Ladies and gentlemen, can everyone see the witness?

Mr. Elliott, just raise your hand again to make sure everyone can see him.

Very good. Please raise your hand once more.

MARTIN ELLIOTT,

called as a witness by the government, having been duly sworn, testified as follows:

THE COURT: OK. Counsel.

DIRECT EXAMINATION

BY MS. DEININGER:

Q. Good afternoon, Mr. Elliott.

A. Good morning.

Q. You're right. You're in California. It's morning. Right? Good morning.

* * *

[DJA2151] help support the merchant in their activities to accept Visa transactions.

Q. Have you ever heard of offshoring?

A. I have, yes.

Q. What is offshoring?

A. "Offshoring" is a term often used that refers to situations where merchants that are going to be problematic or may not be welcome in their home markets, where they try to move their businesses offshore, they work with agents offshore to find acquirers that may be willing to take their activity.

Q. And what might a merchant to do to get an offshore account if they haven't been able to get one in their home market?

A. Well, in my experience, offshoring is often with merchants that know they can't get an account in a marketplace where they should reside and work with agents or ISOs, and they'll put up multiple accounts offshore, and they'll often set them up using different names and perhaps different principals, but they simply keep their accounts operating and going.

Q. So switching to a different topic for a minute, Mr. Elliott, when a cardholder makes a purchase using their credit or debit card, what information about the transaction is transmitted to Visa?

A So there is a merchant descriptor that includes a number of transaction fields, and predominantly what they include is the acquiring BIN – that's the bank identification number – that [DJA2152] identifies the acquirer that processed the transaction. There's also the merchant's name field, and this is the name that appears on the cardholder's statement when they see their bill at the end of the month.

There's also a city field that identifies the city, the state, the merchant category code, obviously the date, the transaction amount. And there's typically a country code as well, which country it's in. But when these transactions are transmitted to Visa, we in turn shift them to the issuing bank.

Q. Is there any additional information included for card-not-present transactions?

A. We do have point-of-sale condition codes, which are values that identify whether it's a card-present transaction or a card-not-present transaction, which could be internet or mail/phone order.

Q. OK. I think you – I was just going to ask, what is a card-not-present transaction? What does that mean?

A. "Card not present" means the card – the cardholder was not physically present when the transaction was consummated. And so typically today that means an internet transaction or a mail-order transaction.

Q. And so what happens after Visa receives information about an individual transaction?

A. So what I may have said earlier on is, you can think of Visa like a big electronic switch. And so when an – when a [DJA2153] transaction comes in from a merchant to an acquirer, the acquirer routes it to Visa. And then we immediately route that transaction to the cardholder's card issuing bank so that they can decide whether or not they want to approve it or decline it.

And then once that card issuing bank either approves it or declines it, we route that response back to the issuer, to the acquirer, and the acquirer in turn to the merchant. Q. And how long does that process

generally take, from when a Visa cardholder uses his or her card to when the transaction is approved or declined?

A. It's typically nanoseconds.

Q. How many transactions are processed through the Visa network in any given period of time?

A. It's about 500, 500 to 600 million a day.

Q. The information that the issuing bank receives about the transaction, is that generally the same as the information that Visa receives?

A. It is, yes, because it went from the acquiring bank to Visa and Visa routes it to the issuing bank. So it's the same.

Q. So I want to focus on some of the information you mentioned that Visa receives that relates specifically to the merchant. And by that I mean the merchant name, the location, and the MCC code. That's all part of the transaction information that Visa receives, right?

* * *

[DJA2158] familiar with how they operate, and I've implemented them.

Q. So does Visa have rules regarding illegal transactions?

A. We do, yes.

Q. And can you tell me at a high level what is Visa's rule regarding illegal transactions?

A. The fundamental rule states something like, transactions must be legal in both the buyer and the seller's jurisdiction. So, for example, if a cardholder in Germany is buying something from a merchant in

New York, whatever that product or service is, it needs to be legal in Germany and in New York, not just one side.

Q. And why does Visa have this fundamental rule?

A. Well, we operate a global payment system in almost 200 countries around the world, and so we have an obligation to make sure that we're compliant with the rules in all those countries. And so the best way to do that is to make sure the transactions are legal in both the buyer's and seller's jurisdiction.

Q. And what's the purpose of the rule?

A. The purpose of the rule is to make sure that Visa complies with applicable laws, whether they be in U.S., Canada, or Europe, or anywhere, really, and to meet our own regulatory obligation.

Q. Now, you mentioned, I think you mentioned "regulatory obligation." Generally what are you referring to there?

* * *

[DJA2179] also typically check the –

Q. Sorry. One second, Mr. Elliott. Mr. Elliott, can you repeat what kind of file is it that they would usually check?

A. The file that they would typically check, we refer to it in the industry as MATCH, and MasterCard hosts what we call the MATCH file, also known as a terminated merchant file. And it's a file of merchants that are terminated for cause by other acquiring banks they had problems with.

And so, for example, if a merchant was terminated for fraud, lying on their application, chargebacks or doing something illegal, the acquirer would terminate

them, and then the rules obligate that they be placed on this MATCH list or terminated merchant file. By checking any new applicants against this list, they could find out if other banks have had problems with them before they try them.

Q. Okay. You were actually quite a bit louder when you leaned forward. So if you don't mind, if you could stay close to the mic, that might be helpful.

Who maintains the terminated merchant file that you were just discussing?

A. MasterCard.

Q. And who has access to it?

A. All of the acquiring banks that participate in the Visa and MasterCard program.

Q. For this rule that we were looking at, that should still be [DJA2180] in front of you, about the merchant qualification standards, was the version of that rule in place for the entirety of the period between 2016 through 2019?

A. Yes.

Q. And to your knowledge, were there any material changes made to this rule in that period?

A. The only update was the one in October of 2016, where there was an add about not misrepresenting the merchant outlet location.

Q. Okay. Looking just a little bit lower down on this same page, do you see a section titled 1.5.1.4, Submission of illegal transactions?

A. Yes.

Q. Can you read what it says below that for me?

A. An acquirer must not knowingly accept from a merchant for submission into the Visa payment system any transaction that is illegal or that the acquirer or merchant should have known was illegal.

Q. And for purposes of this rule, would illegal transactions include marijuana transactions?

A. It would.

Q. Was a version of this rule in place for the entirety of the period between 2016 and 2019?

A. It was.

Q. And are you aware of any material changes being made to

* * *

[DJA2182] section one that says About This Guide. Let me know when you're there.

A. I'm there.

Q. Okay. Can you just read that first paragraph for me?

A. The Visa Global Brand Protection Program requires Visa acquirers to implement adequate controls to ensure their merchants do not process transactions that are illegal and/or may adversely affect the reputation of Visa or its affiliates. The Visa Global Brand Protection Program guide for acquirers provides that an overview of the GBPP and describes what acquirers must do to effectively control the regulatory, financial, reputation, brand and litigation exposures associated with card-not-present merchants.

Q. Okay. So looking at the last line, it says "describes what acquires must do to effectively control the regulatory, financial, reputation, brand, and

litigation exposures associated with card-not-present merchants."

So again, would card-not-present merchants include online merchants?

A. They would, yes.

Q. So let's go to page 7 of this same document, and it should say section 2 at the top, Visa Global Brand Protection Program?

A. Yes, I'm there.

Q. Okay. Can you just again read this first paragraph for me?

A. With the continued growth of card-not-present transactions

* * *

[DJA2184] services. In the United States, would that include the sale of marijuana?

A. It does, yes.

Q. So I just want to look a little bit further down on that same page. Section 2.1, Program purpose and components. And you see where it says: The program's primary goal is to protect acquirers and the integrity of the Visa payment system by preventing merchants from, and then there's three bullets? Can you just read those three bullets for me?

A. Yes. Bullet one: Conducting illegal transactions; bullet two: Facilitating transactions that endanger public health and safety; bullet three: Processing transactions that may adversely affect the good will of the Visa payment system.

Q. Okay. I think we can turn away from the document for a minute. And can you just generally –

from your experience, can you tell me what the different components are of the Global Brand Protection Program?

A. Sure. So the first – and I'm going to cover the components of the program that we enforce against clients without (indiscernible). The first phase of it is going to include the identification of a problematic merchant, and so that's the point in time where we identify an online merchant. And typically we focused in on online merchants when we identified them selling some illegal product as part of their store.

[DJA2185] The second thing is once we identify the merchant, we have to identify where they're located in the system. So once we identify who they're acquiring bank is, we notify the acquiring bank that it's violated the Global Brand Protection Program. And then, in turn, we ask how are they going to remediate it. So we send them a letter telling them that they violated it. Then we ask them to explain how they're going to fix the problem and remediate it, and then we decide, based on the feedback from the acquirer and the history in the program, whether or not we assign risk – pardon me, whether we assign non-compliance assessments or fines.

Q. So the first phase that you mentioned was identification, right?

A. Yes.

Q. And that involved, among other things, trying to identify illegal transactions in the Visa system, right?

A. That's correct.

Q. So what are the different things that Visa does to identify violations of the Global Brand Protection Program?

A. So we have a two-part approach. We have a proactive approach, where we use a third-party entity to scan certain websites for illegal activity, and they attempt to make test buys at these merchants. We do that because we don't necessarily know by looking at websites what the merchant's name actually is and the payment system.

[DJA2186] So by conducting a test transaction, we can identify if they accept Visa, what bank they're processing with and what the name of that merchant actually is.

And once we've been able to identify them, we then look to move to the notification.

Q. But going back to – for us to focus on the identification phase, other than test transactions, are there other ways that violations are identified?

A. There are. And the second reactive approach is we work off of tips and feedback we get from our client banks, issuers who often provide us with complaints about problematic merchants that they have identified. We also get tips from law enforcement or other entities, perhaps in the media about an entity selling something that's prohibited, and then we investigate that and run it through the identification process.

Q. So the first thing you mentioned was test transactions, right? How frequently does Visa conduct test transactions?

A. We do them weekly.

Q. And does Visa currently routinely conduct test transactions for suspected marijuana merchants?

A. Can you repeat that?

Q. Does Visa – right now, does Visa do routine test transactions for suspected marijuana merchants?

A. We are not proactively testing marijuana merchant websites. We've taken a risk-based approach, and we're very heavily [DJA2187] focused on illegal gambling and illegal pharmacies. We come across marijuana applications when they are reported to us by our client bank, or if we see them in one of our other compliance posts.

Q. So if I understand you correctly, is it fair to say that your priorities in this area have been set based on your risk-based approach; is that right?

A. That is correct.

Q. What do you mean by risk-based approach? What are the factors that Visa is considering?

A. We look at entities that are presenting the most significant threat to the payment system, and also, we look at that from the area of legality and laws that may apply to us. And then also, based on the volume of – from these various industries that try to sneak into the payment system.

Q. You said that marijuana merchants do come to Visa's attention through tips; is that right?

A. That's correct.

Q. So does Visa conduct a test transaction when it receives a tip regarding a potential illegal transaction?

A. We do. If it's possible to do so, we do.

Q. And remind me again, what are some of the ways that Visa can receive tips about violations of its Global Brand Protection Program?

A. Some of the direct ways are card issuing banks that have [DJA2188] had a negative experience. They contact us and complain about a certain merchant. We also may get something from law enforcement, or we may get something that we notice in the media.

The other thing that happens is we do run chargeback and fraud programs that identify merchants that have excessive volume of chargeback disputes, and if a merchant fits with the compliance programs, oftentimes the investigation may identify other problematic activity. But we have top marijuana merchants in the chargeback program, as well.

Q. So what does Visa do if it identifies illegal transactions being conducted by a merchant?

A. So what do we do? Well, one, if we identify the merchant, we then notify the acquiring bank that they have a problem, that they're in violation of the Global Brand Protection Program, and that they need to investigate it and get back to us with how they're going to fix it.

Q. And what can be the result of that investigation or notification?

A. Well, the investigation results coming back to us from the acquirer typically is we terminate the merchant, or if there's a question about it, they may want to talk with us and have a discussion, or if it's just a single product, for example, maybe the merchant is selling a counterfeit T-shirt, they may remove that good from the site and come back and say everything [DJA2189] else is legal; we've removed the one problem product, and that's where we go.

Q. Can there also be assessments or fines that are imposed?

A. There can. The Global Brand Protection Program does include non-compliance assessments that can be assessed to the acquiring bank.

Q. What, if anything, does Visa do if it notices that an acquiring bank has repeated brand protection program violations for merchants it's sponsoring?

A. Well, if we get an acquiring bank that has multiple identifications or a history of violations, we can impose risk-reduction measures on them, which means we can limit them from being able to sign up any new card authorized merchants or agent or payment facilitators. We may also require them to undergo an operational audit to make sure they're compliant with our rules and have good risk controls in place.

Q. If there were sufficient issues, could you terminate an acquirer from the payment system?

A. We could, yes.

Q. And if a merchant is identified as selling an illegal product, can you require an acquirer to terminate the merchant?

A. We can, yes.

Q. So I think you mentioned Visa also has dispute and fraud monitoring programs?

A. I did.

APPENDIX K

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

———

Docket Nos. 21-1678(L), 21-2214(CON)

———

UNITED STATES OF AMERICA,

Appellee,

v.

HAMID AKHAVAN,

Defendant-Appellant.

———

STATE OF NEW YORK
COUNTY OF NEW YORK
SOUTHERN DISTRICT OF NEW YORK

ss.:

———

AFFIRMATION IN OPPOSITION TO THE DEFENDANT'S MOTION TO RECALL THE MANDATE

EMILY DEININGER, pursuant to 28 U.S.C. § 1746, hereby affirms under penalty of perjury:

1. I am an Assistant United States Attorney in the Office of Damian Williams, United States Attorney for the Southern District of New York. I represented the Government both in the District Court and on appeal. I submit this affirmation in opposition to the motion of defendant-appellant Hamid Akhavan to recall the mandate and then stay the mandate pending a

petition for a writ of certiorari. Because the motion identifies neither a "substantial question" likely to result in Supreme Court review (let alone reversal) nor "good cause" for a stay of the mandate, Fed. R. App. P. 41(d)(1), the motion should be denied.

* * *

1307 (1989) (O'Connor, J., in chambers); *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers). Courts may also consider the public interest. *E.g., Conkright v. Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers).

12. The movant bears the burden of making the required showing; even if a movant meets that burden, a decision to grant or deny a motion for a stay of the mandate "is a matter of discretion." Khulumani v. Barclay Nat'l Bank Ltd., 509 F.3d 148, 152 (2d Cir. 2007).

13. "A petition for a writ of certiorari will be granted only for compelling reasons." U.S. Sup. Ct. R. 10. The Supreme Court considers, among other factors, whether the court below "has entered a decision in conflict with the decision of another United States court of appeals on the same important matter" or "has decided an important federal question in a way that conflicts with relevant decisions of [the Supreme] Court." U.S. Sup. Ct. R. 10(a), (c).

Video Testimony

14. The Confrontation Clause of the Sixth Amendment provides that "[i]n with the witnesses against him." U.S. Const. amend VI. There are several "elements of confrontation—physical presence, oath, cross-examination, and observation of demeanor by

the trier of fact." *Maryland v. Craig*, 497 U.S. 836, 846 (1990).

15. In *Maryland v. Craig*, 497 U.S. 836 (1990), the Supreme Court approved the use of one-way video testimony for a child witness because "denial of [face-to-face] confrontation is necessary to further an important interest and . . . the reliability of the testimony is otherwise assured." Id. at 850. In doing so, the Supreme Court recognized that "face-to-face confrontation is not an absolute constitutional requirement"; rather, "the Confrontation Clause reflects a preference for face-to-face confrontation at trial, a preference that must occasionally give way to considerations of public policy and the necessities of the case." Id. at 849, 857.

16. In *United Sates v. Gigante*, 166 F.3d 75 (2d Cir. 1999), this Court subsequently addressed a confrontation challenge to the use of two-way video testimony by a witness whose "illness and concomitant infirmity" made it "medically unsafe" to travel to testify in person. *Id*. at 79. In contrast to the one-way video testimony approved in *Craig*, the witness during two-way video testimony both sees and is seen by the trial participants, including the defendant. *Id.* at 80. The Court concluded that two-way video testimony was permissible where it would "further the interests of justice" and upon a finding of witness unavailability and "exceptional circumstances," drawing from the standard applicable to depositions under Federal Rule of Criminal Procedure 15. *Id.* at 81. The Court reasoned that a stricter standard need not be applied to two-way video testimony because it "preserve[s]" "[t]he salutary effects of face-to-face" confrontation, including "1) the giving of testimony under oath; 2) the opportunity for cross-examination; 3) the ability of the

fact-finder to observe demeanor evidence; and 4) the reduced risk that a witness will wrongfully implicate an innocent defendant when testifying in his presence," and thus "afford[s] greater protection of [the defendant's] confrontation rights" than simply admitting the transcript of a Rule 15 deposition. *Id.* at 80-81.

B. Discussion

17. Akhavan falls far short of making the showing necessary for the exceptional relief that he seeks. The claim that he says he intends to raise in an anticipated petition for certiorari—that testimony from a Government witness via two-way video conference violated his Confrontation Clause rights—does not meet the criteria for a grant of certiorari. Nor does Akhavan demonstrate a reasonable possibility of reversal of this Court. Moreover, Akhavan fails to establish good cause for a stay. His motion should be denied.

1. Akhavan Has Not Presented a Substantial Question

18. Akhavan first contends that the mandate should be stayed so that the Supreme Court may consider the standard for Confrontation Clause challenges to testimony by two-way video. (Mot. 5-7). As noted above, this Court has approved the use of two-way video where allowing such testimony will "further the interests of justice" and upon a finding of "exceptional circumstances." *Gigante*, 166 F.3d at 81; *see also United States v. Benson*, 79 F. App'x 813 (6th Cir. 2003) (citing Gigante approvingly and affirming use of two-way video). Other courts, however, have utilized the test adopted by the Supreme Court in *Craig*, requiring a finding that testimony by two-way video is "necessary to further an important public policy" and that "the reliability of the testimony is otherwise

assured." (See Mot. 6 (citing, *inter alia*, *United States v. Carter*, 907 F.3d 1199, 1208 (9th Cir. 2018); *United States v. Abu Ali*, 528 F.3d 210, 240-41 (4th Cir. 2008); *United States v. Yates*, 438 F.3d 1307, 1314-18 (11th Cir. 2006) (en banc); *United States v. Bordeaux*, 400 F.3d 548, 554-55 (8th Cir. 2005)).

19. But the Supreme Court has previously rejected petitions for certiorari challenging the *Gigante* standard—both in *Gigante* itself, *Gigante v. United States*, 528 U.S. 1114 (2000) (No. 98-1983), and in a recent case where the petitioner cited the same conflict that Akhavan cites here, *New Mexico v. Schwartz*, 574 U.S. 1185 (2015) (No. 14-317). Akhavan has not demonstrated any reasonable probability that the Supreme Court will take this issue up now.

20. Indeed, the *Gigante* and *Craig* standards do not, in reality, present the "pronounced split" that Akhavan contends. (Mot. 7). To the contrary, in most cases where a witness is "unavailable" and "extraordinary circumstances" arise such that two-way video testimony "furthers the interest of justice," such testimony will also be "necessary to further an important public policy." *See United States v. Cole*, 2022 WL 278960, at *4 (N.D. Ohio, Jan. 31, 2022) (concluding both *Gigante* and *Craig* standards met for witness who was beyond the court's subpoena power); *United States v. Akhavan*, 523 F. Supp.3d 443, 455 & n.12 (S.D.N.Y. 2021) (concluding standards articulated in both *Gigante* and *Craig* were met and that "*Gigante* is consistent with *Craig*"); *United States v. Donziger*, 19 Cr. 561 (LAP), 2020 WL 5152162, at *2-3 (S.D.N.Y. Aug. 31, 2020) (finding remote two-way video testimony comported with *Gigante* and *Craig*); *United States v. Harris*, 17 Cr. 00001 (HG), 2018 WL 1990519, at *2-4 (D. Haw. Apr. 26, 2018) (similar). And, as this

Court has explained, two-way video testimony meets *Craig*'s requirement that the reliability of the testimony otherwise be assured by preserving essentially all of "[t]he salutary effects of face-to-face" confrontation. Gigante, 166 F.3d at 81. In other words, the difference between the standards being applied by this Court and other appellate courts is not so significant to present a substantial question on which the Supreme Court is likely to grant certiorari.

21. Akhavan next argues that a substantial question exists as to whether *Craig* remains good law following *Crawford v. Washington*, 541 U.S. 36 (2004). (Mot. 7-9). This Court, however, considered that argument and rejected it for good reason. As the panel explained, "Crawford does not stand in tension with [*Craig*] or *Gigante*" because "Crawford concerns an entirely different question than *Gigante* and *Craig*." *Akhavan*, 2022 WL 17852627, at *4. *Craig* and *Gigante* "concerned whether video testimony may vindicate Confrontation Clause rights that undeniably exist," while "*Crawford*, on the other hand, answered whether the Confrontation Clause is implicated in the first instance by testimonial, out-of-court statements notwithstanding other indicia of reliability." *Id.*

22. Other circuit courts have repeatedly reached the same conclusion, finding that *Crawford* did not overrule *Craig* and that "*Crawford* does not answer th[e] question" whether "the confrontation that occurred [via two-way video testimony] is constitutional." *Yates*, 438 F.3d at 1314 n.4; *see also United States v. Protho*, 41 F.4th 812, 823 (7th Cir. 2022) ("*Crawford* is inapt, and Craig governs here."); *United States v. Wandahsega*, 924 F.3d 868, 879 (6th Cir. 2019) ("*Crawford* did not overturn *Craig*."); *Carter*, 907 F.3d at 1206 n.3 ("*Crawford* did not overturn *Craig*. We

thus remain bound by *Craig* until the Supreme Court sees fit to reconsider it, regardless of whether subsequent cases have raised doubts about its continuing vitality."); *Horn v. Quarterman*, 508 F.3d 306, 319 (5th Cir. 2007) ("[W]e are not at liberty to presume that *Craig* has been overruled *sub silentio*.").

23. *Crawford* was decided almost two decades ago, and the Supreme Court has repeatedly rejected petitions for certiorari raising the issue of whether *Craig* survives *Crawford*. *Castillo v. Virginia*, 141 S. Ct. 1390 (2021) (No. 20-921); *Junkin v. Florida*, 568 U.S. 1029 (2012) (No. 12-475); *Stock v. Montana*, 565 U.S. 1093 (2011) (No. 11-464); *Pack v. United States*, 552 U.S. 1313 (2008) (No. 07-1176). There is no reasonable probability that the Supreme Court will take up Akhavan's petition when it has rejected these others.

24. Finally, Akhavan claims, in sum, that the District Court erroneously found that there were exceptional circumstances warranting two-way video testimony in light of the protocols in place at the courthouse at that time to prevent the spread of COVID-19 and because Elliott could have been replaced as a witness by a different corporate representative. (Mot. 10-11). This Court, however, already rejected that argument, concluding that there was no clear error in finding that Elliott was unavailable and that exceptional circumstances existed based on the "need to prevent serious illness and death and to protect [Elliott's] family," given Elliott's age and comorbidities, his need to travel cross-country to testify in person, and the scheduling of the trial at a time when vaccines were not yet easily available. *United States v. Akhavan*, 2022 WL 17825627, at *5. These case-specific and factual claims, moreover, do

not come close to meriting Supreme Court review. See U.S. Sup. Ct. R. 10 ("A petition for certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."). The fact-specific nature of Akhavan's objections further demonstrates that this does not merit Supreme Court review.

25. A stay is further unwarranted because this case presents a particularly poor vehicle for the Supreme Court to resolve the issues Akhavan has raised. Even if the Supreme Court were to conclude that *Craig*, rather than *Gigante*, should govern, the District Court properly concluded that Elliott's remote testimony was permissible under *Craig* as well as *Gigante*. The District Court found that "[p]reventing the serious illness or death of a third-party witness whose testimony is compelled by subpoena is an important public policy," and that the reliability of Elliott's testimony was assured through the two-way video conference process, which permitted testimony under oath, with cross-examination, jury observation of the witness's demeanor, and face-to-face visibility of the witnesses and the defendants. *Akhavan*, 523 F. Supp.3d at 456 n. 12. And this Court's application of the *Gigante* standard demonstrates that this case also satisfies *Craig*. First, this Court's conclusion that the two-way video testimony "amidst an unprecedented global pandemic, where the witness was unvaccinated and risked substantial illness or death from COVID-19, furthered the interest of justice," *Akhavan*, 2022 WL 17852627, at *5, establishes that the testimony was "necessary to further an important public policy" under *Craig*. Second, this Court expressly determined that "[b]y permitting Defendants, defense counsel, the questioner, the judge, and the jurors all to see and be seen by the witness, two-way video safeguarded 'the

reliability of the evidence by subjecting it to rigorous adversarial testing.'" *Id.* (quoting *Craig*, 497 U.S. at 857).

26. And even assuming there was any error, under *Craig*, *Crawford*, or *Gigante*, in permitting Elliot to testify via video-conference—and there was not— any such error was harmless. Elliott's testimony was largely cumulative of and consistent with that of John Verdeschi, a similarly situated witness from Mastercard. Much like Elliott, Verdeschi testified as to the roles of different players in the card payment processing network; the information provided to the credit card companies and U.S. issuing banks when processing card transactions; Mastercard's policies prohibiting illegal transactions, including marijuana transactions; processes for enforcing those policies; and the termination of certain marijuana merchants, including several fake merchants used by the defendants in the Scheme. (A. 724-911).

27. Moreover, the critical point that Visa's policies prohibited the processing of illegal transactions, including marijuana transactions, was also attested to by representatives from Bank of America, Citigroup, and Actors Federal Credit Union. Those Visa policies, moreover, would almost certainly have been admissible as business records, authenticated via a record custodian's certification, even absent Elliott's testimony. Elliott's testimony was therefore not only cumulative of Verdeschi's, but was corroborated on the material points by other, additional witnesses and independently admissible evidence. The Government's evidence on this point was overwhelming. In sum, there is thus no good reason to believe that five Justices of the Supreme Court would vote to reverse the judgment. *See Nara*, 494 F.3d at 1133.

28. Akhavan's arguments disputing harmlessness are unavailing. In claiming that the Government cited Visa 42 times in its closing (Mot. 9), Akhavan ignores that only two of those references pertained to Elliott's testimony specifically, as opposed to more general information about Visa's policies that was also attested to by other witnesses. (See A. 2768, 2793-94).[2] In other words, while Visa's general prohibition against illegal transactions was central to the Government's case, Elliott's testimony was not. And Elliott's testimony regarding *Visa's* policies and procedures had little bearing on the defendant's theory as to materiality—which was that *banks* did not consider the types of evidence misrepresented by Defendants, *see Akhavan*, 2022 WL 17825627, at *2—or Akhavan's subjective intent. (See Mot. 9).

[2] On both occasions, the Government referenced Elliott's testimony that Visa had, on prior occasions, identified and taken steps to shut down illegal marijuana transactions. That information was cumulative of testimony provided by Verdeschi, who similarly testified that Mastercard had previously identified and taken steps to shut down illegal marijuana transactions in its network. (A. 764-73).