SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 42

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

PAUL J. MANAFORT, JR.,

Defendant.

Indictment No.: 774/2019

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S OMNIBUS MOTION

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September 4, 2019

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Defendant Paul J. Manafort, Jr. respectfully submits this memorandum of law in support of his motion to dismiss the indictment pursuant to New York Criminal Procedure Law ("CPL") §§ 210.20 and 40.20, and for other relief set forth herein (the "Omnibus Motion").

PRELIMINARY STATEMENT

Since 1970, the New York Legislature has "decreed" that this state's courts will extend double jeopardy protection beyond the minimum standard embodied in the state and federal constitutions, *Schmidt ex rel. McNell v. Roberts*, 74 N.Y.2d 513, 517 (1989), providing in Section 40.20 of the CPL that "[a] person may not be separately prosecuted for two offenses based upon the same act or criminal transaction unless" one of nine enumerated statutory exceptions applies. CPL § 40.20(2). The legislative purpose underlying the CPL's "extraordinarily broad proscriptions against multiple prosecutions," *People v. Berkowitz*, 50 N.Y.2d 333, 345 (1980), "is prevention of multiple prosecutions and cumulative punishment for several offenses which arise out of the same or nearly the same conduct." *People v. Grant*, 116 A.D.2d 773, 774 (3d Dep't 1986) (citation omitted). Thus, under New York law, "absent the statutory exceptions, no matter the number of statutory offenses technically violated, or the number of jurisdictions involved, an accused is not to suffer repeated prosecution for the same general conduct." *People v. Abbamonte*, 43 N.Y.2d 74, 81-82 (1977). The indictment before this Court—charges brought by the New York County District Attorney based on alleged conduct identical to that for which Mr. Manafort was previously charged, tried, and sentenced—violates this black-letter New York law. As such, the indictment must be dismissed.

The District Attorney is well aware that Mr. Manafort, a former government relations consultant and one-time campaign manager for President Donald J. Trump, has previously been charged, tried, and sentenced in a federal prosecution before the United States District Court for

the Eastern District of Virginia to a years-long term of imprisonment for federal Bank Fraud offenses allegedly committed in connection with applications for residential mortgage loans from 2015 to 2017. Apparently unsatisfied with the result of the month-long federal trial on the thirty-two count federal indictment, the People have brought the present New York indictment charging Mr. Manafort with an additional sixteen counts of state-law offenses—including Residential Mortgage Fraud, Falsifying Business Records, and Scheme to Defraud—based on the same alleged acts and transactions underlying the prior federal proceeding.

The People cannot, and presumably will not, attempt to deny the common factual basis underlying the prior and present proceedings. Instead, they may argue, as previewed by the District Attorney when announcing the charges against Mr. Manafort, that they seek only to vindicate "New York's sovereign interests, including the integrity of our residential mortgage market."[1] But whatever the interest of New York in the transactions for which Mr. Manafort has already been criminally prosecuted and is currently serving a years-long prison sentence, in connection with a case brought to vindicate the governmental interest in the integrity of that very market, it is well established that New York's double jeopardy statute "legislatively *nullifies* the 'dual sovereign' doctrine in this State," with the result that, absent a specifically enumerated statutory exception, a prior federal prosecution like the one at issue here bars a subsequent New York prosecution. *Wiley v. Altman*, 52 N.Y.2d 410, 413 (1981) (emphasis added). And while New York's double jeopardy statute provides an exception—not applicable here—where the offenses have different elements and are "designed to prevent *very different kinds* of harm or evil," CPL § 40.20(2)(b) (emphasis added), it does not provide that the double jeopardy bar may be circumvented by the mere incantation of the words "residential mortgage market"—a fig leaf woefully inadequate to cover

[1] Press Release, *District Attorney Vance Announces Indictment of Paul Manafort* (Mar. 13, 2019), available at https://www.manhattanda.org/district-attorney-vance-announces-indictment-of-paul-manafort/.

the People's improper attempt at successive prosecutions of Mr. Manafort in violation of New York law. Nor may the People seek refuge in the fact that certain counts of the prior federal indictment were dismissed following the declaration of a mistrial on those counts and Mr. Manafort's subsequent entry into a plea agreement, as New York's double jeopardy statute is clear that "it is the *fact* of the prior prosecution, not the result, which triggers the statutory protection." *Wiley*, 52 N.Y.2d at 413 (emphasis added).

Mere minutes after Mr. Manafort's second federal sentencing, the District Attorney—delivering a statement that was as much campaign speech as public announcement—proclaimed the indisputable principle that "[n]o one is beyond the law in New York."[2] Regrettably, he neither advertised nor adhered to the equally indisputable principle that no one is below the law in New York. Mr. Manafort is entitled to the equal protection of New York's double jeopardy statute, which permits no exceptions for defendants who have garnered national interest, nor for favored political causes of the elected district attorney. Thus, in the end, this politically charged case is made easy by New York's clear and longstanding statutory double jeopardy prohibition, which is intended to prevent precisely the type of abusive, successive prosecution sought by the District Attorney here. The Court need only apply clear statutory language and settled law to dismiss the indictment in its entirety.

BACKGROUND

Paul J. Manafort, Jr. is an American government relations consultant. He is a second-generation immigrant and the first person in his family to go to college. For nearly his entire career, Mr. Manafort worked for elected officials and operated businesses engaged in political consulting and public affairs work in the United States and around the globe. He graduated from

[2] https://www.manhattanda.org/district-attorney-vance-announces-indictment-of-paul-manafort/.

Georgetown University in 1971 with a bachelor's degree in business administration and earned his law degree from Georgetown in 1974. He began his career in politics in 1975, working in President Gerald R. Ford's White House personnel office. In 1980, he co-founded the firm Black, Manafort, Stone & Kelly. In March 2016, Mr. Manafort was hired by then-presidential candidate Donald J. Trump's campaign to serve as an advisor and campaign chairman for the 2016 presidential election. In August 2016, Mr. Manafort resigned from the Trump campaign.

A. Prior Federal Proceeding In The Eastern District of Virginia

On February 22, 2018, the Department of Justice Special Counsel's Office (the "Federal Government") filed a Superseding Indictment (the "Federal Indictment") in a criminal case before the United States District Court for the Eastern District of Virginia, captioned *United States v. Paul J. Manafort, Jr.*, No. 1:18-CR-83 (the "Federal Proceeding"). (*See* Ex. D, Federal Indictment, EDVA Dkt. No. 9.)[3] The Federal Indictment charged Mr. Manafort with five counts of Subscribing to False United States Individual Income Tax Returns under 26 U.S.C. § 7206(1), 18 U.S.C. §§ 2 and 3551 *et seq*. (Counts 1s-5s); four counts of Failure to File Reports of Foreign Bank and Financial Accounts under 31 U.S.C. §§ 5314 and 5322(a), 18 U.S.C. §§ 2 and 3551 *et seq*. (Counts 11s-14s); five counts of Bank Fraud Conspiracy under 18 U.S.C. §§ 1349 and 3551 *et seq*. (Counts 24s, 26s, 28s-29s, and 31s); and four counts of Bank Fraud under 18 U.S.C. §§ 2, 1344, and 3551 *et seq*. (Counts 25s, 27s, 30s, and 32s) (the "Federal Charges").[4] The case was assigned to the Honorable T. S. Ellis, III.

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[3] Citations to Ex. ___ refer to the exhibits to the Affirmation of Todd Blanche filed herewith. Docket entries in the Federal Proceeding are cited as EDVA Dkt. No. ___, the federal trial transcript is cited as EDVA Tr. ___, and exhibits from the federal trial are cited as EDVA Ex. ___.

[4] Counts 6s-10s and 15s-23s of the Federal Indictment were brought only against Defendant Richard W. Gates III.

The Federal Charges centered on two alleged schemes involving Mr. Manafort. First, the Federal Government alleged that Mr. Manafort filed false U.S. individual income tax returns for tax years 2010 through 2014 and failed to file reports of foreign bank and financial accounts for those years (Counts 1s-5s, 11s-14s). Second, and more relevant here, the Federal Indictment alleged a scheme by Mr. Manafort and co-conspirators to fraudulently obtain mortgage loans from financial institutions by misstatements or omissions concerning certain properties Mr. Manafort owned, his businesses, and his finances (Counts 24s-32s). In particular, and as described in greater detail below, the bank fraud and conspiracy charges pertained to Mr. Manafort's efforts to secure (i) a loan from "Lender A," *i.e.*, Genesis Capital Corporation ("Genesis Capital") for 377 Union Street, Brooklyn, New York 11231 (the "Union Street Property"); (ii) a loan and a potential loan from "Lender B," *i.e.*, Citizens Bank, N.A. ("Citizens Bank") for, respectively, 29 Howard Street, New York, New York 10013 (the "Howard Street Property") and the Union Street Property; (iii) a business loan from "Lender C," *i.e.*, Banc of California, N.A. ("Banc of California"); and (iv) loans or potential loans from "Lender D," *i.e.*, The Federal Savings Bank ("FSB") for 174 Jobs Lane, Water Mill, New York, 11976 (the "Jobs Lane Property"), 2401 Nottingham Avenue, Los Angeles, California (the "Nottingham Avenue Property"), and the Union Street Property.

For purposes of this motion, the relevant transactions—those at issue in both the Federal Proceeding and this one—include Mr. Manafort's transactions or attempted transactions with Citizens Bank and FSB with respect to the Union Street, Howard Street, Jobs Lane, and Nottingham Avenue Properties, as well as the business loan from Banc of California.

1. Loans from Citizens Bank on the Howard Street and Union Street Properties

In 2012, Mr. Manafort purchased the Howard Street and Union Street Properties through companies owned by his family and him. (Ex. D, Federal Indictment ¶¶ 28, 30.) The Federal

Government alleged that he used the Howard Street Property from approximately January 2015 through August 2017 as an income-generating rental property. (*Id.* ¶ 30.) In late 2015 through early 2016, Mr. Manafort applied for a mortgage on the Howard Street Property from Citizens Bank for approximately $3.4 million, allegedly misrepresenting to the bank, in order to obtain a greater loan amount, that it was a secondary home and not a rental property. (*Id.* ¶ 31.) Mr. Manafort also allegedly failed to disclose the existence of a prior mortgage on his Union Street Property from Genesis Capital and submitted false tax returns which inflated his income and failed to disclose a $1.5 million outstanding loan. (*Id.* ¶¶ 32-35.) In March 2016, Citizens Bank approved a loan on the Howard Street Property of approximately $3.4 million. (*Id.* ¶ 36.)

Also in March 2016, Mr. Manafort applied for a $5.5 million loan from Citizens Bank on the Union Street Property, in connection with which he allegedly submitted a false statement of assets and liabilities that hid his prior loan from Genesis Capital on the Union Street Property and, through a co-conspirator, allegedly submitted a false 2016 P&L for one of his businesses, overstating its profits by more than $2 million. (*Id.* ¶ 40.) Ultimately, the $5.5 million loan for the Union Street Property did not close. (*See* Ex. F, EDVA Tr. 1937:2-7.)

2. Loans from The Federal Savings Bank on the Jobs Lane and Union Street Properties

Between approximately July 2016 and January 2017, Mr. Manafort, with the assistance of his former associate, Mr. Richard Gates, allegedly sought and secured a total of approximately $16 million in two loans from FSB, using, *inter alia*, the Jobs Lane Property as collateral for one loan (approximately $9.5 million) and the Union Street Property as collateral for the other (approximately $6.5 million). (Ex. D, Federal Indictment ¶¶ 41-42.) Testimony during the trial in the Federal Proceeding indicated that the Nottingham Avenue Property was also considered as a potential source of collateral for the FSB loans, but was ultimately not used. (*See* Ex. F, EDVA

Tr. 2011:20-2012:9, 2172:11-25, 2180:24-25.) The Federal Government alleged that Mr. Manafort made misrepresentations to secure these funds, including providing the bank with inaccurate 2015 and 2016 P&Ls for one of his companies, which overstated its income by millions of dollars. (Ex. D, Federal Indictment ¶ 43.) Mr. Manafort allegedly also lied about a $300,000 delinquency on his American Express card by misrepresenting to FSB that he had lent his credit card to a friend, who had incurred the charges and had not reimbursed him. (*Id.* ¶ 44.)

3. Business Loan from Banc of California

In addition to the mortgage loans described above, the Federal Indictment alleged that Mr. Manafort acted fraudulently in applying for a business loan from Banc of California in approximately February 2016. (*Id.* ¶¶ 37-39, 61-64.) As with the mortgage loans, the Federal Indictment alleged that Mr. Manafort made various false statements to the lender, including submitting a false statement of assets and liabilities that failed to disclose the Genesis Capital loan on the Union Street Property, misrepresenting the amount of the mortgage on the Howard Street Property, and submitting a false 2015 P&L for one of Mr. Manafort's companies. (*Id.*)

4. The Prior Federal Trial

A jury trial commenced in the Federal Proceeding on July 31, 2018. On August 21, 2018, a jury found Mr. Manafort guilty on five counts of Subscribing to False United States Individual Income Tax Returns (Counts 1s-5s), one count of Failure to File Reports of Foreign Bank and Financial Accounts (Count 12s), and two counts of Bank Fraud (Counts 25s and 27s). (EDVA Dkt. No. 280.) With respect to the remaining ten counts, including three counts of Failure to File Reports of Foreign Bank and Financial Accounts (Counts 11s, 13s-14s), five counts of Bank Fraud Conspiracy (Counts 24s, 26s, 28s-29s, and 31s), and two counts of Bank Fraud (Counts 30s and 32s), the jury failed to reach a unanimous verdict and Judge Ellis declared a mistrial (the "Hung Counts"). Judge Ellis thereafter ordered the Federal Government to file a notice indicating whether

it intended to retry or dismiss those counts. (EDVA Dkt. No. 292.) On September 26, 2018, the Federal Government notified the Court that it would move to dismiss the Hung Counts. (Ex. G, EDVA Dkt. No. 298.) On March 7, 2019, the day of Mr. Manafort's sentencing, Judge Ellis entered judgment and dismissed the Hung Counts. (Ex. I, EDVA Dkt. No. 326 at 2.)

Judge Ellis sentenced Mr. Manafort to a total of 47 months' imprisonment (with nine months' credit for time served), consisting of 24 months on each of Counts 1s through 5s; 30 months on Count 12s; and 47 months on each of Counts 25s and 27s, to run concurrently. (*Id.* at 3.) Mr. Manafort was also sentenced to three years' supervised release and ordered to pay $25,548,287.60, primarily as restitution. (*Id.* at 4, 6.)

Notably, in sentencing Mr. Manafort, Judge Ellis took into account as "related conduct" the alleged actions underlying the Hung Counts, which conduct Mr. Manafort had admitted following trial in the Federal Proceeding by way of a statement of facts that he agreed to in connection with a plea agreement resolving a separate criminal case brought against him by the Federal Government in the United States District Court for the District of Columbia (the "DC Proceeding").[5] (*See* Ex. H, EDVA Sentencing Tr. 5:18-6:9.) In total, between the sentences imposed in the Federal Proceeding and the DC Proceeding, Mr. Manafort is currently serving a sentence of approximately seven-and-a-half years' imprisonment. In addition, Mr. Manafort has

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[5] Docket entries in the DC Proceeding, captioned *United States v. Paul Manafort, Jr.*, No. 17-CR-201 (D.D.C. 2017), are cited as DDC Dkt. No. ___. In the DC Proceeding, the Federal Government charged Mr. Manafort with one count of Conspiracy Against the United States (Count 1sss), one count of Conspiracy to Launder Money (Count 2sss), one count of Unregistered Agent of a Foreign Principal (Count 3sss), one count of False and Misleading FARA Statements (Count 4sss), one count of False Statements (Count 5sss), one count of Obstruction of Justice (Count 6sss), and one count of Conspiracy to Obstruct Justice (Count 7sss). (DDC Dkt No. 318.) On September 14, 2018, pursuant to an agreement with the Federal Government, Mr. Manafort pleaded guilty to two counts. (DDC Dkt. No. 422.) On March 19, 2019, Judge Amy Berman Jackson sentenced Mr. Manafort to 60 months' imprisonment for Conspiracy Against the United States, to run concurrently with 30 months of the sentence previously imposed in the Federal Proceeding, and 13 months for Conspiracy to Obstruct Justice, to run consecutively to the 60-month sentence and the sentence imposed in the Federal Proceeding. (DDC Dkt. No. 556 at 2.)

forfeited, among other property, the Union Street, Howard Street, and Jobs Lane Properties, as well as a life insurance policy and the funds in several bank accounts. (DDC Dkt. No. 556-1.)

B. The New York Indictment

On March 13, 2019, shortly after Mr. Manafort was sentenced in the DC Proceeding, the Manhattan District Attorney's Office publicly announced a sixteen-count indictment against him (the "NY Indictment"), which had been filed in this Court on March 7, 2019, the day of Mr. Manafort's sentencing before Judge Ellis. (*See* Ex. A, NY Indictment.) The NY Indictment consists of three counts of Residential Mortgage Fraud in the First Degree (Counts 1-3), one count of Attempt to Commit the Crime of Residential Mortgage Fraud in the First Degree (Count 4), three counts of Conspiracy in the Fourth Degree (Counts 5-7), eight counts of Falsifying Business Records in the First Degree (Counts 8-15), and one count of Scheme to Defraud in the First Degree (Count 16) (the "New York Charges").

While both the ten-page NY Indictment and the two-page purported bill of particulars provided by the People (the "Bill of Particulars"), Ex. B, are sparse on details, the limited facts alleged, as well as the discovery provided by the People to date, demonstrate complete factual overlap between the Federal and New York Charges.

1. Counts Concerning Citizens Bank (Counts 1, 4, 5, and 8-11)

The limited facts alleged in connection with Counts 1, 4, 5, and 8-11 of the NY Indictment make clear that they are premised on the same alleged facts underlying Counts 24s, 25s, and 28s of the Federal Indictment related to Citizens Bank—*i.e.*, the $3.4 million loan on the Howard Street Property and the application for a $5.5 million loan on the Union Street Property. (Ex. D, Federal Indictment ¶¶ 57-60, 65-66.) The Bill of Particulars confirms that each of these counts relates to Citizens Bank, and that the fraud, attempt, and conspiracy counts relate to the Howard Street Property (Count 1), Union Street Property (Count 4), or both (Count 5). Additionally, as discussed

below, the supplemental information provided by the People during discovery (*see* Ex. C, Aug. 16, 2019 Letter to Court), confirms that the business records counts related to Citizens Bank (Counts 8-11) concern the same loans on the Howard Street and Union Street Properties as well.

As to Counts 1, 4, and 5 of the NY Indictment:

- Count 1 charges Residential Mortgage Fraud in the First Degree in connection with Citizens Bank and the Howard Street Property, "during the period from on or about December 22, 2015 to on or about March 7, 2016."

- Count 4 recites a similar allegation with respect to Citizens Bank, except that the count relates to the application for a loan with respect to the Union Street Property and, presumably because that loan did not close, the charged offense is Attempt to Commit the Crime of Residential Mortgage Fraud in the First Degree. The time period is given as "on or about December 22, 2015 to on or about August 18, 2016."

- Count 5 charges Conspiracy in the Fourth Degree in connection with Citizens Bank and the Howard Street and Union Street Properties during the same time period as Count 4, alleging that Mr. Manafort, "with intent that conduct constituting a class B felony, to wit, Residential Mortgage Fraud in the First Degree, be performed, agreed with one and more persons to engage in and cause the performance of such conduct."

To the extent that there could be any doubt that these counts relate to the same facts prosecuted in the Federal Proceeding, the limited additional facts provided in the NY Indictment dispel it. Even the dates selected by the People to frame the allegations make clear that they relate to the same transactions at issue in the Federal Proceeding. For example, the start date alleged for Counts 1, 4, and 5—December 22, 2015—corresponds to a December 22, 2015 email from Mr. Manafort regarding his intention to obtain loans on the Howard Street and Union Street Properties that was introduced at trial during the Federal Proceeding. (Ex. J, EDVA Ex. 161.) Similarly, as summarized in the chart below, it is evident that the overt acts allegedly committed in furtherance of the conspiracy alleged in Count 5 of the NY Indictment correspond to the same transactions with Citizens Bank that were at issue in the Federal Proceeding.

New York Indictment	Federal Proceeding
"On or about January 26, 2016, the defendant stated by email to Individual #1, in part and in substance, 'The appraiser for Howard St is calling to make an appointment to view the condo. Could you please call [Individual #2] to arrange a time for him to access the apartment. Remember, he believes that you and [Individual #3] are living there.'" (Ex. A, NY Indictment at 4.)	"Later, on January 26, 2016, MANAFORT wrote to his son-in-law to advise him that when the bank appraiser came to assess the condominium, his son-in-law should '[r]emember, he believes that you and [MANAFORT's daughter] are living there.'" (Ex. D, Federal Indictment ¶ 31.)
"On or about February 2, 2016, the defendant sent a document, named 'Use of Cash Letter.docx,' by email to Individual #4 and Individual #5 in New York County." (Ex. A, NY Indictment at 4.)	On February 2, 2016, Manafort sent an email to Melinda Francis, cc'ing David M. Fallarino, with the subject: "Use of Cash Memo." The email attached a document: "Use of Cash Letter.docx." (Ex. K, EDVA Ex. 229; Ex. F, EDVA Tr. 1762:1-1763:16.)
"On or about February 24, 2016, Individual #6 stated to Individual #5 in New York County, in part and in substance, that defendant was no longer moving forward with a mortgage and they would provide Individual #5 updated insurance binders confirming there were no mortgagee clauses listed on a property." (Ex. A, NY Indictment at 4.)	"GATES, on MANAFORT's behalf, caused an insurance broker to provide Lender B [Citizens Bank] false information, namely, an outdated insurance report that did not list the Union Street loan. MANAFORT and GATES knew such a representation was fraudulent. After GATES contacted the insurance broker and asked her to provide Lender B [Citizens Bank] with false information, he updated MANAFORT by email on February 24, 2016. MANAFORT replied to GATES, on the same day: 'good job on the insurance issues.'" (Ex. D, Federal Indictment ¶ 33.)
"On or about February 24, 2016, the defendant stated by email to Individual #4 in New York County, in part and in substance, 'Both issues were resolved today. [Individual #6] has informed [Individual #5] and will be forwarding her the appropriate documentation from the insurance Company later today.'" (Ex. A, NY Indictment at 4.)	On February 24, 2016, Paul Manafort emailed David Fallarino, stating, "Both issues were resolved today. Rick Gates has informed Melinda and will be forwarding her the appropriate documentation from the Insurance Company later today." (Ex. L, EDVA Ex. 428.)
"On or about March 4, 2016, the defendant signed a document, entitled 'Uniform Residential Loan Application.'" (Ex. A, NY Indictment at 4.)	"In March 2016, Lender B [Citizens Bank] approved the loan in the amount of approximately $3.4 million (the $3.4 million loan)." (Federal Indictment ¶ 36; *see* Exs. N,

New York Indictment	Federal Proceeding
	P, EDVA Exs. 245, 246 (March 4, 2016 Uniform Residential Loan Applications).)
"On or about May 1, 2016, the defendant stated by email to Individual #6, in part and in substance, 'I need [Individual #7] to do the letter requested below in red. Can you draft it for her to sign?'" (Ex. A, NY Indictment at 4.)[6]	On May 1, 2016, Manafort sent an email to Gates, with subject "Re: 377 Union St Consruction [*sic*] Loan," stating "I need Cindy to do the letter requested below in red. Can you draft it for her to sign?" (Ex. U, EDVA Ex. 401.)

As to the falsifying business records counts related to Citizens Bank (Counts 8-11), the People have confirmed that these counts are part and parcel of the same transactions with respect to the Howard Street and Union Street Properties. Specifically, the People have confirmed (*see* Ex. C, Aug. 16, 2019 Letter to Court) the following:

- Count 8, which charges falsifying a business record "on or about January 20, 2016," relates to an electronic data entry form for the Uniform Residential Loan Application ("URLA") for the Howard Street Property (*see* Ex. M, CB-MDA00019656-19658).[7]

- Counts 9 relates to the completed March 4, 2016 URLA for the Howard Street Property (*see* Ex. O, CB-MDA00016978-16985), which was introduced as an exhibit during the Federal Proceeding (*see* Ex. N, EDVA Ex. 245).

- Count 10 relates to the March 4, 2016 Affidavit of Occupancy for the Howard Street Property (*see* Ex. R, CB-MDA00017072-17073), an unsigned version of which was introduced during the Federal Proceeding (*see* Ex. Q, EDVA Ex. 247). *See also* Ex. D, Federal Indictment ¶ 31 (alleging misrepresentations regarding occupancy of the Howard Street Property).

- Count 11 charges falsifying business records between March 11 and May 2, 2016 in connection with an electronic data entry form for the URLA for the $5.5 million Union Street Property loan (*see* Ex. S, CB-MDA00019653-19655), a completed version of which was introduced during the Federal Proceeding (*see* Ex. T, EDVA Ex. 255).

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[6] The NY Indictment also alleges as an overt act that "[o]n or about August 18, 2016, Individual #1 sent a document, named 'Doc Aug 16, 2016, 1421.pdf,' by email to defendant." (Ex. A, NY Indictment at 4.) While not explicitly relied upon in the Federal Indictment, this alleged act clearly relates to the same transaction.

[7] The document identified by the People in connection with Count 8 (Ex. M), relates to a $2.73 million portion of the $3.4 million Citizens Bank loan on the Howard Street Property. The full loan amount of $3.4 million was applied for pursuant to two applications. (*See* Exs. N ($2.73 million), P ($682,500).)

2. Counts Concerning The Federal Savings Bank (Counts 2, 3, 6, 7, and 12-15)

The Bill of Particulars confirms that Counts 2, 3, 6, 7, and 12-15 relate to FSB, and that the fraud and conspiracy counts relate to the Jobs Lane Property (Counts 2 and 7), the Union Street Property (Count 3), or the Nottingham Avenue Property (Count 6). The same is true with respect to the business records counts concerning FSB (Counts 12-15), which, as explained below, fall within the same transactions. Thus, it is apparent that these counts relate to the same alleged facts at issue in Counts 29s through 32s of the Federal Indictment, regarding conduct allegedly undertaken "[b]etween approximately July 2016 and January 2017" to obtain from FSB two loans totaling about $16 million, with one loan secured by the Jobs Lane Property, and the other by the Union Street Property. (Ex. D, Federal Indictment ¶¶ 42, 67-68, 71-72.)

With respect to the fraud and conspiracy counts (Counts 2, 3, 6, and 7):

- Count 2 charges Residential Mortgage Fraud in the First Degree in connection with FSB and the Jobs Lane Property, between October 19, 2016 and November 18, 2016. The allegations align with the $9.5 million loan on the Jobs Lane Property from FSB that was at issue in the Federal Proceeding. Among other things, the start date for this count, October 19, 2016, corresponds to the date of email correspondence introduced during the federal trial concerning Mr. Manafort's attempts to secure a $9.5 million loan on the Jobs Lane Property. (*See* Ex. X, EDVA Ex. 280.) Additionally, the November 18, 2016 end date for this count approximates the November 16, 2016 closing date of the Jobs Lane loan at issue in the Federal Proceeding. (*See* Ex. F, EDVA Tr. 2069:6-2070:19.)

- Count 3 charges Residential Mortgage Fraud in the First Degree in connection with FSB and the Union Street Property, between November 1, 2016 and January 17, 2017. Again, the start date is telling: it corresponds to the date of the loan application for FSB's $6.5 million loan on the Union Street Property that was introduced during the Federal Proceeding. (*See* Ex. AA, EDVA Ex. 289; Ex. F, EDVA Tr. 2194:23-2195:25 (testimony explaining that loan application relates to $6.5 million Union Street loan).)

- Count 6 charges Conspiracy in the Fourth Degree between July 2016 and October 19, 2016 in connection with FSB and the Nottingham Avenue Property, which, as noted above, was considered as a potential source of collateral for the FSB loans. As summarized in the chart below, the overt acts allegedly committed in support of this count confirm that it is premised on the same facts underlying the Federal Charges concerning FSB.

New York Indictment	Federal Proceeding
"On a date during the period from in or around July 2016 to on or about August 15, 2016, defendant asked Individual #6 in New York County to sign a letter stating, in part and in substance, 'Thank you for allowing me to use the AMEX Business Plum card to purchase season tickets for the 2016 baseball season.'" (Ex. A, NY Indictment at 5.)	"In addition, Lender D [FSB] questioned MANAFORT about a $300,000 delinquency on his American Express card, which was more than 90 days past due. The delinquency significantly affected MANAFORT's credit rating score. MANAFORT falsely represented to Lender D [FSB] that he had lent his credit card to a friend, GATES, who had incurred the charges and had not reimbursed him. MANAFORT supplied Lender D [FSB] a letter from GATES that falsely stated that GATES had borrowed MANAFORT's credit card to make the purchases at issue and would pay him back by a date certain." (Ex. D, Federal Indictment ¶ 44.) *See also* Ex. V, EDVA Ex. 274 (attaching "Amex Plum Note RG.pdf," stating in part, "Thank you for allowing me to use the AMEX Business Plum card to purchase season tickets for the 2016 baseball season.").
"On or about August 15, 2016, the defendant sent a document, named 'Amex Plum Note RG.pdf,' by email to Individual #8 in New York County." (Ex. A, NY Indictment at 5.)	

- Count 7 charges Conspiracy in the Fourth Degree in connection with FSB and the Jobs Lane Property, during the period of "on or about October 21, 2016 to on or about November 18, 2016." Once again, as summarized in the chart below, the overt acts allegedly committed in furtherance of this count leave no doubt that it is premised on the same facts underlying the Federal Charges concerning FSB.

New York Indictment	Federal Proceeding
"On or about October 21, 2016, the defendant sent a document, named 'DMP P&L 9-31-16.pdf,' by email to Individual #9 in New York County." (Ex. A, NY Indictment at 6.)	"To create the false 2016 P&L, on or about October 21, 2016, MANAFORT emailed GATES a .pdf version of the real 2016 DMI P&L, which showed a loss of more than $600,000 . . . . MANAFORT then sent the falsified 2016 DMI P&L.pdf to Lender D [FSB]." (Ex. D, Federal Indictment ¶ 43.)
"On or about October 28, 2016, the defendant electronically signed a document, entitled 'Uniform Residential Loan Application.'" (Ex. A, NY Indictment at 6.)	On October 28, 2016, Manafort electronically signed the "Uniform Residential Loan Application." (Ex. Y, EDVA Ex. 287.)

Similarly, Counts 12 through 15 charge Mr. Manafort with Falsifying Business Records in the First Degree in connection with FSB. Once again, the People have confirmed that these counts relate to the same transactions at issue in the Federal Proceeding.

- Count 12 charges falsifying business records in connection with an October 6, 2016 Loan Memorandum for the Nottingham Avenue and Jobs Lane Properties. (*See* Ex. W, SET-00009531_0001-0017.)

- Count 13 concerns the October 28, 2016 URLA for the $9.5 million FSB loan on the Jobs Lane Property (*see* Ex. Z, SET-00009464_1490-1497), which was introduced during the Federal Proceeding (*see* Ex. Y, EDVA Ex. 287).

- Count 14 concerns an FSB Credit Approval Form for the Jobs Lane Property, dated November 12, 2016 (*see* Ex. CC, SET-00009687_0001-0010), which was introduced during the Federal Proceeding (*see* Ex. BB, EDVA Ex. 437).

- Count 15 concerns the Loan Memorandum for the Union Street Property, dated January 5, 2017 (Ex. EE, NYDA-TFSB0000203-212), an unsigned version of which was introduced during the Federal Proceeding (*see* Ex. DD, EDVA Ex. 293).

3. Scheme to Defraud Count (Counts 16)

Finally, the NY Indictment concludes with a charge of Scheme to Defraud in the First Degree, which alleges as follows:

> The defendant, in the County of New York and elsewhere, during the period from on or about December 22, 2015 to on or about January 17, 2017, engaged in a scheme constituting a systematic ongoing course of conduct with intent to defraud more than one person and to obtain property from more than one person by false and fraudulent pretenses, representations and promises, and so obtained property with a value in excess of one thousand dollars from one and more such persons.

The only additional information provided in the Bill of Particulars is that the purported scheme related to Citizens Bank, FSB, and Banc of California. While the People have declined to provide any further details, the all-encompassing count appears to be co-extensive, in terms of both time

period and substance, with all of the other allegations in the NY Indictment, as well as all of the acts and transactions at issue in the Federal Proceeding during that time period.[8]

ARGUMENT

I. MOTION TO DISMISS ON STATUTORY DOUBLE JEOPARDY GROUNDS

The Federal Constitution guarantees that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb," meaning that a defendant cannot be prosecuted or punished more than once for the same offense. U.S. Const. amend. V; *see United States v. Dixon*, 509 U.S. 688, 696 (1993); *accord* N.Y. Const. art. I, § 6 ("No person shall be subject to be twice put in jeopardy for the same offense"). For constitutional double jeopardy purposes, the Supreme Court has held that two offenses are distinct if each contains an element not found in the other. *Blockburger v. United States*, 284 U.S. 299, 304 (1932). Thus, under the federal formulation, a defendant may be subjected to multiple prosecutions relating to a single act or transaction where the statutes defining the offenses are sufficiently different. *See Dixon*, 509 U.S. at 698. Moreover, under the "dual sovereignty" doctrine, a federal prosecution does not bar a later state prosecution, regardless of the similarity of the offenses. *See Gamble v. United States*, 139 S. Ct. 1960, 1963 (2019).

"[D]issatisfied with the limited protection against separate prosecutions provided under the Federal Constitution," *People v. Wood*, 260 A.D.2d 102, 109 (4th Dep't 1999), *aff'd*, 95 N.Y.2d 509 (2000), in 1970 the New York Legislature significantly expanded double jeopardy protection by statute. *See Schmidt*, 74 N.Y.2d at 517. In particular, and as relevant to this case, Section 40.20 of the CPL provides that "[a] person may not be separately prosecuted for two offenses based upon

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[8] As set out below, Mr. Manafort moves for a proper bill of particulars setting forth sufficient detail with respect to Count 16. To the extent the Court grants that motion, Mr. Manafort respectfully reserves the right to renew his motion to dismiss Count 16 on the basis of such additional information.

the same act or criminal transaction unless" one of nine enumerated statutory exceptions applies. CPL § 40.20(2).

As courts have recognized, New York's double jeopardy statute provides "additional and broader statutory double jeopardy protections" than the constitutional standard in at least two respects. *Booth v. Clary*, 83 N.Y.2d 675, 678 (1994). First, the statute "legislatively nullifies the 'dual sovereign' doctrine in this State," with the result that a prior federal prosecution, like the Federal Proceeding at issue here, will typically bar a subsequent New York prosecution. *Wiley*, 52 N.Y.2d at 413; *see Booth*, 83 N.Y.2d at 678-79 ("State prosecutions are more restricted under the expansive statutory double jeopardy protections found in CPL 40.20 and 40.30, which offer more protection than the 'dual sovereign' doctrine would tolerate.").

Second, "[t]he Legislature, apparently dissatisfied with the Federal formulation, adopted in the Criminal Procedure Law (CPL 40.20, subd 2) what is generally known as the 'same transaction' test which, in its purest form, prohibits a second prosecution to be based on the *same transaction* as a former one." *Abraham v. Justices of N.Y. Sup. Ct. of Bronx Cty.*, 37 N.Y.2d 560, 565 (1975) (citation omitted). Thus, "[u]nder CPL 40.20, not only is the 'dual sovereignties' doctrine ignored, but double jeopardy protection is extended, generally, to offenses arising out of a common event." *Abbamonte*, 43 N.Y.2d at 81.

In sum, "[t]he impetus of the statute, consequently, exempts a person from multiple prosecutions founded on the same transaction, unless an exception plainly renders the general rule inapplicable." *People v. Fernandez*, 43 A.D.2d 83, 90 (2d Dep't 1973).

A. The Prior Federal Proceeding Constituted A Prior "Prosecution" Within The Meaning Of New York's Double Jeopardy Statute

Under New York's double jeopardy statute, "a person 'is prosecuted' for an offense, within the meaning of section 40.20, when he is charged therewith by an accusatory instrument filed in a

court of this state or of any jurisdiction within the United States, and when the action either: (a) Terminates in a conviction upon a plea of guilty; or (b) Proceeds to the trial stage and a jury has been impaneled and sworn or, in the case of a trial by the court without a jury, a witness is sworn." CPL § 40.30(1). Here, the Federal Proceeding clearly constituted a "prosecution" within the meaning of the statute, as Mr. Manafort was charged by "an accusatory instrument" (the Federal Indictment) filed in a court of a "jurisdiction within the United States" (the United States District Court for the Eastern District of Virginia), and the action proceeded "to the trial stage and a jury [had] been impaneled and sworn." *See id.*

This is the end of the matter. The People may argue, however, that an exception should be read into the statute with respect to the Hung Counts.[9] As explained below, any such argument is foreclosed by the clear statutory text, which enumerates specific and limited exceptions to the definition of a prior prosecution, none of which applies here. *See Pokoik v. Dep't of Health Servs.*, 72 N.Y.2d 708, 712 (1988) ("It is well established that '[t]he fact that an act contains no exception or saving clause creates a strong presumption that the Legislature intended none'") (citations omitted); *Hill v. Eppolito*, 5 A.D.3d 854, 856 (3d Dep't 2004) ("[T]he fact that [CPL § 40.30] contains no exception [with respect to tribal courts] creates a strong presumption that none was intended."). But even if there were some ambiguity in the statute, controlling case law and detailed legislative history require that any such ambiguity be resolved in favor of the rights of the accused.

As a preliminary matter, the Court of Appeals long ago held that under CPL § 40.30's clear statutory mandate, "it is the fact of the prior prosecution, not the result, which triggers the statutory

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[9] Even if the People advance this argument, it would not implicate the counts for which the jury in the Federal Proceeding returned a guilty verdict, including: (i) Count 25s of the Federal Indictment, concerning the $3.4 million Citizens Bank loan for the Howard Street Property (which corresponds to Counts 1, 8, 9, and 10 of the NY Indictment in their entirety, and at least partially to Counts 5, 16, and possibly others), and (ii) Count 27s of the Federal Indictment concerning the $1 million business loan from Banc of California (which corresponds at least in part to Count 16 of the NY Indictment).

protection." *Wiley*, 52 N.Y.2d at 413; *see also Abbamonte*, 43 N.Y.2d at 84 ("Whether charges are disposed of by plea or trial, however, bears no functional or logical relationship to whether they indeed arise out of the same 'criminal transaction'."). Thus, the fact that Mr. Manafort was convicted on certain counts in the Federal Proceeding, while other counts were dismissed following a mistrial and Mr. Manafort's entry into a plea agreement, does not affect the statutory double jeopardy analysis.

Any argument to the contrary is foreclosed by the clear statutory text, which provides specific and narrow exceptions that are not applicable here. *See* CPL § 40.30(2)-(4). The only exceptions applicable to a prosecution in another jurisdiction are found in subsection (2), which provides that a prior prosecution will not act as a bar under CPL § 40.20 if either "(a) Such prosecution occurred in a court which lacked jurisdiction over the defendant or the offense; or (b) Such prosecution was for a lesser offense than could have been charged under the facts of the case, and the prosecution was procured by the defendant, without the knowledge of the appropriate prosecutor, for the purpose of avoiding prosecution for a greater offense." CPL § 40.30(2). Neither exception applies here, as the Eastern District of Virginia had jurisdiction over Mr. Manafort and the offenses at issue in the Federal Proceeding, and there can be no argument that Mr. Manafort "procured" the Federal Prosecution to avoid more serious charges.

The remaining exceptions under Section 40.30—found in subsections (3) and (4)—are likewise inapplicable by their terms, as each relates exclusively to the ability of New York prosecutors to retry a criminal defendant in New York following an order that "nullified" the prior *New York* proceedings in that same case and allowed for a new trial. Specifically, they provide:

> 3. Despite the occurrence of proceedings specified in subdivision one, if such proceedings are subsequently nullified by ***a court order which restores the action to its pre-pleading status or which directs a new trial of the same accusatory instrument***, the nullified proceedings do not bar further prosecution of such offense ***under the same accusatory instrument***.

> 4. Despite the occurrence of proceedings specified in subdivision one, if such proceedings are subsequently nullified by a court order which dismisses the accusatory instrument but ***authorizes the people to obtain a new accusatory instrument*** charging the same offense or an offense based upon the same conduct, the nullified proceedings do not bar further prosecution of such offense under any new accusatory instrument obtained ***pursuant to such court order or authorization*.**

CPL § 40.30(3)-(4) (emphasis added). Any attempt by the People to shoehorn Mr. Manafort's state case into one of these exceptions should be rejected. As reflected in the emphasized text above, Subsection (3), while it allows for a retrial following a mistrial in a New York state prosecution, by its terms limits any such retrial to "further prosecution of such offense *under the same accusatory instrument*." CPL § 40.30(3) (emphasis added). Thus, even had the prior prosecution at issue here occurred in a New York court, under Section 40.30(3) the People would be "limited to retrying defendant upon the same accusatory instrument." *People v. Rodriguez*, 150 A.D.2d 265, 266 (1st Dep't 1989); *see also People v. Moseley*, 172 A.D.3d 1461, 1461 (3d Dep't 2019) (same). Nothing in Section 40.30(3) permits the People to re-prosecute Mr. Manafort under a new indictment. Similarly, the last remaining exception, in Subsection (4), does not apply here, as the People do not bring the NY Indictment "pursuant to" "a court order which dismisses the accusatory instrument but authorizes the people to obtain a new accusatory instrument charging the same offense or an offense based upon the same conduct." CPL § 40.30(4). Simply put, the judicial authorization for retrial contemplated by Subsections (3) and (4) is not present here.

While the statute's text is clear on its face, the legislative history also confirms this plain reading. The original Practice Commentary accompanying the newly enacted CPL § 40.30—authored by Richard G. Denzer, chief counsel to the drafting committee—was explicit in clarifying the effect of a mistrial: such proceedings, "while not barring further prosecution of the *same indictment* in the same court, do, except as provided in the fourth subdivision, bar any subsequent prosecution for the same offense under a *different indictment* either in the **same court or in a**

different court." (Ex. GG, Practice Commentary to CPL § 40.30 at 123-24 (1971) (bold emphasis added).) The example provided by the Practice Commentary is instructive:

> Thus, where a trial for grand larceny in a Bronx County court is terminated by a mistrial order and a direction of a new trial, the indictment may be further prosecuted in the Bronx court, but *the same crime may not be prosecuted under a different indictment either in New York or the Bronx*.

(*Id.* at 124 (emphasis added).) Here, a successive prosecution of Mr. Manafort in New York as to the conduct underlying the Hung Counts is barred, no less than had he previously been tried in Bronx County rather than the Eastern District of Virginia. (*See also id.* at 123 ("Subdivision 3 deals primarily with prosecutions which, after proceeding to trial, have been terminated by a court order . . . nullifying the trial proceedings and directing a new trial of the charge in the same court. Under such circumstances, the new or second trial is not truly a *second prosecution* of the charge, but a continuation of the original prosecution.").) Moreover, as already noted, the "fourth subdivision" referenced in the Practice Commentary, *i.e.*, CPL § 40.30(4), similarly has no application here.[10]

Any remaining doubt is dispelled by comparing the provisions of the CPL with the corresponding provisions of the Model Penal Code ("MPC")—which provisions the drafting commission considered but rejected in crafting CPL § 40.30's definition of a prior prosecution. Specifically, the legislative history of CPL § 40.30 includes a November 23, 1965 memorandum from Denzer to the members of the drafting commission, in which he notes that "it was suggested that the Commissioners consider, as a possible alternative, the American Law Institute's

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[10] As explained by Denzer: "The application of subdivision 4 may be illustrated by a case in which, following the commencement of a trial, the court dismisses the indictment on the basis of some defect therein but authorizes the people to resubmit the charge to a grand jury for the purpose of obtaining a new indictment for the same offense or for an offense based upon the same facts. The proposed provision assures that prosecution of the new indictment so authorized is not barred by the occurrence of the original trial proceedings." (Ex. GG, Practice Commentary to CPL § 40.30 at 124 (1971).)

formulation on the subject." (Ex. FF, Denzer Memo, Nov. 23, 1965.) The memorandum proceeded to set out the pertinent MPC provisions, including, as relevant here, Section 1.10 ("Former Prosecution in Another Jurisdiction: When a Bar.") (*Id.*) Notably, under that provision, double jeopardy attaches not, as under the CPL, when the trial commences, but rather only when "[t]he first prosecution resulted in an *acquittal or in a conviction*." (*Id.* (emphasis added).) The drafters of the CPL could have adopted this MPC formulation, under which a mistrial resulting in neither a conviction nor an acquittal would not pose a bar to a subsequent New York prosecution. That they did not do so creates the inescapable inference that the intention underlying CPL § 40.30 was for double jeopardy protection to extend to prior prosecutions in other jurisdictions that did *not* result in either conviction or acquittal, but which the drafters believed should nonetheless bar a subsequent New York prosecution.[11]

In sum, the only avenue to re-prosecution potentially remaining open with respect to the conduct underlying the Hung Counts would be a retrial of those same counts in the same court, the United States District Court for the Eastern District of Virginia, pursuant to the same Federal Indictment. A new trial on the Federal Indictment is not sought here by the People, nor could it be. Rather, the Federal Proceeding has run its course—resulting in sentencing and a final judgment dismissing the Hung Counts. At that point—the conclusion of the Federal Proceeding—the jeopardy which previously attached when the jury was sworn terminated, and Mr. Manafort cannot again be put in jeopardy in violation of CPL § 40.20. Indeed, even assuming *arguendo* that it were

[11] Even if the statute's text and legislative history were indeterminate, where "'two constructions of a criminal statute are plausible, the one more favorable to the defendant should be adopted in accordance with the rule of lenity.'" *People v. Golb*, 23 N.Y.3d 455, 468 (2014) (citation omitted). That rule applies not only to statutes defining substantive criminal offenses, but also to provisions addressing other aspects of criminal justice, such as the statutory double jeopardy issue presented here. *See People v. Thompson*, 26 N.Y.3d 678, 687-88 (2016) (applying rule of lenity to construction of look-back period in the second violent felony offender statute).

possible for the *Federal Government* to retry Mr. Manafort on the Hung Counts (notwithstanding that the judgment indicated that they were dismissed "with prejudice," Ex. I, EDVA Dkt. No. 326 at 2), the Legislature, in enacting CPL § 40.30, made the policy judgment that a hung jury in a prior federal proceeding should not expose the defendant to further prosecution in New York, and instead the decision whether to pursue a retrial should reside exclusively with the Federal Government. The clear statutory text, as well as the statute's legislative history, admits of no other reading.

B. Each Of The Counts In The New York Indictment Is Based On An "Act" Or "Transaction" That Served As A Basis For The Prior Federal Proceeding

Under New York's statutory double jeopardy law, "the initial inquiry is whether a later prosecution of a defendant and a prior prosecution are based upon 'the same act or criminal transaction,'" as defined in CPL § 40.10. *Abbamonte*, 43 N.Y.2d at 82.

As used in the statute, "act" is undefined, and thus has its ordinary meaning. The term "criminal transaction," however, is given a more precise definition: "'Criminal transaction' means conduct which establishes at least one offense, and which is comprised of two or more or a group of acts either (a) so closely related and connected in point of time and circumstance of commission as to constitute a single criminal incident, or (b) so closely related in criminal purpose or objective as to constitute elements or integral parts of a single criminal venture." CPL § 40.10(2). An "offense," in turn, "is committed whenever any conduct is performed which violates a statutory provision defining an offense." CPL § 40.10(1).

Here, the alleged conduct underlying the NY Indictment consists of the same acts and transactions that served as the basis for the Federal Proceeding, and thus the present prosecution is barred by New York's double jeopardy statute, absent a showing by the People that one of the statutory exceptions applies.

1. The Conduct Allegedly Constituting The Offenses Charged In The New York Indictment And The Federal Indictment Are So Closely Related That They Constitute A Single "Act," "Criminal Incident" Or "Criminal Venture"

The factual overlap between the Federal Proceeding and the NY Indictment is extensive—if not total. As set out above, each of the counts in the NY Indictment charges Mr. Manafort with an offense premised on the same acts and transactions underlying the Federal Proceeding. In particular, each of the NY Indictment's sixteen counts is directly traceable to a handful of loans or loan applications concerning the same three banks (Citizens Bank, FSB, and Banc of California) and four properties (the Howard Street, Union Street, Jobs Lane, and Nottingham Avenue Properties) during the same time period (2015-2017) that served as the basis for the Federal Charges.

The allegedly fraudulent acts undertaken by Mr. Manafort in connection with each such loan constitute the same "act" as previously prosecuted, within the meaning of the double jeopardy statute. Alternatively, to the extent any of the "acts" on which the NY Indictment is based were not charged in the Federal Proceeding, the underlying facts in the two cases are nonetheless so closely related as to constitute the same "criminal incident" or "criminal venture," and thus the statute bars an additional prosecution related to those transactions. *See*, *e.g.*, *People v. Claud*, 76 N.Y.2d 951, 953 (1990) ("[D]efendant's careless operation of the boat constitutes the same act giving rise to both offenses . . . and indeed comprises the same transaction."); *People v. Lennon*, 80 A.D.2d 672, 673 (3d Dep't 1981) ("[T]he conduct constituting the possessory crime and the larceny was 'so closely related in criminal purpose or objective as to constitute elements or integral parts of a single criminal venture.'").

While not required for statutory double jeopardy to apply, the fact that "[t]he same evidence of defendant's activities" would almost certainly be used in "both trials" further demonstrates that

the conduct at issue constituted a single act or transaction. *Grant*, 116 A.D.2d at 774. As noted above, it is evident from the alleged overt acts in furtherance of the conspiracy counts (Counts 5, 6, and 7), as well as the documents cited by the People as the basis for the business records counts (Counts 8-15), that the People's evidence would overlap substantially—if not entirely—with that presented in the Federal Proceeding.

2. The Conduct Allegedly Constituting The Offenses Charged In The New York Indictment Could Have Been Alleged In Support Of The Prior Federal Conspiracy Counts

Even if both prosecutions were not based on the exact same acts and transactions—which they are—the statutory double jeopardy bar nonetheless applies because any such acts or transactions at issue in the present prosecution *could have been* pleaded or introduced as evidence in support of the conspiracy counts in the Federal Indictment.

The Court of Appeals has held that "conspiracy is an embracive crime," and accordingly "[i]t embraces all of the overt acts and substantive crimes in the persisting criminal enterprise." *Abbamonte*, 43 N.Y.2d at 85. "Hence," in the double jeopardy context, "it is sophistic to exclude some or include others depending upon whether some or others are pleaded, proven, not pleaded, or not proven" in the prior proceeding. *Id.* To the contrary, even where an "offense was not, but *could have been*, alleged and proved in the prior Federal conspiracy prosecution, subsequent State prosecution offends the statutory mandate" against double jeopardy. *Id.* at 79 (emphasis added). Thus, New York's bar on multiple prosecutions does not "hinge" on any particular "procedural or pleading detail, manipulatable at the option of the prosecutor," such as the specific overt acts alleged in support of a conspiracy, or the evidence selected by the prosecutor for introduction at trial. *Id.* at 83.

Here, while the NY Indictment gives no reason to think that anything in the People's case-in-chief against Mr. Manafort would introduce a new act or transaction not previously addressed

during the Federal Proceeding, to the extent anything in the NY Indictment does not directly correspond to the facts underlying the Federal Proceeding, it is clear that these "new" facts at the very least *could have been* alleged or introduced as evidence in support of the prior federal conspiracy counts. In particular, Counts 24s, 26s, 28s, 29s, and 31s of the Federal Indictment charged Mr. Manafort with wide-ranging conspiracies related to each of the loan applications at issue in this case during the same time period at issue here. (*See* Ex. D, Federal Indictment ¶¶ 58 (conspiracy between December 2015 and March 2016 to defraud Citizens Bank), 62 (conspiracy between March 2016 and May 2016 to defraud Banc of California), 66 (conspiracy between March 2016 and August 2016 to defraud Citizens Bank), 68 (conspiracy between April 2016 and November 2016 to defraud FSB), 72 (conspiracy between April 2016 and January 2017 to defraud FSB).)

As in *Abbamonte*, therefore, "[t]he determinative point with regard to the counts [in the present indictment] is that each of them could have been set forth in the Federal conspiracy count," regardless of whether the Federal Government chose to include them. *People v. Helmsley*, 170 A.D.2d 209, 211, 213 (1st Dep't 1991) (double jeopardy applied where "[a]n examination of the Federal conspiracy count reveals that the objects of that conspiracy, the means of the conspiracy, and the overt acts encompass or could have encompassed everything charged against the defendant in the State indictment, including . . . creation of false documents, books and records"); *see also People v. Yank*, 305 A.D.2d 1001, 1002 (4th Dep't 2003) (statutory double jeopardy applied where "[e]vidence of defendant's possession of three kilograms of cocaine . . . could have been received as proof of the conspiracy charged in the federal indictment").

C. None Of The Nine Enumerated Exceptions To Statutory Double Jeopardy Applies

Where, as here, "the charges in the two indictments are based on the same criminal transaction, the next question is whether the exceptions of CPL 40.20 (2) . . . nevertheless permit the State prosecution." *Helmsley*, 170 A.D.2d at 211.

"Each of the statutory exceptions to the general rule proscribing successive prosecution for offenses arising from the same transaction was drafted to address a particular situation in which the statutory prohibition was deemed overly broad." *Kaplan v. Ritter*, 71 N.Y.2d 222, 229 (1987). As such, the Court of Appeals has repeatedly emphasized that each exception is to be strictly construed in accordance with its terms. *See id.* at 229-30 (rejecting interpretation of the "different victim" exception in CPL § 40.20(2)(e) that would permit "the circumvention of the more demanding requirements of CPL 40.20(2)(b)," the "different evils" exception); *Schmidt*, 74 N.Y.2d at 520 (holding that "subdivision [g] by its language is limited to prior prosecutions in another 'state,'" and thus does not apply where the "prior prosecution occurred in Federal court").

Here, none of the limited statutory exceptions applies.

1. Exception (a) Does Not Apply Because The Offenses As Defined Do Not Have Substantially Different Elements And The Acts Establishing One Offense Are Not In The Main Clearly Distinguishable From Those Establishing The Other

The first statutory exception provides that a second prosecution may be pursued where two independent requirements are both satisfied: "The offenses as defined have substantially different elements and the acts establishing one offense are in the main clearly distinguishable from those establishing the other." CPL § 40.20(2)(a).

As is clear from the statute's text, for this exception to apply, the differences in both the elements of the offenses and the acts allegedly establishing those elements must be considerable: "the offenses must have *substantially* different elements, *and* the acts establishing one offense

must be *clearly* distinguishable from those establishing the other." *Helmsley*, 170 A.D.2d at 211. Thus, successive prosecutions are not allowed merely because the offenses are "technically distinguishable in minor aspects." *Id.* at 211-12.

a) The Offenses As Defined Do Not Have Substantially Different Elements

None of the offenses charged in the NY Indictment—Residential Mortgage Fraud in the First Degree (and Attempt and Conspiracy to commit the same), Falsifying Business Records in the First Degree, and Scheme to Defraud in the First Degree—has "substantially different" elements from the relevant Bank Fraud and Conspiracy counts charged in the Federal Indictment.

The relevant counts from the Federal Indictment charged Mr. Manafort with Bank Fraud under 18 U.S.C. § 1344 and Bank Fraud Conspiracy under 18 U.S.C. § 1349. Bank Fraud is committed by "[w]hoever 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. The Conspiracy count, in turn, requires that the defendant "conspires to commit any offense under this chapter," including Bank Fraud. 18 U.S.C. § 1349.

Thus, as summarized in the Government's proposed jury instructions in the Federal Proceeding (Ex. E, EDVA Dkt. 88) (the "Federal Instructions"), which the District Court adopted in relevant part (*see* Ex, F, EDVA Tr. 2559-2561, 2568-2569), Bank Fraud consists of four elements:

> <u>One:</u> The defendant knowingly executed or attempted to execute a scheme or artifice to defraud a financial institution, or a scheme or artifice to obtain the money, funds or other property owned by or under the control of a financial institution by means of material false or fraudulent pretenses, representations or promises . . . ;

> Two: The false or fraudulent pretenses, representations, or promises employed in the scheme were material;
>
> Three: The defendant acted with the intent to defraud; and
>
> Four: The financial institution was then chartered or insured by the United States.

(Ex. E, Federal Instructions at 102.) And to show Bank Fraud Conspiracy, three elements are required:

> First: That the conspiracy, agreement, or understanding to commit bank fraud, as charged in the superseding indictment, was formed, reached, or entered into by two or more persons;
>
> Second: That at some time during the existence or life of the conspiracy, agreement, or understanding, the defendant knew the purpose of the agreement or understanding; and
>
> Third: That with knowledge of the purpose of the conspiracy, agreement, or understanding, the defendant then deliberately joined the conspiracy, agreement, or understanding.

(*Id.* at 89.)

As demonstrated below, the elements of these two federal offenses overlap substantially, if not entirely, with the elements of each of the state offenses charged in the NY Indictment.

Residential Mortgage Fraud in the First Degree. "A person is guilty of residential mortgage fraud in the first degree when he or she commits residential mortgage fraud and thereby receives proceeds or any other funds in the aggregate in excess of one million dollars." Penal Law § 187.25. "Residential mortgage fraud," in turn, "is committed by a person who":

> knowingly and with intent to defraud, presents, causes to be presented, or prepares with knowledge or belief that it will be used in soliciting an applicant for, applying for, underwriting or closing a residential mortgage loan, or filing with a county clerk of any county in the state arising out of and related to the closing of a residential mortgage loan, any written statement which: (a) contains materially false information concerning any fact material thereto; or (b) conceals, for the purpose of misleading, information concerning any fact material thereto.

Penal Law § 187.00(4). While the statute covers a range of conduct, including "soliciting" an applicant for a mortgage loan and making a filing with a county clerk in connection with such a

loan, the NY Indictment makes clear that Mr. Manafort is charged with the portion of the statute prohibiting fraud in connection with "applying for, underwriting or closing a residential mortgage loan." *Id.* (*See*, *e.g.*, Ex. A, NY Indictment Count 1 (alleging that Mr. Manafort committed fraud in connection with "applying for, underwriting and closing a residential mortgage loan").)

Thus, aside from technical differences in the respective jurisdictional or offense-level elements for the state and federal offenses, the substantive requirements—including the required conduct, materiality, and *mens rea*—are virtually identical, as summarized in the following chart:

	Previously Charged Offense **Bank Fraud**	**Presently Charged Offense** **Residential Mortgage Fraud in the First Degree**
Conduct	"The defendant . . . executed or attempted to execute a scheme or artifice to defraud a financial institution, or a scheme or artifice to obtain the money, funds or other property owned by or under the control of a financial institution by means of material false or fraudulent pretenses, representations or promises"	"presents, causes to be presented, or prepares with knowledge or belief that it will be used in . . . applying for, underwriting or closing a residential mortgage loan, . . . any written statement which: (a) contains materially false information concerning any fact material thereto; or (b) conceals, for the purpose of misleading, information concerning any fact material thereto"
Materiality	"The false or fraudulent pretenses, representations, or promises employed in the scheme were material"	"(a) contains materially false information concerning any fact material thereto; or (b) conceals, for the purpose of misleading, information concerning any fact material thereto"
Mental State	"knowingly" and "with the intent to defraud"	"knowingly and with intent to defraud"

In short, both the state and federal offenses require the prosecution to prove that the defendant, acting with fraudulent intent, knowingly misrepresented or concealed material information in order to receive funds from a bank. The fact that the federal offense includes the jurisdictional requirement that the bank was federally insured or chartered (or, as explained below, was a mortgage lender, even if not federally chartered or insured), or that the New York offense

requires, for purposes of establishing the offense in the first degree, that the proceeds received were in excess of one million dollars, does not begin to demonstrate that "[t]he offenses as defined have *substantially* different elements." CPL § 40.20(2)(a) (emphasis added). *See*, *e.g.*, *People v. Alba*, 43 Misc. 3d 878, 883 (Sup. Ct. Bronx Cty. 2014) ("despite the jurisdictional interstate commerce requirement for wire fraud, that crime and scheme to defraud have substantially similar elements") (citing *People v. Lo Cicero*, 14 N.Y.2d 374, 379 (1964) ("The additional element of obstruction of interstate commerce, necessarily present in the Federal indictment, does not diminish the substantial identity of the two charges.")). At best, these technical differences show that the offenses are not *literally* identical—a requirement rendered obsolete by New York's transactional approach to double jeopardy.

Nor does the fact that the state offense is specific to the context of residential mortgages render the offenses "substantially" different. To the contrary, even were such a difference material, the definition of "financial institution" employed in the bank fraud statute expressly encompasses "*a mortgage lending business . . . or any person or entity that makes in whole or in part a federally related mortgage loan*." (Ex. E, Federal Instructions at 103.) *See also* 18 U.S.C. § 20(10) (defining Financial Institution). Thus, as discussed in greater detail below, the federal bank fraud offense encompasses mortgage lenders, whether or not federally chartered or insured.

Attempt to Commit the Crime of Residential Mortgage Fraud in the First Degree. The NY Indictment's attempt count fairs no better. "A person is guilty of an attempt to commit a crime when, with intent to commit a crime, he engages in conduct which tends to effect the commission of such crime." Penal Law § 110.00. As interpreted, the statute also requires that the "defendant committed an act or acts that carried the project forward within dangerous proximity to the criminal end to be attained." *People v. Warren*, 66 N.Y.2d 831, 832 (1985) (citations omitted).

While the attempt count requires the People to prove that the defendant acted "with intent to commit a crime," the prior federal offense of Bank Fraud already required that Mr. Manafort act "knowingly" and with "fraudulent intent." Indeed, as is evident from its first element, the federal Bank Fraud offense by its terms encompasses both the completed offense *and* any inchoate "attempt" like the one charged in the NY Indictment, covering any instance in which the "defendant knowingly executed *or attempted to execute* a scheme or artifice to defraud a financial institution." (Ex. E, Federal Instructions at 102 (emphasis added)); *see also United States v. Stavroulakis*, 952 F.2d 686, 694 (2d Cir. 1992) ("[T]he bank need not actually be victimized; the statute makes an individual criminally culpable for devising and executing or *attempting* to execute such a scheme with the intent to victimize the bank.").

Conspiracy in the Fourth Degree. "A person is guilty of conspiracy in the fourth degree when, with intent that conduct constituting . . . a class B or class C felony be performed, he or she agrees with one or more persons to engage in or cause the performance of such conduct." Penal Law § 105.10(1). Additionally, "[a] person shall not be convicted of conspiracy unless an overt act is alleged and proved to have been committed by one of the conspirators in furtherance of the conspiracy." Penal Law § 105.20.

Here, too, the elements of the state and federal conspiracy offenses are virtually identical, both requiring the prosecution to prove that the defendant entered into an agreement with at least one other person to commit a crime. *Compare* William C. Donnino, Practice Commentary to Penal Law § 105.00 (McKinney 2009 & Supp. 2019) ("The elements of the basic conspiracy offense are: first, the specific intent that a crime be performed; and second, an agreement with another person to engage in or cause that crime to be performed."), *with United States v. McGinn*, 787 F.3d 116, 124 (2d Cir. 2015) ("To prove conspiracy, the government must demonstrate the existence of the conspiracy and the defendant's knowing participation.").

To the extent there are differences, they are at best technical, such as the requirement of an overt act,[12] or the requirement, to prove conspiracy in the fourth degree, that the agreement pertain to a class B or C felony—differences that are insufficient as a matter of law to render the offenses "substantially different." *See Lo Cicero*, 14 N.Y.2d at 379; *Alba*, 43 Misc. 3d at 883.

Falsifying Business Records in the First Degree. "A person is guilty of falsifying business records in the first degree when he commits the crime of falsifying business records in the second degree, and when his intent to defraud includes an intent to commit another crime or to aid or conceal the commission thereof." Penal Law § 175.10. Falsifying Business Records in the Second Degree, in turn, is committed when a person, "with intent to defraud" commits one of four specified acts or omissions, including, as charged here, when he "[m]akes or causes a false entry in the business records of an enterprise." Penal Law § 175.05(1).

Again, the elements of the charged state offense overlap substantially with the prior federal offense of Bank Fraud—charging the defendant with having misstated or concealed a material fact as part of a scheme to defraud. While the Penal Law's definition of falsifying business records focuses on the falsification of a document, as opposed to the broader purpose of furthering a scheme to defraud—a difference that would not render the offenses "substantially" different in any case—that distinction is even less relevant here, as the People have charged Mr. Manafort with Falsifying Business Records in the First Degree, an offense that additionally requires that the defendant's "intent to defraud includes an intent to commit *another crime* or to aid or conceal the commission thereof." Penal Law § 175.10 (emphasis added). In other words, the New York Charges alleging specific instances of falsifying business records are inextricably tied to the People's larger theory that Mr. Manafort committed these acts in furtherance of his scheme to

[12] Courts have held that there is no "overt act" requirement under 18 U.S.C. § 1349. *See United States v. Roy*, 783 F.3d 418, 421 (2d Cir. 2015); *United States v. Chinasa*, 489 F. App'x 682, 685 (4th Cir. 2012).

defraud several financial institutions in connection with loan applications—the very same alleged fraud that was prosecuted in the Federal Proceeding.

Scheme to Defraud in the First Degree. "A person is guilty of a scheme to defraud in the first degree when he or she . . . engages in a scheme constituting a systematic ongoing course of conduct with intent to defraud more than one person or to obtain property from more than one person by false or fraudulent pretenses, representations or promises, and so obtains property with a value in excess of one thousand dollars from one or more such persons." Penal Law § 190.65(1)(b); *see also id.* § 190.65(2) (requiring proof of "the identity of at least one person from whom the defendant so obtained property" but not "of any other intended victim").

Once again, the elements of the state offense of scheme to defraud overlap substantially with the federal offense of bank fraud. As explained in the Federal Instructions, the required "scheme or artifice to defraud" or "scheme or artifice for obtaining money or property" under the bank fraud statute refer to "any deliberate plan of action or course of conduct by which someone intends to deceive or cheat another and by which someone intends to deprive another of something of value." (Ex. E, Federal Instructions at 104 (citing *Shaw v. United States*, 137 S. Ct. 462, 469 (2016)).) These broad federal formulations of a fraudulent scheme clearly encompass the "scheme to defraud" in Penal Law § 190.65(1)(b).

Indeed, both New York's scheme to defraud and federal bank fraud are patterned on the same federal statute—the federal mail and wire fraud offenses. "Congress modeled the bank fraud statute upon the mail and wire fraud statutes, indicating that it wanted the bank fraud statute to be just as broad as the mail and wire fraud statutes." *Stavroulakis*, 952 F.2d at 694 ("[T]he bank fraud statute should be read expansively and, where it dovetails with the mail and wire fraud statutes, we look to precedents arising under those statutes to inform our interpretation of such amorphous phrases as 'scheme to defraud.'"). Similarly, New York's scheme to defraud offense was patterned

on the federal mail and wire fraud statute. *See People v. First Meridian Planning Corp.*, 86 N.Y.2d 608, 616 (1995) (because "the Legislature . . . modeled the [scheme to defraud] offenses upon the Federal mail fraud statute," "we may look to Federal precedents applying similar statutory language"); *People v. Taylor*, 304 A.D.2d 434, 435 (1st Dep't 2003) ("The scheme to defraud statute . . . was derived from and patterned after the federal mail fraud statute.").

Alba, 43 Misc. 3d 878, is instructive. There, the court compared the elements of scheme to defraud with federal wire fraud, concluding that despite various differences between the statutes, "[t]he 'scheme constituting a systematic ongoing course of conduct' required for scheme to defraud is essentially the 'scheme or artifice' required for both wire fraud and mail fraud." *Id.* at 882. The court rejected the argument that statutory double jeopardy protection was rendered ineffective by the wording of the scheme to defraud statute, which, unlike its analogues under federal law, requires a "systematic ongoing course of conduct," holding instead that the state statute "'codifies what is contained in the concept "scheme to defraud" under the federal statute.'" *Id.* (citation omitted). The court similarly rejected arguments that the statutes differed materially based on the wording used to describe the fraudulent intent requirement, the fact that the New York statute requires that property be obtained from at least one victim, or the federal jurisdictional requirement that the defendant make use of the wires. *Id.* at 882-83. The same reasoning applies here with respect to the federal bank fraud statute.

b) The Acts Establishing One Offense Are Not In The Main Clearly Distinguishable From Those Establishing The Other

Even if the elements of any of the New York Charges were substantially different from those required in the Federal Proceeding—which is not the case—the first statutory exception also requires that the acts establishing the presently charged offenses are "in the main clearly distinguishable" from those establishing the previously charged offenses. *See Claud*, 76 N.Y.2d

at 953 (exception (a) inapplicable where statutory elements were substantially different but "defendant's careless operation of the boat constitutes the same act giving rise to both offenses, and indeed comprises the same transaction" (citations omitted)).

Once again, this is not a close case. As demonstrated above, each of the factual predicates underlying the NY Indictment corresponds directly—indeed, is *identical* to—the alleged conduct underlying the prior Federal Proceeding. *See Fernandez*, 43 A.D.2d at 90-91 (exception inapplicable where allegations "state acts which are almost identical"). At best, the People may be able to show that the alleged acts are "technically distinguishable in minor aspects," which is insufficient as a matter of law. *Helmsley*, 170 A.D.2d at 211-12 (exception inapplicable where "the *acts* establishing the State offenses of conspiracy, falsification of business records, offering false instruments for filing, and schemes to defraud can hardly be said to be *clearly* distinguishable"); *see also Abraham*, 37 N.Y.2d at 567 ("[T]he same possession of the same drugs was among the acts charged and proved and for which a conviction was had."); *Schmidt*, 74 N.Y.2d at 522 (prior federal indictment "charges, as one of the overt acts of the conspiracy," "the same theft . . . that constitutes the State larceny charges"); *People v. Naqvi*, 1995 WL 550472, at *5 (Sup. Ct. N.Y. Cty. Aug. 9, 1995) ("[T]he alleged fraudulent acts related to the [state] Ponzi scheme charges are [also] alleged in the federal indictments (*e.g.*, creation of false financial statements, and concealment of fraudulent loans).").

2. Exception (b) Does Not Apply Because The Statutory Provisions Defining The Offenses Are Not Designed To Prevent Very Different Kinds Of Harm Or Evil

The second statutory exception applies where "[e]ach of the offenses as defined contains an element which is not an element of the other, and the statutory provisions defining such offenses are designed to prevent very different kinds of harm or evil." CPL § 40.20(2)(b).

The foregoing comparison of the New York and Federal Charges shows that their elements are substantially similar, and thus the first requirement of CPL § 40.20(2)(b) is not met. But even if certain of the New York Charges could satisfy the elements-based requirement of exception (b), the exception by its terms "requires as an *additional* condition that the purposes underlying each of the offenses be directed toward *materially* different evils." *Fernandez*, 43 A.D.2d at 91 (emphasis added). The People cannot make this showing with respect to any of the charges here.

"[P]aragraph '[b]' does not permit separate prosecutions where one offense is greater or lesser than another. Rather, it requires that the offenses be 'designed to prevent *very different kinds of harm or evil'*." *Abraham*, 37 N.Y.2d at 567 (exception inapplicable where, "[c]learly, the Federal drug conspiracy laws and the State's drug possession laws are aimed at the same evil—narcotics trafficking"); *see also Helmsley*, 170 A.D.2d at 212 ("There is nothing different *in kind* between the harms or evils sought to be prevented in the Federal and State [tax] statutes; much less can it be said that the harms or evils sought to be prevented are *very* different in kind.").

Moreover, as the Court of Appeals has repeatedly held, the "different evils" exception does not apply merely because two statutes address similar evils in different ways, or using different words or formulations. In *Schmidt*, for example, the Court of Appeals found the exception inapplicable because "[t]he Federal crime of interstate transportation of stolen property and the State crime of larceny are both designed to punish thieves and to protect property owners from thefts." 74 N.Y.2d at 522-23. As the Court explained:

> In making the interstate transportation of stolen property unlawful, Congress intended to aid States in detecting and punishing criminals who used the channels of interstate commerce "to make a successful getaway and thus make the state's detecting and punitive processes impotent." By making it more difficult for thieves and their fences to escape with or trade in stolen property, the Federal statute grants greater governmental protection to property owners than they would otherwise enjoy. Similarly, the larceny statute is intended to punish thieves and to protect the interests of property owners. Because the Federal and State offenses at issue here

> are designed to prevent the same evils, the instant case falls outside the exception of CPL 40.20 (2) (b).

Id. (citations omitted).

The Court of Appeals and Appellate Divisions have reached the same result in a variety of other contexts, each time rejecting the notion that differences in the precise contours of the respective statutes altered the fundamental harm or evil which they sought to address. *See*, *e.g.*, *Claud*, 76 N.Y.2d at 953 (exception inapplicable where, "[n]otwithstanding that the Navigation Law refers to the prevention of serious physical injury and the Town Code commands the operation of a boat in a careful and prudent manner, both provisions are designed to assure the safe operation of boats so as to protect human life and avoid injury"); *Wiley*, 52 N.Y.2d at 414-15 (exception inapplicable where "[c]learly . . . both the Maryland prosecution, based though it was on that State's conspiracy statute, and the present prosecution for murder [under] this State's laws were directed at a like goal[:] punishment for the unlawful taking of a particular human life").[13]

Here, the statutory text, case law, and legislative history concerning the offenses demonstrate conclusively that the statutes are not directed at "very different kinds of harm or evil." CPL § 40.20(2)(b). The federal bank fraud statute was enacted to allow federal prosecution of those who commit fraud against banks—the same "harm or evil" at issue in each of the New York Charges. As the legislative history explains, "[t]he offense of bank fraud . . . is designed to provide an effective vehicle for the prosecution of *frauds in which the victims are financial institutions* that are federally created, controlled or insured." Comprehensive Crime Control Act of 1983, S. Rep.

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[13] *See also Fernandez*, 43 A.D.2d at 91 (exception inapplicable where "the evil to be inhibited – the prevalence of violence and public disturbance – is common to" assault, resisting arrest, and disorderly conduct); *Lennon*, 80 A.D.2d at 673 ("While larceny is aimed specifically at the thief and criminal possession of stolen property guards against transfers or 'fencing', the harms are not 'very different'."); *Wood*, 260 A.D.2d at 109 ("The Family Court and City Court orders of protection were designed to prevent precisely the same 'kinds of harm or evil,' to wit, harassment of defendant's ex-wife by prohibited contact with her as well as vindicating the authority of the court that issued the order."); *Northrup v. Relin*, 197 A.D.2d 228, 232-33 (4th Dep't 1994) (exception inapplicable notwithstanding the federal statute's focus on "[t]he effect upon the good order and discipline of the military").

No. 98-225, at 377 (1983), 1984 U.S.C.C.A.N. 3182, 3517 (emphasis added) (legislation "would assure a basis for federal prosecution of those who victimize these banks through fraudulent schemes"). Additionally, the legislative purpose was expanded in the wake of the 2008 financial crisis to include frauds on mortgage lenders, regardless of whether federally chartered or insured. *See United States v. Bouchard*, 828 F.3d 116, 124 (2d Cir. 2016) ("Prior to 2009, the term 'financial institution' was defined to include insured depository institutions of the FDIC, but not mortgage lenders . . . . The crisis prompted Congress in 2009 to amend . . . § 20 (which defines financial institutions for purposes of § 1344) . . . to cover mortgage lending institutions specifically.") (citing Fraud Enforcement and Recovery Act (FERA) of 2009, Pub. L. No. 111-21, 123 Stat. 1617 (2009)).

As set out below, the harm or evil addressed by each of the New York Charges is substantially similar; certainly none was "designed to prevent very different kinds of harm or evil." CPL § 40.20(2)(b).

Residential Mortgage Fraud and Attempt to Commit Residential Mortgage Fraud. As noted, the "harm or evil" addressed by the provisions of New York's Residential Mortgage Fraud statute charged here is the same—harm to the financial institutions victimized by such frauds.[14]

The People may point to the context in which the New York statute was enacted—the 2008 financial crisis—in an effort to argue that, because of this context, it necessarily addresses a different harm. But the People's argument would proceed from a false premise—that the federal bank fraud statute does not concern itself with "residential mortgage fraud." To the contrary, the federal bank fraud statute is regularly employed by federal prosecutors to address alleged

[14] The Court of Appeals has held that the "harm or evil" addressed by an attempt under Penal Law § 110.00 is equivalent to that of the "substantive" offense that the defendant is "charged with attempting to commit." *People v. Bryant*, 92 N.Y.2d 216, 229 (1998).

residential mortgage fraud, as in the Federal Proceeding at issue here.[15] Moreover, as already noted, Congress amended the federal criminal code in 2009 to provide that the bank fraud statute would extend to "a mortgage lending business (as defined in section 27 of this title) or any person or entity that makes in whole or in part a federally related mortgage loan as defined in section 3 of the Real Estate Settlement Procedures Act of 1974." 18 U.S.C. § 20(10); *see also* S. Rep. No. 111-10, at 3 (2009), 2009 U.S.C.C.A.N. 430, 432 ("[T]he bill amends the definition of 'financial institution' in the criminal code (18 U.S.C. [§] 20) in order to extend Federal fraud laws to mortgage lending businesses that are not directly regulated or insured by the Federal Government."); *id.* at 6-7, 2009 U.S.C.C.A.N. at 434-35 (discussing application to bank fraud statute). Thus, any suggestion that the purpose of the federal bank fraud statute is narrowly restricted to the federal government's interest as an insurer of financial institutions, or that the broad bank fraud statute somehow does not encompass the governmental interest in prosecuting mortgage fraud, must be rejected, as must any argument that the amended bank fraud statute is not intended to address the 2008 financial crisis.

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[15] For example, a search of filings in the Southern District of New York since 2008 reveals more than a dozen federal bank fraud indictments premised at least in part on alleged residential mortgage fraud. *See, e.g.*, *United States v. Kaplan*, No. S6 06 Cr. 1179 (RJH) (S.D.N.Y. Jan. 13, 2009) (alleging defendants "submitted and caused to be submitted false employment and financial information and false real estate appraisals" "in order to procure home mortgage loans"); *United States. v. Howell*, No. 09 Cr. 00145 (S.D.N.Y. Feb. 17, 2009) (alleging defendants submitted "false residency, employment and financial information" to financial institutions "to procure home mortgage loans"); *see also United States v. Meyers*, No. 09 Cr. 523 (S.D.N.Y. May 21, 2009); *United States v. Larochelle*, No. 09 Cr. 948 (S.D.N.Y. Oct. 5, 2009); *United States v. Bills*, No. S1 09 Cr. 507 (KMW) (S.D.N.Y. Oct. 13, 2009); *United States v. Reskakis*, No. 09 Cr. 975 (S.D.N.Y. Oct. 13, 2009); *United States v. Persaud*, No. S1 09 Cr. 958 (S.D.N.Y. Oct. 15, 2009); *United States v. Williams*, No. 10 Cr. 530 (S.D.N.Y. June 15, 2010); *United States v. Dente*, No. 1:09-cr-01188-LTS (S.D.N.Y. June 17, 2010); *United States v. Ramnauth*, No. S3 09 Cr. 958 (SAS) (S.D.N.Y. July 26, 2010); *United States v. Johnson*, No. 10 Cr. 973 (S.D.N.Y. Oct. 8, 2010); *United States v. Richmond*, No. S1 10 Cr. 243 (VM) (S.D.N.Y. Mar. 22, 2011); *United States v. Abakporo*, No. S3 12 Cr. 340 (SAS) (S.D.N.Y. May 2, 2013); *United States v. Hossain*, No. S3 13 Cr. 908 (AJN) (S.D.N.Y. Aug. 11, 2014).

Moreover, while the legislative history accompanying New York's 2008 legislation indicates that its drafters sought to "help prosecutors crack down on a wide variety of illegal activities which have contributed to many mortgage foreclosures," N.Y. B. Jacket, 2008 S.B. 8143, Ch. 472, it is equally apparent that the Legislature viewed the evil to be addressed as the perennial problem of fraud—addressable under existing criminal law but, in the Legislature's view, an area in which prosecutors' task would be facilitated by a simplified statutory regime with the potential for stiffer penalties. As the legislative history explains:

> There currently is no separate Penal Law provision expressly prohibiting residential mortgage fraud, and thus *prosecutors must bring such cases under different theories, such as scheme to defraud and larceny*. This bill therefore seeks to *simplify* such prosecutions by explicitly defining and criminalizing the act of residential mortgage fraud.

Id. (emphasis added); *see also id.* (noting "prosecutors must typically rely on the larceny and scheme to defraud statutes to prosecute such cases"). In addition to streamlining the prosecution of such frauds, the bill's supporters also advocated for the imposition of harsher penalties than were available under then-current law. *See id.* ("Under the bill, the magnitude of the fraud may be aggregated and stiffer penalties may be sought by prosecutors. In addition, while under the scheme to defraud theory the most a person may be charged with is a Class E felony, this bill would allow a person guilty of residential mortgage fraud in excess of $1 million to be charged with a Class B felony."). Thus, far from targeting some novel form of wrongdoing growing out of the financial crisis, the 2008 legislation sought to streamline prosecution of a particular species of fraud and provide for enhanced penalties.

This conclusion is further reinforced by the text of the particular provisions under which the People have charged Mr. Manafort. As noted above, while the New York statute covers a potentially wide range of conduct, including "soliciting" an applicant for a mortgage loan and making a filing with a county clerk in connection with such a loan—actions that would not

necessarily, standing alone, threaten to harm a financial institution—the NY Indictment makes clear that Mr. Manafort is charged with fraud in connection with "*applying for, underwriting or closing* a residential mortgage loan." Penal Law § 187.00(4) (emphasis added). (*See*, *e.g.*, Ex. A, NY Indictment Count 1 (alleging that Mr. Manafort committed fraud in connection with "applying for, underwriting and closing a residential mortgage loan").) In other words, the People have charged Mr. Manafort with defrauding a financial institution in connection with a mortgage loan, not with causing any other harm or evil to any other type of victim or constituency. Thus, the proceeds "in excess of one million dollars" that Mr. Manafort allegedly received through his fraud on these banks, Penal Law § 187.25, by definition, would represent the amount by which the banks, and not any other purported victim, were harmed by the alleged fraud.[16]

The People may seek to rely on *Bryant*, 92 N.Y.2d 216, but that case is not to the contrary. There, defendants, who were previously tried in a federal prosecution for federal bank robbery and related charges, were charged in a later New York indictment arising out of the same incident with attempted murder of a police officer during the course of his official duties (Penal Law §§ 110.00, 125.27(1)(a)(i)) and knowing possession of defaced firearms (Penal Law § 265.02(3)). *Id.* at 225. Distinguishing *Schmidt*, the Court of Appeals held that the "different evils" exception applied because "[t]he purposes of the Federal crimes . . . are 'the protection of financial institutions in which the government has an interest,'" whereas the "State weapons offense committed by defendants . . . was intended to curtail the availability of defaced firearms which prevent the

[16] The fact that the federal bank fraud statute necessarily implicates a federal interest—as would be the case for any federal statute—does not render the harm or evil addressed by that statute materially different from New York's similar anti-fraud provisions. Indeed, were the mere fact of a federal interest sufficient to make the "different evils" exception applicable, the exception would swallow the well-established rule abolishing the "dual sovereigns" doctrine under New York's double jeopardy statute. Clearly, that is not the law. *See Abbamonte*, 43 N.Y.2d at 81 (under CPL § 40.20, "the 'dual sovereignties' doctrine [is] ignored"); *see also Schmidt*, 74 N.Y.2d at 522-23 (federal and state offenses addressed same harm or evil); *Abraham*, 37 N.Y.2d at 567 (same); *Helmsley*, 170 A.D.2d at 212 (same).

identification and detection of crime, and the trafficking of such firearms in the marketplace," and "the substantive homicide offense that defendants were charged with attempting to commit focuses exclusively on the prevention of the killing of police officers." *Id.* at 229. Here, in contrast, while the bank fraud statute implicates the federal interest in the protection of financial institutions, including in connection with the residential mortgage market, the New York Charges address the very same evil posed by frauds upon those same institutions operating in the same market. Thus, here, unlike in *Bryant*, the "prevention of this evil" is "addressed by" and "embraced within, the Federal provisions at issue." *Id.* at 230.

Scheme to Defraud and Falsifying Business Records. A similar analysis applies with respect to Scheme to Defraud and Falsifying Business Records.

The legislative history for Scheme to Defraud indicates that it was intended as a consumer protection statute, drafted in response to "a growing number of frauds perpetrated upon consumers wherein goods and services are promised and paid for but without the expected performance." (Ex. HH, Sponsor's Mem., 1976 N.Y. Leg. Ann. at 35.) As with the 2008 legislation in response to the financial crisis, it appears that the primary intent was not to extend the Penal Law to some previously unaddressed harm or evil, but rather to "provide[] state government enforcement agencies with the necessary stringent mechanisms to eradicate this abuse and thereby provide added protection for the consumer." (*Id.* at 36.)[17] While it is unclear why the People have charged Mr. Manafort under a consumer protection statute "designed to aid in the prosecution of consumer fraud schemes where many victims are bilked mainly of small amounts of money," *People v.*

[17] Among other things, the bill's sponsors noted that "[u]nder existing law, larceny is not a felony unless the value of the property taken exceeds $250 or certain other conditions, not usually applicable in the situations addressed by this proposal, are met. . . . The proposal would, however, make scheming to defraud a felony even if the value of property actually taken does not exceed $250. Moreover, the proposal would require, for a conviction, proving the identity of only one actual victim of the scheme." (Ex. HH, Sponsor's Mem., 1976 N.Y. Leg. Ann. at 36.)

Mikuszewski, 73 N.Y.2d 407, 412 (1989), to the extent the statute has any application here, it would be to address the alleged harm to the only alleged victims of the charged fraud: the financial institutions that made the mortgage loans at issue in the Federal Proceeding.

As the court held in *Alba* with respect to the analogous federal wire fraud statute, these are not "very different kinds of harm or evil," as the federal bank fraud statute and "New York's scheme to defraud are both designed to protect the unwary from schemes to deprive them of their property by fraud." 43 Misc. 3d at 885. Indeed, as noted above, both the federal bank fraud offense at issue in the Federal Proceeding and New York's Scheme to Defraud offense at issue here derive from and are interpreted in light of the federal bank and wire fraud offenses. *See Stavroulakis*, 952 F.2d at 694; *First Meridian*, 86 N.Y.2d at 616; *Taylor*, 304 A.D.2d at 435.

The same is true with respect to Falsifying Business Records. While there is some authority for the proposition that the "the harm sought to be prevented by the Penal Law crime of falsifying business records" is "to prevent a business entity from being defrauded by means of false entries in its books or records," *Sharpton v. Turner*, 170 A.D.2d 43, 48 (3d Dep't 1991), the Court of Appeals has rejected any "insider/outsider distinction" in interpreting this provision, holding instead that "the Legislature, in enacting section 175.00 *et seq.*, intended to protect outsiders, as well as insiders, from fraudulent falsification of an enterprise's records." *People v. Bloomfield*, 6 N.Y.3d 165, 170-71 (2006) ("reject[ing] [the] argument that false documents created and held for the purpose of deceiving outside third parties do not qualify as business records"). Indeed, working a fraud upon outsiders is the *only* possible harm that could be at issue in this case, as the NY Indictment charges Mr. Manafort with having defrauded financial institutions to which he applied for loans, not defrauding his own entities or businesses. Thus, the "harm or evil" purportedly addressed in these eight counts is indistinguishable from the harm or evil addressed by the NY Indictment's other counts.

Conspiracy. Finally, the harm or evil addressed by the conspiracy counts in the NY Indictment is the same as that addressed by the conspiracy counts in the Federal Indictment. Under New York law, "[t]he crime of conspiracy is an offense separate from the crime that is the object of the conspiracy," *People v. McGee*, 49 N.Y.2d 48, 57 (1979), and thus "[t]he evil sought to be prevented by the conspiracy statute" is the agreement itself—*i.e.*, "the deterrence of concerted activity in furtherance of a criminal purpose." *Robinson v. Snyder*, 259 A.D.2d 280, 281 (1st Dep't 1999) ("The essence of the offense is an agreement to cause a specific crime to be committed (Penal Law art 105) together with the actual commission of an overt act by one of the conspirators in furtherance of the conspiracy (Penal Law § 105.20).").

The essence of the federal conspiracy counts at issue here is the same: "A criminal conspiracy is an agreement or a mutual understanding knowingly made or knowingly entered into by at least two people to violate the law by some joint or common plan or course of action." (Ex. E, Federal Instructions at 90.) Thus, under federal law, as under New York law, "[p]articipating in a conspiracy to commit a crime is an entirely separate and distinct charge from the actual violation of the substantive charge which may be the object of the conspiracy," and "[a]ll that [the jury] must find [to convict] is that there was an agreement to commit that offense and that a defendant voluntarily joined the conspiracy." (*Id.* at 99; *see also id.* at 96 ("The government is not required to prove that the parties to or members of the alleged agreement or conspiracy were successful in achieving any or all of the objects of the agreement or conspiracy.").)[18]

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[18] The fact that the New York conspiracy statute requires an overt act does not change the fundamental character of the offense, rendering the "different evils" exception applicable. Rather, "the function of the overt act in a conspiracy prosecution is 'simply to manifest that the conspiracy is at work.'" *People v. Arroyo*, 93 N.Y.2d 990, 992 (1999) (citation omitted); *see also People v. Bongarzone*, 116 A.D.2d 164, 169 (2d Dep't 1986) ("The purpose of the overt act requirement in conspiracy prosecutions is both to provide corroboration of the existence of the agreement to commit a crime, as well as to establish that the conspiracy has gone forward to an extent that it poses a sufficient threat to society to call for penal sanctions."), *aff'd*, 69 N.Y.2d 892 (1987).

3. None of the Other Statutory Exceptions Is Applicable

The remaining statutory exceptions—exceptions (c) through (i)—are even further divorced from the present case, and were clearly intended to address circumstances not presented here. *See* CPL § 40.20(2)(c) (addressing possession vs. use of contraband matter); *id.* § 40.20(2)(d) (delayed death exception); *id.* § 40.20(2)(e) ("different victim" exception); *id.* § 40.20(2)(f) (prior prosecution terminated due to insufficiency of evidence to establish element not required for New York charge); *id.* § 40.20(2)(g) (consummated vs. inchoate offenses); *id.* § 40.20(2)(h) (racketeering offenses); *id.* § 40.20(2)(i) (separate sovereigns pursuing tax offenses).

II. MOTION TO INSPECT AND DISMISS OR REDUCE PURSUANT TO CPL SECTIONS 210.20 AND 210.30

During discovery, the People provided the defendant with a partially redacted copy of the minutes of the Grand Jury testimony in this case. The People declined, however, to provide the defendant with the instructions delivered to the Grand Jury. Because the District Attorney is charged with the responsibility of presenting legally sufficient charges, evidence, and lawful instructions to the Grand Jury, it is hereby moved that the Court order that a transcript of the Grand Jury proceeding—complete with all instructions given to the Grand Jury—be given to the Court and the defendant for the purposes of determining whether the evidence before the Grand Jury was legally sufficient to support the charges, and whether the charges and instructions presented to the Grand Jury were legally sufficient to support the charges and to ensure a fair, untainted presentation. Upon such inspection, it is hereby moved that the Court dismiss the NY Indictment or reduce the relevant counts because of the insufficiency of the Grand Jury evidence and/or improper instructions and charges. In the alternative, it is hereby moved that defendant be permitted to offer argument, both written and oral, pursuant to CPL § 210.30(4)(b). Defendant hereby reserves all motions pursuant to CPL §§ 210.25, 210.35 and 210.40 to the extent that information needed to make such motions is currently unavailable to the defendant.

III. MOTION FOR A BILL OF PARTICULARS

At Mr. Manafort's arraignment, the People provided a "voluntary disclosure form," which included a two-page purported Bill of Particulars. (*See* Ex. B, Bill of Particulars.) After the defendant demanded additional detail with respect to the business records and scheme to defraud counts, the People supplemented this disclosure by identifying the documents at issue for the business records counts. (*See* Ex. C, Aug. 16, 2019 Letter to Court.) The People declined, however, to provide any further clarification or detail with respect to Count 16 (Scheme to Defraud), as to which they have provided only the alleged date range, county, and financial institutions at issue. At a minimum, the People should also be required to identify the loan or loans in connection with which Mr. Manafort allegedly undertook the charged fraudulent scheme.

CPL § 200.95 provides that the Court must grant a Motion for a Bill of Particulars if satisfied that the requested items of information are necessary to enable the defendant adequately to prepare or conduct his defense. Additionally, Article I, Section 6 of the Constitution of New York State and the 6th Amendment of the Constitution of the United States mandate that a defendant has fair notice of the accusations against him. *See People v. Iannone*, 45 N.Y.2d 589, 599 (1978) ("[T]he court must be vigilant in safeguarding the defendant's rights to a bill of particulars and to effective discovery.").

While it appears from the limited information provided to date that the conduct underlying Count 16 of the NY Indictment is the same as the conduct that was at issue in the Federal Proceeding, and thus that the count must be dismissed on statutory double jeopardy grounds, to the extent the People contend that there is different conduct at issue, Mr. Manafort believes that he cannot adequately prepare or conduct his defense without the minimum information outlined above. This information would not require the People to recite matters of evidence, and the information sought is within the knowledge and control of the District Attorney and his witnesses

and cannot be obtained from any other sources. Without such particulars, the defendant would be prejudiced in his defense. Thus, Mr. Manafort respectfully requests an order, pursuant to CPL § 200.95, directing the District Attorney to provide a proper bill of particulars, including the minimum necessary information to provide the defendant with notice of the basis for Count 16.

IV. MOTION TO PRECLUDE THE DISTRICT ATTORNEY FROM CROSS-EXAMINING THE DEFENDANT REGARDING PRIOR BAD ACTS, INCLUDING A PRIOR CRIMINAL RECORD (*SANDOVAL*)

In the event that Mr. Manafort elects to testify at trial and the prosecution may wish to cross-examine him, the defense requires a pre-trial hearing to determine the permissible scope of cross-examination regarding the defendant's prior criminal record and bad acts pursuant to *People v. Sandoval*, 34 N.Y.2d 371 (1974).

The nature and extent of cross-examination is within the sound discretion of the trial court, balancing the probative value of proof and the danger of prejudice to the defendant. *Id*. at 374. Where evidence has no probative value other than to show that a defendant has a criminal disposition or character, such evidence should be excluded. *Id.* at 375; *see also People v. Sharp*, 107 N.Y. 427, 467 (1887) ("[W]hen a man is put upon trial for one offense, he is to be convicted, if at all, by evidence which shows that he is guilty of that offense alone, and . . . proof of his guilt of one or a score of other offenses in his lifetime is wholly excluded."). Further, the Court should consider the risk of discouraging the defendant from taking the stand in his own defense and the resulting impact on his right to a fair trial. *See Sandoval*, 34 N.Y.2d at 378.

Here, the use of the defendant's prior criminal record upon cross-examination will have no probative value as to truth and veracity, will only establish a criminal predisposition or propensity, will accordingly cause prejudice and would thereby inhibit defendant's right to exercise the constitutional right to testify on his own behalf or would deprive him of the same. In particular, the People should be prohibited from cross-examining the defendant with respect to any prior bad

acts or convictions at issue in either the DC Proceeding or the Federal Proceeding that are not directly related to the conduct charged in the NY Indictment.

V. MOTION TO SUPPRESS STATEMENTS (*HUNTLEY*)

The People have served notice, pursuant to CPL § 710.30(1)(a), that evidence of a statement allegedly made by the defendant will be offered as evidence at trial. To the extent the Court denies defendant's motion to dismiss, the defendant reserves the right to move the Court to conduct a hearing, prior to trial, and thereupon suppress from evidence any and all statements allegedly made by the defendant. Defendant reserves the right to contend that any statement must be suppressed as obtained in violation of his constitutional protection against self-incrimination. Additionally, the defendant moves to preclude the People from introducing into evidence any statement made by the defendant which is not clearly and properly noticed pursuant to CPL § 710.30.

VI. MOTION RESERVING DEFENDANT'S RIGHT TO FILE FURTHER MOTIONS

Pursuant to CPL § 255.20(3), the defendant respectfully reserves the right to bring further motions, including but not limited to motions to suppress evidence, statements and/or testimony, should such motions become appropriate. Subject to the resolution of such motions, the defendant reserves the right to move to suppress any other unlawfully seized evidence upon discovery of such items. The defendant further reserves the right to request an adjournment after pretrial hearings and to investigate information developed at said hearing, pursuant to *People v. Peacock*, 31 N.Y.2d 907 (1972). Additionally, while the People have represented that discovery is substantially completed, the defendant respectfully reserves the right to move pursuant to CPL § 240.40(1) for production of any items not yet produced upon discovery of such deficiency.

CONCLUSION

For the foregoing reasons, the defendant respectfully requests that the Court dismiss the indictment and grant all other relief requested in this Omnibus Motion.

Dated: September 4, 2019
New York, New York

Respectfully Submitted,

CADWALADER, WICKERSHAM & TAFT LLP

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