

1 HILARY POTASHNER (Bar No. 167060)
Federal Public Defender
2 Seema Ahmad (Bar No. 270992)
(E-Mail: Seema_Ahmad@fd.org)
3 Ashfaq G. Chowdhury (Bar No. 243763)
(E-Mail: Ron_Chowdhury@fd.org)
4 Deputy Federal Public Defender
321 East 2nd Street
5 Los Angeles, California 90012-4202
Telephone: (213) 894-2854
6 Facsimile: (213) 894-0081

7 Attorneys for Defendant
TEOFIL BRANK

8
9 **UNITED STATES DISTRICT COURT**
10 **CENTRAL DISTRICT OF CALIFORNIA**
11 **WESTERN DIVISION**

12 UNITED STATES OF AMERICA,

13 Plaintiff,

14 v.

15 TEOFIL BRANK,

16 Defendant.

Case No. CR-15-131(A)-JFW

**DEFENDANT BRANK'S MOTION
FOR JUDGMENT OF ACQUITTAL
PURSUANT TO FED. R. CRIM.
PRO. 29; MEMORANDUM OF
POINTS AND AUTHORITIES**

17
18 Defendant, Teofil Brank, by and through his counsel of record, Deputy Federal
19 Public Defenders Seema Ahmad and Ashfaq G. Chowdhury, respectfully moves this
20 Court for a judgment of acquittal based on the evidence adduced at trial and the
21 attached memorandum of points and authorities.

22
23 Respectfully submitted,

24 HILARY POTASHNER
Federal Public Defender

25 DATED: July 27, 2015

26 By: */s/ Seema Ahmad*

27 SEEMA AHMAD
ASHFAQ G. CHOWDHURY
Deputy Federal Public Defenders
Attorneys for Teofil Brank
28

MEMORANDUM OF POINTS AND AUTHORITIES

I. FACTS ADDUCED AT TRIAL¹

A. Evidence Regarding Donald Burns's Reputation

During Mr. Brank's trial, the testimony of Donald Burns, as well as that of Justin Griggs, Jason Bumpus, and Matthew Power demonstrate that there was no objectively reasonable threat to Mr. Burns's reputation even if Mr. Brank had ever revealed his pay-for-sex relationships because Mr. Burns was already public and notorious about his prostitution activities. Moreover, Mr. Burns solicited the gay pornography production company, Sean Cody, to film gay pornography at his architecturally renowned house in La Jolla; a house built from glass that offered so little privacy that the company declined to film there.

1. Donald Burns's Testimony

a. Pay-for-Sex Relationships with Publicly Known Gay Pornography Actors

On direct examination, the prosecutor asked what details Mr. Burns was specifically concerned would be made public by Mr. Brank. *See* Trial Transcript, July 7, 2015 at 118, attached as Exhibit A. He responded concisely by saying "Absolutely that I had been paying for sex with adult male models." *Id.* The remainder of Donald Burns's testimony demonstrates that this he had no such fear and even if he did it was not objectively reasonable. Mr. Burns admitted he would pay gay pornography actors to recruit other individuals to have pay-for-sex relationships. Tr., July, 7, 2015 at 118. Specifically, he testified about an email he wrote to Mr. Brank in September 2014

¹ In order to allow the defense to expeditiously file this motion, the Court Reporter provided counsel with a draft trial transcript of witness testimony relevant to this motion (Exhibit A). That transcript was provided in two parts and is reflected as such in citations to the transcript within this motion.

1 which listed eleven gay pornography actors whom he wanted to prostitute for him, *and*
2 *to whom he would offer referral fees if they would recruit others.* Tr., July 8, 2015 at
3 60-61. Some of these individuals had rejected Mr. Burns's previous attempts to engage
4 in pay-for-sex relationships, yet Mr. Burns pursued them and made his interest in such
5 arrangements well-known to them anyway.

6 Mr. Burns described how beginning in early 2013, he would fly one to four gay
7 pornography actors to one of his homes every three to six weeks to engage in
8 prostitution. Tr., July 7, 2015 at 117-18. He brought them to his homes repeatedly. He
9 also said that his communities in Nantucket and Palm Beach are very small with
10 populations of 8,000 to 60,000. Tr., July 7, 2015 at 78.

11 Mr. Burns claimed to have engaged in these pay-for-sex relationships with gay
12 pornography actors because he thought they were "discrete." Mr. Burns also admitted
13 the ease with which he found their contact and personal identifying information on the
14 internet. Tr., July 7, 2015 at 120. He used Facebook and the Sean Cody gay
15 pornography company website to track down gay pornography actors with whom he
16 wanted to have sex. *Id.* In fact, Mr. Burns stated: "There's an executive at the Cody
17 Media Company that maintains an open Facebook page which includes displaying his
18 friends and his photographs, and he, in my mind, foolishly becomes friends with Sean
19 Cody actors and models in their actual true names. And they're right there for the
20 world to see..." Tr., July 8, 2015 at 68. Mr. Burns admitted he had no confidentiality
21 agreement with the gay pornography actors that prostituted for him. Tr., July 8, 2015 at
22 61.

23 **b. Relationship with Mackinzie Amadon**

24 During his trial testimony, Mr. Burns admitted beginning a pay-for-sex
25 relationship in 2013 with a gay pornography actor named Mackinzie Amadon. Tr., July
26 8, 2015 at 16. He further admitted that his close friends knew that Mr. Amadon was a
27 gay pornography actor. In other words, Mr. Burns *told* his friends that Mr. Amadon
28 acted in gay pornography. He did not hide this fact from his close friends. Mr. Burns

1 acknowledged that Mr. Amadon's films were available on the internet during that time
2 frame. Tr., July 8, 2015 at 70. Mr. Burns openly and publicly traveled internationally
3 with Mr. Amadon. Tr., July 8, 2015, at 54, 56.

4 In addition to the trip to France, where Mr. Burns had no qualms about
5 introducing his gay porn star escort to the American Ambassador, he and Mr. Amadon
6 were photographed together at public events and were written about in society online
7 publications. Specifically, Mr. Burns testified that Mr. Amadon escorted him to
8 fundraisers, galas, and high-society dinners with the attendant paparazzi and writers
9 who published photographs of Mr. Amadon and Mr. Burns online. Tr., July 8, 2015 at
10 61-62. Moreover, Mr. Burns introduced Mr. Amadon to powerful public figures
11 including a Republican politician and Christopher Forbes, a scion of the Forbes
12 publishing family. Tr., July 8, 2015 at 52, 59.

13 To persuade the jurors of his alleged fear of reputational harm, Mr. Burns
14 testified that: "The internet is something that, once information is posted to it, spreads
15 exponentially and very quickly..." Tr., July 7, 2015 at 101.

17 **2. Justin Griggs's Testimony**

18 Mr. Griggs is a gay pornography actor who had a pay-for-sex relationship with
19 Mr. Burns. He was introduced to Mr. Burns through another gay pornography actor
20 named Hayden. Tr., July 8, 2015 at 75. Specifically, he described how Mr. Burns paid
21 to fly him, Hayden and another young man to Nantucket on a private jet. Tr., July 8,
22 2015 at 76. Mr. Burns did not confine these prostitutes in the house during their entire
23 visit. Mr. Griggs testified that Mr. Burns "showed them around" Nantucket. *Id.* In
24 Palm Beach, they went "surfing, grilling out, [and] to dinner." Tr., July 8, 2015 at 85.
25 After the public day time activities, Mr. Griggs testified that the group sex would take
26 place at night. Tr., July 8, 2015 at 85.

27 //

28 //

3. Testimony of Jason Bumpus and Matthew Power

Mr. Bumpus and Mr. Power are employees of Sean Cody. Specifically, Mr. Bumpus described how Mr. Burns contacted Sean Cody to use his architecturally famous, unique, and identifiable home in La Jolla -- called the "Razor House" -- to film gay pornography. Tr., July 8, 2015 at 157. The Sean Cody production team concluded they could not film gay pornography at the Razor House: Mr. Bumpus explained that the house lacked privacy because it is built from glass. Tr., July 8, 2015 at 158. Mr. Bumpus also stated that Mr. Burns's mentioned that the pornography shoot was something to brag about to his friends. Tr., July 8, 2015 at 158.

Similarly, Matthew Power testified that Mr. Burns's home was built by the famous architect Wallace Cunningham. Tr., July 8, 2015 at 162. He stated that Mr. Burns had emailed Sean Cody saying he wanted to use his house for filming a gay pornography shoot. Tr., July 8, 2015 at 161.

B. The Evidence Not Made Available to the Jury

Of course, neither the jury nor the Court may speculate about evidence that was not adduced at trial. Nevertheless, in assessing whether the evidence supports a finding beyond a reasonable doubt that an objectively reasonable person would have feared reputational harm, the Court should consider Mr. Burns's affirmative efforts to radically narrow the scope of the FBI's investigation of his electronic media.

Notwithstanding that Mr. Burns had reported a two-year long relationship with Mr. Brank, evidence at trial showed that the FBI chose to limit the scope of its investigation of Mr. Burns's cell phone and failed to examine his personal computer. Special Agent Bauman testified that Mr. Burns told the FBI that he only wanted them to look at SMS and MMS messages on his cell phone from the period of February 16, 2015 through and including March 4, 2015. Tr., July 8, 2015 at 174-75. Agent Bauman testified that he wanted to conduct a more thorough examination of his cell phone. Tr., July 8, 2015 at 174. Agent Bauman testified that he could have sought a

1 search warrant but did not. *Id.* Counsel for Mr. Burns selectively provided certain
2 email messages from Mr. Burns to Mr. Brank. Despite the FBI's ability -- some might
3 argue obligation -- to seek a search warrant for both the cell phone and the personal
4 computer, agents permitted the complaining witness to dictate a critical aspect of their
5 investigation.

6 By way of explanation, Mr. Burns testified that he did not want the FBI to have
7 access to "private" information on his cell phone. However, he did not have similar
8 qualms about the FBI accessing his Goldman Sachs investment account or documents
9 about the creation of his yacht-building corporation. Mr. Burns exercised more caution
10 and restraint with the FBI gaining access to his electronic media than he did with his
11 illegal, sexual relationships with gay pornography actors. Juxtaposing Mr. Burns's
12 reluctance to give the FBI broader access to his electronic media with his public outings
13 with Mackinzie Amadon undermines his testimony asserting that he feared for his
14 reputation.

16 II. ARGUMENT

17 A. Legal Standard for Judgment of Acquittal

18 "After the government closes its evidence or after the close of all the evidence,
19 the court on the defendant's motion must enter a judgment of acquittal of any offense
20 for which the evidence is insufficient to sustain a conviction." Fed. R. Crim. Pro. 29.
21 The motion may be renewed after the court discharges the jury. Fed. R. Crim. Pro.
22 29(c)(1). Mr. Brank renews his prior oral motion for a judgment of acquittal made after
23 the close of the government's evidence.

24 To prevail on a Rule 29 motion, Mr. Brank must show that in viewing the facts
25 in the light most favorable to the government, "the government's proof was insufficient
26 as a matter of law to constitute a crime." *United States v. Rocha*, 598 F.3d 1144, 1153
27 (9th Cir. 2010). The court must view the evidence in the light most favorable to the
28 government and determine whether any rational trier of fact could have found the

essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 316 (1979). To prevail on a motion for a judgment of acquittal, a defendant need not demonstrate that the record is devoid of any relevant evidence of a crucial element of the offense because such a standard would be "simply inadequate to protect against misapplications of the constitutional standard of reasonable doubt." *Id.* at 320. Rather, a court must grant a motion for a judgment of acquittal "if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." *Id.* at 324.

Jackson instructs that the district court must first consider the evidence in the light most favorable to the prosecution, assuming that the trier of fact resolved any conflicting inferences in favor of the government. *U.S. v. Nevils*, 598 F.3d 1158, 1164 (9th Cir. 2010). The inquiry does not end there, however. Next, the court must consider whether any rational trier of fact could have found the "essential elements" beyond a reasonable doubt. *Id.* The second step, moreover, requires the court to determine whether the evidence at trial, "including *any* evidence of innocence, could allow any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt." *Id.* at 1165 (emphasis added).

B. The Prosecution's Proof of "Reputational Harm" Was Insufficient as Matter of Law to Constitute a Crime

1. The Allegations in the FSI and the Jury Instructions Require an Objectively Reasonable Threat to Reputation

Notwithstanding evidence adduced at trial as to any other elements of any of the crimes charged in the First Superseding Indictment ("FSI"), no rational fact finder could conclude that the prosecution proved beyond a reasonable doubt the first element of the offenses charged in Counts One, Two and Five of the FSI. In Count One, the prosecution charged Mr. Brank with a violation of 18 U.S.C. § 875(d), alleging an extortionate threat to reveal unspecified "sensitive information" about Donald Burns if

1 he did not give Mr. Brank money and a car. FSI, Docket No. 93. In Counts Two and
 2 Five of the FSI, the prosecution charged Mr. Brank with extortion and attempted
 3 extortion under the Hobbs Act. In both counts, the prosecution alleged that the
 4 extortion involved an alleged threat by Mr. Brank to reveal unspecified "sensitive
 5 information" about Donald Burns.

6 The court instructed the jury as to the elements of Counts One, Two and Five in
 7 its instructions 12, 13 and 15. Jury Instructions, Docket No. 272. Instruction Number
 8 12 included the following instruction with respect to the first element of 18 U.S.C. §
 9 875(d):

10 In determining whether a communication is a "true
 11 threat," you must find that it meets both an objective and
 12 subjective standard. As to the objective standard, a true threat
 13 is one that would be understood by reasonable people hearing
 or reading it in context as a serious expression of an intent to
 injure the reputation of another, in this case Donald Burns.

14 Instructions Number 13 and 15 included the following language as part of the
 15 first element of 18 U.S.C. §1951(a)²:

16 the defendant induced Donald Burns to part with property by
 17 the wrongful use of fear, specifically by wrongful threat of
 reputational harm.

18 **2. No Rational Fact Finder Could Find Beyond A Reasonable Doubt**
 19 **That There Was an Objectively Reasonable Threat of Harm to**
 20 **Donald Burns's Reputation or That He Was Induced to Part with**
 21 **Money and Property Because He Feared Reputational Harm.**

22 The government's theory of prosecution at trial³ was that Mr. Brank threatened
 23 to harm Mr. Burns's reputation by revealing Mr. Burns's prostitution arrangements.
 24

25 ² Mr. Brank reincorporates his argument that reputational harm is not cognizable
 26 as a violation of the Hobbs Act as set forth in his Motion to Dismiss Counts 2 and 5.
 27 See Docket 195.

28 ³ The indictment is not so specific. The First Superseding Indictment merely
 alleges that Mr. Brank threatened to reveal "sensitive information." The vagueness of

1 Given that narrow issue, the evidence adduced at trial was simply insufficient to sustain
2 a conviction as to Counts 1, 2, and 5.

3 An objectively reasonable person who was genuinely concerned for his
4 reputation would not (1) persistently ask his prostitutes to spread his solicitations to
5 engage in criminal conduct by word of mouth, or (2) continue to contact men who
6 refused his offer, identifying it as illegal, given the risk that they would contact law
7 enforcement. At trial, Mr. Burns admitted that he would email, text, and call gay
8 pornography actors to persuade them to prostitute for him. Several of these individuals
9 rejected his advances yet he continued to pursue them anyway. These individuals did
10 not engage in any criminal activity, had no loyalty to Mr. Burns, and were clearly
11 capable of discussing Mr. Burns's advances publicly. Moreover, Mr. Burns sent emails
12 to Mr. Brank including information about gay pornography actors that was publicly
13 available. He offered Mr. Brank "referral fees" -- but more importantly, was willing to
14 engage in referral fee arrangements *with any gay pornography actor that was willing*.

15 What objective basis did Mr. Burns have for believing that 20- or 30-something
16 gay pornography actors would act with discretion? None. To the contrary, he
17 encouraged them *not* to be discrete. As discussed above, he asked them to spread the
18 word among other gay pornography actors that he was looking for prostitutes. He
19 acknowledged that at least one of the young men, Justin Griggs, had a low-wage job, at
20 least on occasion he flew them in groups by private jet to meet him, and he had no
21 means of controlling what photographs they took or text messages or tweets they sent
22 while they were at his home for sex parties. There was no reason to believe that these
23 young men with low incomes who suddenly found themselves flown by private jet to
24 exclusive communities would keep that information to themselves. What reasonable
25

26 this phrase in the FSI enabled the prosecution to continue to develop its theory after the
27 defense filed a motion to dismiss Counts 2 and 5 arguing that reputational harm is not
28 cognizable under the Hobbs Act. At trial, the prosecution narrowed "sensitive
information" to "pay for sex" relationships.

1 person would believe that they would refrain from telling others about this novel
2 experience?

3 Mr. Burns thought it would assist the prosecution's case against Mr. Brank if he
4 emphasized how small and elite his communities are. Neither Mr. Burns nor the
5 prosecution wanted the jury to draw the more damaging but obvious inference:
6 repeated orgies with young male prostitutes at these homes could hardly have gone
7 unnoticed in such exclusive communities. It is unlikely that the neighbors in these
8 elite, very small communities mistook these groups of young men as Mr. Burns's
9 relatives. There was nothing discrete about how Mr. Burns conducted these weekend
10 sex parties. He recklessly exposed himself in public in these small communities with
11 groups of young men who were obviously not from his social set.

12 Most revealing is Mr. Burns's public relationship with gay pornography actor
13 Mackinzie Amadon. Mr. Burns admitted that Mr. Amadon prostituted for him
14 beginning in 2013. He also admitted that Mr. Amadon's gay pornography films are
15 easily viewable on the internet. Just like Mr. Burns, his friends could readily find on
16 the internet the gay pornography in which Mr. Amadon acted. Yet, Mr. Burns traveled
17 the world with Mr. Amadon, introduced him to dignitaries and politicians, was
18 photographed with him and written about in society publications, and continued to
19 provide financial support to Mr. Amadon while having sex with him. Mr. Burns was
20 and is all over the internet in the company of a known gay pornography actor. He acted
21 without fear for his reputation and took no steps to prevent images of them together
22 from being circulated on the internet. These are hardly the actions of a man fearful for
23 his reputation in his community of politicians, charitable donors, and business
24 connections. Mr. Burns successfully persuaded the jury to accept that the cost of travel
25 and hotels and food did not constitute compensation to Mr. Amadon for having sex
26 with Mr. Burns. Just because he didn't give Mr. Amadon cash in an envelope does not
27 mean that any reasonable person would fail to understand that he had an on-going "pay-
28 for-sex" relationship with Mr. Amadon.

1 Mr. Burns engaged in all of this activity despite claiming at trial that the
2 information on the internet spreads exponentially. Mr. Burns cannot have it both ways
3 -- he cannot claim he feared that Mr. Brank would expose him on the internet for
4 engaging in prostitution when he was providing that information on the internet for the
5 world to see.

6 Furthermore, Mr. Burns's alleged reputational fears do not make sense. He
7 claimed that he was worried about his business reputation and that he was concerned
8 about his ability to secure loans and charitable donations to his foundation. At the same
9 time, he was inviting a gay pornography company to shoot films at his architecturally
10 renowned house that *is made of glass*. The gay pornography company declined to film
11 there for lack of privacy, yet Mr. Burns was eager to use his famous home -- a home
12 identified with his name-- for filming gay sex that would be posted to the internet. It
13 simply does not make sense that Mr. Burns was worried about his reputation with
14 conservative, risk-averse corporate entities while being willing to have his
15 architecturally famous house featured in gay pornography on the internet. Not only did
16 Mr. Burns want gay pornography to be filmed in his famous glass house, he wanted
17 bragging rights. These are not the words of a man seeking to be discrete and protect his
18 reputation.

19 Finally, the government made much of a tweet posted on the "Jarec Wentworth"
20 Twitter feed that asked if any porn stars know a man named Don. However, by
21 definition, that tweet was limited to a population of individuals interested in gay
22 pornography. The only viewers of that tweet would be individuals familiar with Mr.
23 Brank's "Jarec Wentworth" pornography persona. Mr. Brank did not tweet in his own
24 name let alone post to the New York Times, Vanity Fair, or the like. In fact, it is Mr.
25 Burns who was willing to be photographed at the New York Historical Society and
26 other high-society events with a gay pornography actor who prostituted for him.
27 Moreover, Mr. Burns admitted his friends knew Mr. Amadon was benefitting from
28 their relationship, that he provided Mr. Amadon with over \$200,000, and that he

1 continued to have sex with him while providing that financial support. Mr. Burns's
2 testimony alone provides reasonable doubt that an objectively reasonable person would
3 believe that his reputation was threatened or that he was in fact induced to part with
4 money or property because he feared reputational harm.

6 **III. CONCLUSION**

7 Testimony by the complaining witness that he feared that his reputation would be
8 harmed does not carry the prosecution's burden. That testimony, taken in the context of
9 the rest of Mr. Burns's testimony, evidence of his conduct, and the testimony of other
10 witnesses demonstrates that no reasonable fact finder could conclude that the
11 prosecution proved its case beyond a reasonable doubt. The Court should enter a
12 judgment of acquittal as to Counts 1, 2 and 5.

13
14 Respectfully submitted,

15 HILARY POTASHNER
16 Federal Public Defender

17 DATED: July 27, 2015

By */s/ Seema Ahmad*

18 SEEMA AHMAD
19 ASHFAQ G. CHOWDHURY
20 Deputy Federal Public Defenders
21
22
23
24
25
26
27
28