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Hessler - cross

**A**

1 Q. Mr. Hessler, does the document reference the fact that the  
2 settlement discussions are ongoing?

3 THE COURT: The document speaks for itself. Next  
4 question.

5 I'm sure the members of the jury are fully capable of  
6 reading it.

7 Q. All right. During that time period, September of 2016, did  
8 the settlement discussions continue between you and Blacksands?

9 MR. LANDSMAN-ROOS: Objection.

10 THE COURT: Sustained.

11 Q. During the period September 27th through and continuing on  
12 from there, did the settlement -- did the discussions continue  
13 between you and Blacksands regarding payment of the judgment?

14 MR. LANDSMAN-ROOS: Objection.

15 THE COURT: Sustained.

16 MS. FRITZ: If we could pull up Exhibit Y.

17 Q. As of on or about Monday, September 26th, did you  
18 communicate over to Chris Harris certain terms pursuant to  
19 which ICBC would accept -- would agree to a settlement of the  
20 matter?

21 A. Bear with me.

22 (Pause)

23 Yes.

24 Q. And did you communicate that by email over to Mr. Harris?

25 A. Yes.

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1 Q. OK. And is that the email that you are looking at there,  
2 Exhibit Y?

3 A. Yes.

4 Q. OK.

5 MS. FRITZ: I offer into evidence Exhibit Y.

6 MR. LANDSMAN-ROOS: Objection.

7 THE COURT: Ground?

8 MR. LANDSMAN-ROOS: It is the 403 connection issue  
9 that we have discussed.

10 THE COURT: Sustained.

11 BY MS. FRITZ:

12 Q. Did you communicate to Mr. Harris in that same email that  
13 ICBC has agreed --

14 MR. LANDSMAN-ROOS: Objection.

15 THE COURT: Ms. Fritz, I just sustained the objection  
16 to the document.

17 MS. FRITZ: Yes.

18 THE COURT: And you know that it is inappropriate to  
19 refer in a question to the contents of a document that is not  
20 in evidence, and your question is embarking on embodying the  
21 content of the document I just excluded and thereby bringing it  
22 to the attention of the jury, in violation of my ruling. The  
23 objection is sustained. It's not to happen again.

24 BY MS. FRITZ:

25 Q. On or about September 26th, did you also confirm to Chris

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1 Harris that ICBC was forbearing its further --

2 MR. LANDSMAN-ROOS: Objection.

3 Q. -- discovery -- demand for the discovery at that point?

4 THE COURT: Answer that yes or no.

5 A. I don't recall.

6 Q. I understand. If you could take a look at the document and  
7 see if that refreshes your recollection, particularly paragraph  
8 2.

9 (Pause)

10 A. So, I'm sorry, can I have your question again?

11 Q. Did you communicate to Mr. Harris, on or about  
12 September 26th, that ICBC was forbearing pressing its discovery  
13 demands at that point?

14 A. No.

15 Q. Did you state to Mr. Harris that ICBC will not seek further  
16 relief --

17 MR. LANDSMAN-ROOS: Objection.

18 THE COURT: Are we talking about a telephone  
19 conversation, a meeting, or the document I've excluded?

20 MS. FRITZ: We're talking about the communication that  
21 did occur in writing in the document.

22 THE COURT: Sustained.

23 Q. At the time September 26th, were you continuing to pursue  
24 the discovery demands relating to the Court's order dated  
25 August 22nd?

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1 A. My client and I had no need to pursue discovery if we were  
2 going to receive payment of the judgment. The entire point of  
3 discovery was to enable us to enforce the judgment. On  
4 September 6th, when Mr. Harris represented to the Court that  
5 Blacksands agreed to pay the judgment, we put some faith in  
6 that because of the standing in which we held Latham & Watkins  
7 and Mr. Harris. And in reliance on his representation to the  
8 Court that Blacksands had agreed to pay the judgment, we  
9 unilaterally took the position that we would not continue to  
10 litigate to obtain the responses that we were entitled to on  
11 September 6th because we didn't want to waste the money doing  
12 that because we had been led to believe, by Mr. Harris, that we  
13 would imminently receive payment.

14 Q. With respect to the settlement discussions, or discussions  
15 regarding payment of the judgment, I believe you stated during  
16 your direct examination that Blacksands had not provided  
17 specific information about its proposal for payment of those --  
18 of the judgment?

19 MR. LANDSMAN-ROOS: Objection.

20 THE COURT: Sustained.

21 Q. Did Blacksands during this period of time provide specific  
22 proposals -- specific information regarding how it could pay  
23 the judgment?

24 MR. LANDSMAN-ROOS: Objection.

25 THE COURT: Sustained.

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Hessler - cross

1 Q. Did Blacksands --

2 THE COURT: It is not an accurate summary. Let's just  
3 go on.

4 Q. Did Blacksands, during this period of time, provide  
5 information regarding how it intended to pay the judgment?

6 A. In vague terms we received sort of very, you know, sort of  
7 10,000-foot level explanations of where the money would come  
8 from. For example, I don't recall if it was this proposal, but  
9 there was one proposal that some unrelated party had proposed  
10 to put up a residential apartment in Manhattan as security  
11 pending payment of the judgment, for example. We had a lot of  
12 communications from Blacksands about potential financings from  
13 which we would be paid. None of them had come to fruition. We  
14 were now three years into this litigation, and we were not  
15 going to put our faith in those further vague statements.

16 So, we asked for specific information, for example,  
17 who owned the property, were there any security, were there any  
18 liens on the property, was there a mortgage on it, how was the  
19 financing proposed to work, how was the grant of security  
20 proposed to work. And other than the initial high-level  
21 description of what was planned or proposed, we never received  
22 the concrete details that we had asked for that would have  
23 given us the assurances we would have needed to forbear from  
24 enforcement.

25 Q. You mentioned this issue of security. Was that an issue

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1 that ICBC had raised, that it wanted security if the proposal  
2 was that its judgment would be paid sometime in the future?

3 MR. LANDSMAN-ROOS: Objection.

4 THE COURT: Ground?

5 MR. LANDSMAN-ROOS: The same objection, 403.

6 THE COURT: Anything else?

7 MR. LANDSMAN-ROOS: I think there is also perhaps a  
8 form objection there.

9 THE COURT: Sustained at least as to form.

10 BY MS. FRITZ:

11 Q. Let's just take a step back.

12 The proposal that Blacksands made with respect to  
13 paying the judgment, did that involve a project that Blacksands  
14 was currently involved in?

15 MR. LANDSMAN-ROOS: Objection.

16 THE COURT: Sustained.

17 Q. Was the discussion that was going on relating to providing  
18 information about a project from which Blacksands intended to  
19 pay the judgment?

20 MR. LANDSMAN-ROOS: Objection.

21 THE COURT: Sustained.

22 Q. Based on the conversations that occurred, was there  
23 discussion, now moving into the November timeframe, regarding a  
24 meeting, Blacksands and ICB attending a meeting to further  
25 discuss the proposal that Blacksands was making?

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1 MR. LANDSMAN-ROOS: Objection.

2 THE COURT: Sustained.

3 Q. Did a meeting then occur in London?

4 MR. LANDSMAN-ROOS: Objection.

5 THE COURT: Sustained.

6 Q. In connection with the document production that was  
7 provided by Mr. Brennerman, the one that you looked at earlier,  
8 you had indicated that it included documents regarding some  
9 contracts, things like that. Do you recall that?

10 MR. LANDSMAN-ROOS: Objection.

11 THE COURT: Sustained. It is not an accurate summary  
12 of what he said. He said, as I remember, notably, though there  
13 may have been other things, two unsigned leases for office  
14 space, or something like that.

15 MS. FRITZ: OK.

16 Q. Do you have a recollection of whether that discovery that  
17 was provided also included documentation relating to the  
18 project that Blacksands was involved in at that point?

19 MR. LANDSMAN-ROOS: Objection.

20 THE COURT: Sustained. That assumes that there was in  
21 fact a project that Blacksands was involved in.

22 MS. FRITZ: Not assuming that, again --

23 THE COURT: Of course it does. The question says, "Do  
24 you have a recollection of whether that discovery that was  
25 provided also included documentation to the project that

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1     Blacksands was involved in at that point?"   That was your  
2     question.

3     BY MS. FRITZ:

4     Q.   At the meeting in London, was there an extensive  
5     presentation done for ICBC regarding Blacksands' project?

6             MR. LANDSMAN-ROOS:  Objection.

7             THE COURT:  Sustained.  There was no evidence of any  
8     meeting in London, there are simply questions, to which  
9     objections have been sustained.

10            The jury is reminded that the questions are not  
11     evidence.

12            MS. FRITZ:  If we could pull up Defendant AI.

13     Q.   OK.  So let me just ask you, Mr. Harris, was there a  
14     meeting in London at the offices of Exotic --

15            MR. LANDSMAN-ROOS:  Objection.

16            THE COURT:  I believe you already asked if there was a  
17     meeting in London.  I sustained that objection.  Am I mistaken,  
18     Ms. Fritz?

19            MS. FRITZ:  Your Honor just indicated that I needed to  
20     prove that there was a meeting.

21            THE COURT:  I didn't say that at all.  I said your  
22     question assumed that there was one.  I didn't say you had to  
23     prove it.  I sustained the objection to your attempt to do so,  
24     if indeed there ever was a meeting.

25            Now, let's get on with it.



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1 Q. Mr. Hessler, if you could take a look at Exhibit AI. Is  
2 that a communication that you had with Chris Harris during the  
3 period November 2016?

4 A. Yes, it is.

5 Q. OK. And does this relate to the discussions that were  
6 occurring between --

7 MR. LANDSMAN-ROOS: Objection.

8 THE COURT: Sustained.

9 Now, I don't want to do this, but if you can't ask  
10 proper questions from this point onward, I'm going to have to  
11 consider terminating your examination.

12 I have made the ruling. This material is not  
13 relevant. You are going to go on to a different subject, or  
14 you are going to sit down.

15 MS. FRITZ: If we could pull up Government Exhibit  
16 309.

17 Q. Did there come a time on or about October 14th when ICBC  
18 filed an order to show cause for an adjudication of contempt  
19 against Blacksands?

20 A. Yes.

21 Q. And is Exhibit 309 a copy of the document filed by  
22 Blacksands but also with entries by the Court?

23 A. Yes. This is a copy of the order to show cause that  
24 commenced that motion, yes.

25 Q. All right. And can you briefly explain what is meant by

B

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1 First, the orders are short, clear, specific. They  
2 are easy to understand. We have been through them a number of  
3 times with the witnesses. The second element, Christopher  
4 Harris testified that, among other things, the particular  
5 orders in question were communicated to the defendant. Third,  
6 they were clearly disobeyed. By September 6th, there was no  
7 compliance with the Court's order. By October 4th, there was  
8 no compliance with the Court's order. The jury heard evidence  
9 that the ultimate production was insufficient. And there is  
10 ample evidence that it was willful and knowing and that  
11 includes, among other things, the time period that went by, the  
12 fact that the defendant had all these documents in his  
13 possession and we went through that at length, and his  
14 production indicates that -- and his responses to discovery  
15 indicate that he understood an obligation and just chose to do  
16 something differently.

17 THE COURT: OK. The motion is denied.

18 OK. Now, I have a draft charge which my law clerk  
19 will distribute to you and it is short, and we'll start the  
20 charge conference at 5 o'clock so that we are in a position to  
21 sum up tomorrow morning and get the case fully to the jury.

22 Now, I'm in the process of preparing what will be an  
23 addition -- you can distribute them -- an addition to the  
24 charge that isn't in there already. And in the most general  
25 terms, and subject to it being reduced to writing in a form

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1     satisfactory to me, it will go something like this -- in  
2     substance like this. It will address the evidence with respect  
3     to settlement discussions and it will address the evidence with  
4     respect to the purported responses in November -- purported  
5     responses.

6             The substance of what I'll say about the settlement  
7     discussion argument will be that they've heard evidence about  
8     what one side characterizes as settlement discussions and the  
9     other -- at least one witness on the other side has something  
10    somewhat different. But in any case, the existence of  
11    settlement discussions, even if there were any, do not suspend  
12    or abrogate an individual's obligation to comply promptly with  
13    court orders unless the Court suspends or alters the order.

14            You have heard evidence, I will say to them, about  
15    these purported responses, dated November 4th and whatever the  
16    other November date is. I propose to instruct them that the  
17    crime of contempt is complete as of the first day on which a  
18    defendant was obliged to comply with a court order that  
19    otherwise meets the requirements for criminal contempt; in  
20    other words, all of the elements are satisfied. Evidence of a  
21    subsequent compliance or attempted compliance can be relevant  
22    to the question of whether the failure to comply earlier was  
23    willful.

24            In considering whether the purported responses -- in  
25    considering what significance to give the purported responses

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1 I hear nothing.

2 I am going to ask my law clerk to distribute a very  
3 brief proposed addition, which we'll mark as Court Exhibit B,  
4 which is what I discussed earlier.

5 MS. FRITZ: Thank you.

6 May I, your Honor?

7 THE COURT: You want to begin?

8 MS. FRITZ: Unless the government --

9 THE COURT: Has the government had enough time?

10 MR. LANDSMAN-ROOS: Yes.. Thank you.

11 THE COURT: Go ahead, Ms. Fritz.

12 MS. FRITZ: It is the first one regarding settlement  
13 discussions that concerns me and it concerns me for following  
14 reason, but I don't have the law here to cite for your Honor.  
15 It concerns me based on the following hypothetical: If the  
16 parties in this case agreed on August 22nd that the plaintiff  
17 was not further seeking the discovery while settlement  
18 discussions were going on and if that continued --

19 THE COURT: I missed the date. August 22nd?

20 MS. FRITZ: The Court order's compliance on the 22nd  
21 and actually gives him two weeks.

22 THE COURT: Right.

23 MS. FRITZ: So if as of the date that compliance would  
24 have been required, the parties have agreed that ICBC is not  
25 pursuing its discovery demands at that point and is instead is

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1 very desirous of and wishes to engage in discussions regarding  
2 payment of the judgment and if that circumstance continues for  
3 a period of time, I totally understand your Honor saying that  
4 as a technical matter that doesn't in any way eliminate the  
5 existence the Court orders, but I do believe the law says that  
6 the parties are allowed to agree between themselves that  
7 discovery demands are not being pursued. If that is what is  
8 going on and that is being communicated, I have told your Honor  
9 before I don't think it is fair to say that someone is in  
10 contempt if the adversary has stood down at that point.

11 Now, I am happy to go get the law to say that parties  
12 are able to agree on things that may be inconsistent with a  
13 pending court order without coming back and getting that order  
14 revised. For example, we had all kinds of monetary cases with  
15 the government where there is limits on what could be paid. We  
16 go to the government and we say, Look, is it okay if we pay the  
17 kid's tuition. There is a court order that may restrain  
18 payment; but if the parties agree, then that may not be a  
19 wilful violation of a court order.

20 That may have been a lousy example.

21 THE COURT: Look, you know, I will give you a counter  
22 example. If a court after having innumerable times extended  
23 the discovery period in a civil case and finally after two  
24 years of delays says July 1st, and I mean it, and the parties  
25 on June 30th start talking and they are very desirous of

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1 settling and they blow right through it, seems to me the judge  
2 is entirely within his rights to say, okay, you are going to  
3 trial. I don't care what you agreed between yourselves. It  
4 was my order. You didn't do it at your own risk.

5 MS. FRITZ: Is that a willful violation of the Court's  
6 order? In other words, I think we're dealing with a very  
7 consensual problem here, which is can parties basically agree  
8 to things -- I said it a moment -- that is inconsistent with  
9 the order. I believe that they can and I believe that is  
10 exactly what happened here.

11 THE COURT: Obviously they do. Sometimes it can be a  
12 crime. That's the problem. If there were an agreement between  
13 two parties where there was a court order to produce the  
14 discovery by September 4th that they are not going to insist on  
15 it while they are seeking discovery and there is a pending  
16 contempt application and then the talks break down and the  
17 beneficiary of the court order then presses the contempt  
18 application, first thing that could happen is going forward  
19 they could get a coercive order forcing compliance.

20 MS. FRITZ: Absolutely.

21 THE COURT: The place where the agreement pinches them  
22 is that the extent civil contempt is a compensatory remedy as  
23 well as coercive seems to me they would be blocked from getting  
24 damages caused by the delay in compliance during the period in  
25 which there would be a delay in compliance. It seems to me

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1 also that that example doesn't answer your point.

2 MS. FRITZ: I think there is a couple of issues.

3 Honestly, if on a particular day there is an agreement that  
4 discovery is not being demanded and if on that day -- you can  
5 argue the next day he violated the order but at that point is  
6 there a willful violation of a court order, I do not believe  
7 so. Not only here did the parties deal with precisely that  
8 issue, but the parties then went onto exchange settlement  
9 agreements that also would have addressed settlement of any  
10 contempt sanctions.

11 THE COURT: Civil.

12 MS. FRITZ: Yes. So the parties were in this case  
13 treating the Court's orders as if they were susceptible of  
14 alteration by the parties in terms of amount, in terms of  
15 whether the order to -- the demand for production applies today  
16 or tomorrow or the next day. They were treating it as if they  
17 had the ability to impact the Court order. Whether they were  
18 correct or incorrect, I don't know. This instruction to me  
19 goes a step too far to basically say I would argue it suggests  
20 that the parties cannot do that and as a matter of law I don't  
21 think that is correct nor do I think it is appropriate where  
22 the pivotal issue is willfulness and whether an individual in  
23 Mr. Brennerman's position would have understood that if Hessler  
24 says okay now we're going to settle, let's go meet in London,  
25 let's go do all these things to try to resolve this because

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1 honestly ICBC just wanted its money, if all that is going on,  
2 would he know that no matter with a Paul Hessler says, he is  
3 engaging in a violation of the Court's order?

4 THE COURT: I will hear from the government.

5 MR. LANDSMAN-ROOS: Well, your Honor, first of all,  
6 the vast majority of this is not even in evidence. So we're  
7 arguing from a hypothetical. Our view is that the instruction  
8 is appropriate for at least two reasons. First, is that  
9 largely, and this was argued by my colleague this morning and  
10 it is in our letter briefing, in many ways this argument  
11 amounts to a collateral attack on the underlying order. Even  
12 if you credit defense counsel's argument that this somehow goes  
13 to willfulness, the law is pretty clear that willfulness or  
14 good-faith defense is limited to the circumstances where an  
15 individual tries to comply but fails.

16 So the example here would be had Mr. Brennerman  
17 gathered up a lot of the bank records in his apartment and a  
18 lot of things on his computer and missed some and that was held  
19 to have violated the Court order, that would be a plausible  
20 good-faith defense. This I didn't understand the law or I was  
21 given the wrong view of the law is not a valid good-faith  
22 defense. So the Court's instruction is totally appropriate.  
23 It is not a defense to willfulness if he thought in the civil  
24 context -- even if this is true and there is evidence that he  
25 thought in the civil context their settlement discussions could



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1 put things on hold.

2 THE COURT: One more minute, Ms. Fritz.

3 MS. FRITZ: Now I am going to the clearest example I  
4 can think of which is Mr. Hessler indicated that forbearance  
5 concept in the documents that are in evidence. He sat on the  
6 witness stand and he said, We have no interest in pursuing that  
7 issue if we were going to settle. That is in evidence. If  
8 that information is communicated by Mr. Harris to  
9 Mr. Brennerman saying, okay, he has agreed to standdown while  
10 we try to settle this thing, it goes to knowledge of whether  
11 there is an extant duty. It goes to willfulness. It goes to  
12 intent. Even if he is wrong and I am not sure he is wrong.

13 THE COURT: Last one minute, government.

14 MR. LANDSMAN-ROOS: The only thing I would add is the  
15 citation *Remini* decision from the Second Circuit that my  
16 colleague put on the record this morning defines the parameters  
17 of a good-faith defense, discusses in that context a mistake of  
18 law defense in terms of what advice was given by counsel. It  
19 is not exactly advice of counsel defense here. We think the  
20 principle is similar. To the extent Mr. Brennerman's lawyers  
21 told him what was going on in settlement discussions, that is  
22 not a basis for a good-faith defense.

23 THE COURT: My present disposition is to overrule Ms.  
24 Fritz' objection. I will think about it some more overnight  
25 and before summations somebody remember to ask me whether I

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1 changed my mind.

2 MS. FRITZ: Obviously, your Honor, particularly given  
3 the nature of my personality, I will try to find some case law  
4 also.

5 THE COURT: That's not a bad idea.

6 There is nothing else on Exhibit B, right?

7 MS. FRITZ: That's correct.

8 THE COURT: How long do you expect to be on closings?

9 MR. LANDSMAN-ROOS: We're still refining but my hunch  
10 is less than a half hour.

11 THE COURT: Ms. Fritz?

12 MS. FRITZ: I shall strive for the same.

13 THE COURT: Look, the last thing I want here is  
14 summations interrupted by objections. I would say that is the  
15 penultimate thing I want. The last thing I want is summations  
16 interrupted by objections that require me to instruct the jury  
17 either in the middle or later with respect to what counsel has  
18 just said. By this time you all know what I am going to charge  
19 and you all know the in limine rulings and you all know that my  
20 view quite clearly is that summations are based on the evidence  
21 of record not on anything else. I trust you will comply with  
22 that. It is in nobody's interest otherwise.

23 Thank you.

24 MR. LANDSMAN-ROOS: Your Honor, one other issue. I  
25 mentioned there would be the potential instruction on documents

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1 (At the sidebar)

2 MS. FRITZ: Your Honor, this seems to me to be  
3 indicative, first of all, of bias, particularly given the way  
4 it plays out. While he is absolutely insisting that ICBC is  
5 not a party here and can't be served with a subpoena and isn't  
6 responding, he delivers 5,000 pages to the government. So I  
7 want to bring it out, in terms of our efforts from the defense  
8 side, to be able to show the jury the extent of the material  
9 that was already in Blacksands' possession that is directly  
10 responsive to the questions that Mr. Landsman-Roos just asked.  
11 He specifically said did you ever get financial statements,  
12 were there ever bank accounts. This is the material that  
13 proves it. And I want to start by showing that he refused to  
14 provide it but that ultimately we do have a binderful only by  
15 virtue of cooperating with the government.

16 THE COURT: You know, I'm really somewhat at a loss to  
17 understand what your argument is.

18 MS. FRITZ: OK. Let me try it this way.

19 THE COURT: I mean, there are just concepts floating  
20 around. In my mind they are not connecting.

21 MS. FRITZ: OK. The issue is had Blacksands produced  
22 to the bank financial statements for the relevant period, that  
23 includes volumes of documents that were produced during the  
24 period 2013 through 2014, the period covered by him. That  
25 material --

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1 THE COURT: His request didn't even go back before  
2 April 1, 2014, first of all.

3 MS. FRITZ: That's not true. It is 2013.

4 THE COURT: Look, you are a very difficult lawyer to  
5 deal with, I have to tell you.

6 The Exhibit is 304?

7 MR. LANDSMAN-ROOS: Yes, your Honor.

8 THE COURT: You may be right but let's look. My  
9 recollection is different.

10 (Pause)

11 You are right, it is April 1, 2013.

12 MS. FRITZ: During that period, all the way through  
13 2013 and 2014, volumes of material were being provided.

14 THE COURT: But it is April 1, 2013 to the date of the  
15 response to the request, which was in 2016, right?

16 MR. LANDSMAN-ROOS: Correct, your Honor.

17 MS. FRITZ: That is correct.

18 THE COURT: And it is your position that Brennerman  
19 produced 2014, '15 and '16 financial statements, 2014, '15 and  
20 '16 wire transfers, bank statements before the loan agreement  
21 get signed; is that your position?

22 MR. LANDSMAN-ROOS: Of course not, your Honor.

23 THE COURT: Of course not.

24 MS. FRITZ: Obviously, in terms of many of his  
25 40-some-odd requests, they have to do with assets and

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1 financials and banking relationships. That's what he keeps  
2 going on and on about. It's there. They have it.

3 THE COURT: That's, by your own acknowledgment --

4 MS. FRITZ: Let me just -- all I'm saying --

5 THE COURT: You just stop.

6 By your own acknowledgment, if Blacksands produced  
7 such records, in general, before the loan agreement was signed,  
8 it all happened before the end of 2014, which was the date the  
9 loan agreement was signed, in my recollection. OK? It doesn't  
10 touch anything at all from November of 2014 to 2016, which was  
11 the core, if not the entirety, of the post-judgment discovery.  
12 It was focused, in material part, on where are the assets now,  
13 where are the bank relationships now, where is the money now,  
14 and what's been happening for the past couple of years. That's  
15 the first point. Not a complete match on the time period,  
16 that's the first point.

17 The second point is in my judgment, whatever ICBC --  
18 excuse me, Blacksands provided to ICBC before the loan was made  
19 is completely irrelevant. It's completely irrelevant at least  
20 because a motion to compel compliance with the discovery  
21 requests that were served post-judgment was made. Objections  
22 were interposed. The objections do not object to producing  
23 materials previously furnished to ICBC. In any case, even if  
24 they had objected to that, the ruling was comply with the  
25 document request in full.

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Hessler - cross

1           Excuse me. Now, it is not open to you in a contempt  
2 proceeding to argue that the ruling, the order that he  
3 violated, was mistaken, erroneous, improvident. It's just  
4 closed. You have no argument on that ground.

5           MS. FRITZ: All right. First of all, the Latham  
6 Watkins' responses and their opposition to the motion to compel  
7 laid all of this out for your Honor, that this material that is  
8 being demanded in 2016 had been provided in '11, '12 and '13.

9           THE COURT: OK. I believe you are wrong about that  
10 but it is immaterial.

11          MS. FRITZ: I wish we could just go and take a look at  
12 it so we could confirm --

13          THE COURT: That is what I just did during the last  
14 break. I read the objections to the document requests. It is  
15 not there.

16          MS. FRITZ: The opposition to the motion to compel  
17 briefs the fact that that is --

18          THE COURT: Suppose so. And the order was the  
19 objections are not meritorious, produce the documents.

20          MS. FRITZ: All right. So assuming that to be the  
21 case, I know that what your Honor was ruling was not that  
22 everything has to be reproduced, that whatever --

23          THE COURT: You think so? That is not what the order  
24 says.

25          MS. FRITZ: If that's what the Court's order -- then

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Hessler - cross

1 we need to clarify that one way or the other.

2 THE COURT: There is nothing to clarify.

3 MS. FRITZ: In my view, if something is provided in  
4 the hands of ICBC, a lawyer cannot come back in 2016 because he  
5 simply never looked at it, never paid attention to it, and  
6 demand exactly the same material.

7 THE COURT: Do you want to add anything else?

8 MR. LANDSMAN-ROOS: Two things, your Honor. One is I  
9 don't believe that is even the law, the ruling under the civil  
10 discovery rules. But in any event, I think your Honor is  
11 correct that to the extent it even was, it has already been  
12 addressed. And we have an in limine ruling that we are not  
13 going to relitigate the underlying contempt hearing.

14 The second is I think defense counsel is trying to  
15 bring out the fact -- and we've already had some testimony on  
16 it, but the discovery requests that Latham served and the  
17 witness has testified were pulled back because of a  
18 jurisdictional problem. And I think her questions are, to some  
19 degree, also trying to confuse the --

20 MS. FRITZ: No. That's not the point.

21 The issue also is, from Mr. Brennerman's point of  
22 view, this has to be willful, this has to be intentional. I  
23 don't know that Mr. Brennerman would understand what your Honor  
24 just said, that even though I delivered a truckload of  
25 documents to them, I have to do it again. So I think the

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Hessler - cross

1 record needs to reflect the background against which he was  
2 operating. And this is what I said in the opening. He knows  
3 that they have all of that material. Paul Hessler, if you  
4 could just view him as a relevant party --

5 THE COURT: Look, I have made my ruling. Go on.

6 MS. FRITZ: OK. Go on.

7 THE COURT: That doesn't mean go on on what I've  
8 sustained the objection to. That means proceed, obeying my  
9 ruling.

10 MS. FRITZ: Which is that I am not allowed to elicit  
11 the fact that this material was produced to ICBC, financial  
12 statements --

13 THE COURT: I've already allowed you to ask him the  
14 scope of his knowledge of anything that was produced because  
15 there was no objection, as I remember. And you are not getting  
16 into anything else with this witness that I can see unless you  
17 ask a question that's not within the scope of the ruling and I  
18 see it in a different light. I'm not stopping you from making  
19 a record, but you are not heading down a productive path here.

20 MS. FRITZ: All right. Because I have -- there is  
21 significant -- the next area of questioning really has to do  
22 with some of the aspects of what was provided to ICBC.

23 THE COURT: You are going to have a hard time.

24 MS. FRITZ: All right. I'll give it a go.

25 (In open court)



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Hessler - cross

1 THE COURT: The objection is sustained. Let's  
2 proceed.

3 BY MS. FRITZ:

4 Q. All right. Mr. Hessler, in anticipation of this  
5 proceeding, you've indicated that you sat down and you met with  
6 the government, right?

7 A. Yes.

8 Q. How many times did you do that?

9 A. I believe it was five in total, including briefly  
10 yesterday.

11 Q. OK. And how many hours do you think that that encompassed?

12 A. So yesterday it was 10 minutes, 15 minutes order of  
13 magnitude, and the first four meetings, I don't recall  
14 precisely but I would say between two hours and three hours,  
15 maybe three and a half -- maybe two to four. Let's say two to  
16 four to be safe.

17 Q. OK. And is it correct that during this same time period in  
18 the runup to this trial, that you and I had conversations where  
19 I was seeking to get certain documents?

20 A. Umm, you are going to have to refresh my recollection. I  
21 don't believe so.

22 Q. Did you and I have a series of communications concerning my  
23 efforts to get ICBC documents through you?

24 A. Yes, we did.

25 Q. And I was not successful?

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Rebuttal - Mr. Sobelman

1 conduct some of their most important affairs by email and by  
2 phone, and that seems to be exactly what was going on here.

3 Ms. Fritz also suggested that Brennerman might have  
4 disobeyed the Court's orders because somehow he thought the  
5 bank already had some of his documents, and this doesn't make  
6 sense. First, let's be clear, there is no evidence that the  
7 bank already had the information or documents that Brennerman  
8 was required to produce -- none -- and no evidence that  
9 Brennerman's company had already given the bank the documents  
10 it was required to produce. In fact, the defense asked  
11 Mr. Hessler if ICBC had those documents and he said no.

12 Second, there is nothing in the Court's orders that  
13 says that Brennerman's company doesn't need to produce a  
14 document or answer a question that he thinks or the company  
15 thinks that the bank already has that document in its  
16 possession. In fact, the orders require Brennerman's company  
17 to, quote, comply fully with the Court's orders.

18 Third, if you look back at Brennerman's company's  
19 responses, there is not one request or interrogatory to which  
20 Brennerman responds by saying, oh, the bank already has the  
21 information, please reference what I sent you on X date. It  
22 just isn't there.

23 If this is what Brennerman thought --

24 MS. FRITZ: Objection. The information about the data  
25 room is in the interrogatory response.

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1 the issue in the charge conference and maybe on motions, but I  
2 will tell you that provisionally without hearing anything from  
3 either of you about the case. It seems to make a lot of sense  
4 to me. The case is *G & C Miriam v. Webster Dictionary*, 639  
5 F.2d, 29 principally at page 37 but not only on page 37.  
6 That's the first item.

7 Now, I have Ms. Fitz's letter of September 3rd. Does  
8 anybody have anything further to say about the subject raised  
9 there?

10 No.

11 MS. FRITZ: Your Honor, with respect to that letter,  
12 we forwarded the letter and now we've had a bit of a dialogue  
13 on it. The government did respond on the issue and we provided  
14 some additional remarks in our September 5th letter. All of  
15 those relate to the same issue that was presented in the  
16 September 3rd letter.

17 THE COURT: Yes. I've seen the September 5th letter  
18 also. It seems to me that the government is allowed to prove  
19 the two civil contempt orders in the civil case because they go  
20 at least to the question of whether failure to comply with the  
21 underlying disclosure orders was willful at least from the date  
22 of the civil contempt adjudications. There is authority that  
23 in my view supports that. As long as we have a moment, I will  
24 find it here. I refer to *United States v. Wells*, 1994 WL  
25 421471 and *Red Bull Interior Demolition v. Palmadessa*, 908

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1 F.Supp 1226 at 1241. There may be other authority, but those  
2 are the things I have in mind.

3 With respect to that, I have the two orders of  
4 contempt before me. I don't know what their exhibit numbers  
5 here are. The first one is Document 108 on the civil docket.  
6 I think there could be some redactions from this that might  
7 improve the situation. So try to follow along with me.

8 The second paragraph, which starts with the words  
9 "Having considered," over onto page 2 and concluding with the  
10 words "reasonable manner" seems to me might be usefully might  
11 be redacted because the recitals I don't think do much of  
12 anything, and they contain findings that are not necessary to  
13 the willfulness and indeed the knowledge issues to which this  
14 is also relevant.

15 Secondly, paragraphs two through five are unnecessary  
16 and could be redacted. I don't know if either side has a view  
17 as to whether the fact that I am the judge who signed the order  
18 should remain or should be redacted, just my name and  
19 signature.

20 Does anybody have any comments on those proposed  
21 redactions?

22 MR. LANDSMAN-ROOS: One clarification, point, your  
23 Honor. The order, which is Government Exhibit 311 and is the  
24 October 24th, 2016 order, referenced the redaction of paragraph  
25 five. I assume you're meaning what you have renumbered as

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1 paragraph five in addition to the excised?

2 THE COURT: No, I didn't renumber it. I don't think I  
3 renumbered anything. Oh, I see what you are saying. There are  
4 two paragraph fives. I was proposing to redact both of them.

5 MR. LANDSMAN-ROOS: Okay.

6 THE COURT: Any other comments from either side on the  
7 proposed redactions?

8 MS. FRITZ: Your Honor, with respect to any of the  
9 issues relating to contempt, it has been our position  
10 throughout that the contempt information should not be  
11 presented. I understand that your Honor just referenced --

12 THE COURT: I understand that. I am ruling against  
13 you.

14 MS. FRITZ: I want the record to reflect that both  
15 sides have now cited for the Court the decision in *Senffner*  
16 that your Honor didn't reference a moment ago.

17 THE COURT: Which I have read and to the extent, if  
18 any and I doubt much, it supports or point of view, I disagree  
19 with it in this context on these facts.

20 MS. FRITZ: It appears, though, that your Honor is  
21 being guided by it somewhat though by trying to remove findings  
22 that would be redundant to what the jury is being asked.

23 THE COURT: If you don't want them removed or you want  
24 to remove different ones, you should tell me. I mean no  
25 disrespect. This is not a continuing seminar. I am offering

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1 to redact material because I am trying to be responsive to  
2 concerns you have raised where I think the proposed redactions  
3 are not necessary to the proper use the government in my view  
4 is entitled to make of the contempt finding. Now, if you don't  
5 like the redactions, you don't want them, you want them all to  
6 stand, fine; but I am not going to back to square one of the  
7 discussion of whether the fact of the contempt will go before  
8 the jury. It will.

9 MS. FRITZ: Our position is on the record. We  
10 appreciate the redaction.

11 THE COURT: Fine.

12 With respect to the order finding Mr. Brennerman  
13 personally in contempt, which was Docket Item 139 in the civil  
14 docket, I am treating essentially the same way. The second  
15 full paragraph, except for the final fragmentary sentence which  
16 reads "The Court therefore orders that" would be redacted. At  
17 least that is my proposal. It seems to me paragraphs two and  
18 three are unnecessary to the proper use. If the defense wants  
19 them out, I will take them out.

20 MS. FRITZ: The defense's position is we would like to  
21 keep two, but the other redactions are fine.

22 THE COURT: Two is relevant why and what is the  
23 government's position? Let's take the government's position  
24 first.

25 MR. LANDSMAN-ROOS: Well, your Honor, it is not

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1 immediately clear to me what the relevance of two is.

2 THE COURT: Do you object to it? You wanted to put  
3 the whole order in.

4 MR. LANDSMAN-ROOS: Yes. We don't have an objection  
5 to it.

6 THE COURT: Paragraph two will stand. That takes care  
7 of that. So that takes care of the September 3rd letter.

8 Now we have Ms. Fitz's letter of September 5th, Docket  
9 Item 86 in the criminal docket. What is going on with these  
10 transcripts and motion papers, Mr. Landsman-Roos?

11 MR. LANDSMAN-ROOS: Yes, your Honor. At this time  
12 we're not intending to enter in as exhibits the transcripts or  
13 the motion papers, at least they are in the 300 series, which  
14 is cited in the letter. The one potential exception is the 100  
15 series are documents that were found in Mr. Brennerman's  
16 apartment. So to the extent the motions existed there, they  
17 are relevant to his notice, knowledge, willfulness.

18 THE COURT: Ms. Fitz.

19 MS. FRITZ: My position is to the extent that the  
20 motions are being put in, whatever may be the rationale for  
21 them being put in, we would object to it first of all but also  
22 we want to make certain that whatever the opposition is,  
23 whatever the opposing pleading is also becomes part of the  
24 record.

25 THE COURT: We'll deal with it if and when it arises.