

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION**

UNITED STATES OF AMERICA,

Case No. 08-Cr-60099-ZLOCH/SELTZER

Plaintiff,

vs. **FORT LAUDERDALE, FLORIDA**

MAY 13, 2008

BRADLEY BIRKENFELD, et al.,

Defendant.

**TRANSCRIPT OF INITIAL APPEARANCE & BOND HEARING
BEFORE THE HONORABLE BARRY S. SELTZER,
UNITED STATES MAGISTRATE JUDGE**

APPEARANCES:

FOR THE GOVERNMENT:

United States Attorney's Office
500 E. Broward Boulevard
Fort Lauderdale, Florida 33301
BY: JEFFREY NEIMAN, A.U.S.A.
BY: JEFFREY KAY, A.U.S.A

FOR THE DEFENDANT:

BY: PETER RABEN, ESQ.
1200 Brickell Avenue
Miami Florida 33131

ALSO PRESENT: BY: DANNY ONORATO, ESQ.

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(Call to order of the Court)

THE COURT: Okay. Let me call the United States versus Bradley Birkenfeld. Bradley Birkenfeld.

Mr. Birkenfeld, if you will approach. Is the government moving to unseal the indictment?

MR. NEIMAN: It is, Your Honor.

THE COURT: All right. I will go ahead and sign the order. I am unsealing the indictment. All right.

And does the government have an extra copy of the indictment for the defense?

MR. NEIMAN: He has been provided a copy.

THE COURT: Okay. Very well. Let me ask counsel to state their appearances.

MR. NEIMAN: Jeffrey Neiman on behalf of the United States.

THE COURT: Welcome.

MR. RABEN: Good morning, Your Honor. Peter Raben here on behalf of Mr. Birkenfeld. And if the Court please, I am here with Danny Onorato.

Mr. Onorato will be filing a motion to proceed pro hac vice. He is a member of the D.C. and California Bars. He has been an attorney for 12 years.

He is also a member of the Federal Bars of Colorado, Maryland and California. He is in the District of Columbia. He is a partner with Sherman & Onorato over the last four years, and prior to that he was an Assistant United States Attorney for 5 years in the District of Columbia.

I would ask the Court to allow him to appear pro hac vice, with the proviso that we follow-up with the written pleadings which are required for this district.

THE COURT: All right. With that understanding, that there will be a written motion that conforms to the local rules and a proposed order and no objection and the fee paid into the Clerk of the Court, any objection?

MR. NEIMAN: No, Your Honor.

THE COURT: Okay. Can I have the spelling of your last name?

MR. ONORATO: Yes, sir. It is O-n-o-r-a-t-o.

THE COURT: O-n-o-r-a-t-o?

MR. ONORATO: Yes, sir.

THE COURT: Okay. Onorato?

MR. ONORATO: Yes, sir.

THE COURT: Your first name is Danny or Daniel?

MR. ONORATO: It is Danny.

THE COURT: Danny. Okay. Welcome. All right. Welcome. All right. Bradley Birkenfeld, good morning.

THE DEFENDANT: Good morning, sir.

THE COURT: Mr. Birkenfeld, you are here for your first or your initial appearance, having been arrested on a warrant or surrendered, actually, I understand on a warrant issued pursuant to an indictment I will get to in just one moment.

Let me first take this opportunity, however, to inform you that you have the right to remain silent; that anything that you say may be used against you.

If you take a look at the indictment, it is rather lengthy. Count I appears to charge a violation of Section 371, Title 18.

It says that, "From in or about 2001, up to and including the date of this indictment, in the Southern District of Florida, and elsewhere, that you and another individual, and others, known and unknown to the grand jury, unlawfully and willfully and knowingly conspired to defraud the United States or an agency thereof, to wit: The IRS, in violation of 18, United States Code, Section 371."

It says that, "The object of the conspiracy was that you would and did defraud the U.S. for the purpose impeding, impairing, obstructing and defeating the lawful government functions of the IRS, and the ascertainment, computation, assessment and collection of U.S. income taxes."

It then goes on to detail the means and methods of the conspiracy and the overt acts committed in furtherance thereof, all in violation of 18, U.S.C., Section 371.

Okay. Mr. Birkenfeld, do you understand the allegations against you?

THE DEFENDANT: Yes, sir.

THE COURT: Mr. Birkenfeld, you are entitled to be represented by counsel throughout these proceedings.

If you cannot afford an attorney, you may be entitled to have one appointed for you by the court.

Mr. Raben, Mr. Onorato, are you both going to be entering permanent appearances?

MR. ONORATO: Yes, sir, we are, and we have filed those with the clerk.

THE COURT: Okay. Very well.

Mr. Birkenfeld, you are entitled to have a hearing to determine the terms and conditions of your bond.

Well, let's do this: I am sorry. Since you are entering permanent appearances, we can go forward with the arraignment.

MR. NEIMAN: Yes.

MR. RABEN: Yes.

THE COURT: Why don't we do that.

Mr. Birkenfeld, have you had an opportunity to review the indictment and do you understand the allegations against you?

THE DEFENDANT: Yes, Your Honor.

THE COURT: All right. Either Mr. Raben or Mr. Onorato, do you waive reading of the indictment in its entirety and are you prepared to enter a plea at this time?

MR. ONORATO: Yes, Your Honor. We have been given access to a copy of the indictment. I have gone over it with our client.

At this time we will waive formal reading of the indictment, and we will enter a plea of not guilty and ask for a trial by jury, and we will ask that the court sign the standing discovery order for the district.

THE COURT: Very well. The plea of not guilty and the demand for jury trial will be entered into the record, and the standing discovery order will be issued as of this date.

The status conference is set for?

THE CLERK: May 28th at 11:00 o'clock before Judge Snow.

MR. ONORATO: Does the court have discretion to move that to the first week in June?

THE COURT: All right. Aaron, what date? What is the first date in June?

THE CLERK: The 2nd is a Monday.

THE COURT: How is June 2nd at 1:00 o'clock in the afternoon before Judge Snow?

MR. ONORATO: That's fine, Your Honor.

THE COURT: All right.

MR. ONORATO: Thank you very much for the courtesy.

THE COURT: Yes. The status conference will be June 2nd at 1:00 p.m. before Judge Snow here in Fort Lauderdale.

Now, Mr. Birkenfeld, you are entitled to have a hearing to determine the terms and conditions of your bond.

Let me ask the government what its bond recommendation is as to Mr. Birkenfeld?

MR. NEIMAN: Your Honor, by way of background, the defendant was arrested last week in Boston and had his initial appearance and there was a Rule 20 to down here.

THE COURT: Right. Okay.

MR. NEIMAN: He appeared here, after I believe it was a million dollar corporate surety bond was set in Boston.

We do have a jointly recommended bond proposal for the Court to consider in order to, actually in lieu of the one million dollar corporate surety bond.

The defendant has agreed to pledge to the Clerk of the Court --

THE COURT: We don't take pledges.

MR. NEIMAN: Okay. Could a deed --

THE COURT: No. We don't take deeds.

MR. NEIMAN: No? You don't take deeds?

THE COURT: No.

MR. NEIMAN: If I may have a moment?

THE COURT: Yes.

MR. NEIMAN: Your Honor, if we may have a few moments?

THE COURT: All right.

MR. NEIMAN: Your Honor, the parties would recommend a 1.5 million personal surety bond to be co-signed by the defendant and his brother.

THE COURT: Wait. Wait. There was a corporate surety bond posted in --

MR. ONORATO: Your Honor, that's incorrect. There was no corporate surety bond posted.

THE COURT: All right. Then let me get the correct information.

MR. ONORATO: Your Honor, the judge up in Boston released Mr. Birkenfeld on his promise to appear here. His brother and he co-signed for a one million dollar personal surety bond.

THE COURT: A one million dollar personal surety bond?

MR. ONORATO: Correct.

THE COURT: So that was the bond that was set in Massachusetts?

MR. ONORATO: Correct. Then the judge ordered him to appear here so Your Honor could more fully develop other conditions.

It was contemplated that Mr. Birkenfeld's brother at the time would post his personal residence to assure his appearance here today.

The judge said she was not going to go through that process, but told him he was on the hook if Mr. Birkenfeld did not appear for his residence being taken.

THE COURT: Well, I have got to tell you Mr. Birkenfeld lives outside of the United States. I am not comfortable with a personal surety bond, notwithstanding the amount and the nature of the charges.

So if you all want to talk and work out something more substantial, fine, but it is going to have to be considerably more substantial than a personal surety bond.

MR. ONORATO: Judge, could we approach for one second?

THE COURT: No. You can all talk about it and work it out, but, no.

MR. ONORATO: Your Honor, although he resides outside of the United States, during the pendency of this case he will not be residing outside of the United States.

THE COURT: No. I have read the Pretrial Services report. I did read the Pretrial Services report.

He has been living in Switzerland for 13 years, and so I am not willing to accept a personal surety bond, but if you all want to talk and work out something far more substantial, I will listen to it. In the meantime, let me go ahead and take the other matter.

MR. ONORATO: Thank you.

[There was a short recess].

THE COURT: Let's do this: Mr. Raben, and Mr. Onorato, I don't want to put you on the spot, although I think it is inevitable in this situation to a certain extent that you are on the spot.

If you want, we can break for lunch. If there are people that you need to speak to, and maybe somebody other than Mr. Neiman, I don't know if this is Mr. Neiman's case.

MR. NEIMAN: It is, Your Honor.

THE COURT: It is your case. Oh. All right. Then Mr. Neiman will be the one that you speak to, and we can continue it after lunch, or if you are ready to go forward now, we can do that.

MR. NEIMAN: Well, what the government and the defense would propose, and whether the court would accept a personal surety bond as well as a substantial 10 percent bond, because all of the properties that are going to be used to collateralize these are United States properties. None of these properties are foreign properties.

THE COURT: Well, I have got to tell you when I have got somebody living overseas, I normally like to have a bondsman on the case; somebody who is actually going to go and drag him back, and so that is what I would be looking for if we are going to set any type of bond.

MR. NEIMAN: Your Honor, what I would submit to the court is a little bit unusual about these circumstances.

It is that Mr. Birkenfeld has been talking to the government for a period that well exceeds a year. He knew coming into Logan last week that he was going to get arrested,

and it wasn't any surprise to him.

THE COURT: The Pretrial Services report said he was going to his high school reunion.

MR. NEIMAN: He was.

THE COURT: I am not sure he anticipated being arrested, but all right.

MR. NEIMAN: Your Honor, there is a matter which at least I read it in the newspaper which suggested that someone connected with his old employer, if we can approach I can tell the court.

THE COURT: No, no. We do everything in the open here.

MR. ONORATO: Well, then, perhaps we ought to recess for lunch.

MR. RABEN: Yes, Your Honor.

THE COURT: Why don't we recess for lunch. We will take this up at 2:00 o'clock.

THE CLERK: All rise.

[There was a recess for the noon hour].

THE COURT: Welcome back. Let me recall the United States versus Bradley Birkenfeld. Let me ask counsel to state their appearances.

MR. NEIMAN: Jeffrey Neiman and Jeffrey Kay on behalf of the United States, Your Honor.

THE COURT: Welcome.

MR. RABEN: Good afternoon, Your Honor. Peter Raben and Danny Onorato appearing for the defendant.

THE COURT: All right. Welcome. All right. Have the parties had an opportunity to confer with one another during the break?

MR. NEIMAN: We have, Your Honor, and I think it also would be helpful for Your Honor to hear a little more background as to why we are here.

THE COURT: All right. I will also note in the Pretrial Services report that there is no financial information provided.

I don't know what the extradition treaty in Switzerland provides. It is probably a non-extraditable offense, as we have had experience with people who have had tax issues with people over there before.

So this, obviously, raises a lot of red flags. The government has not proffered a word as to what Mr. Birkenfeld's advisory guidelines would be, nor have you told me what his role in the offense was.

The idea of a personal surety bond at this point does not have any appeal, but let me give you an opportunity to be heard.

MR. NEIMAN: Your Honor, I think that --

THE COURT: If you can approach the lectern, please.

MR. NEIMAN: I am sorry. Your Honor, I think that the defendant would be willing to proffer his financial background as well. I have discussed this with his counsel.

THE COURT: Well, he had the opportunity to speak to Pretrial Services, and he declined to do it.

MR. ONORATO: That was in Boston back before. Since he arrived in Boston, he has reached an agreement in principle to cooperate with the United States.

THE COURT: Well, that may be, but that's not a factor I consider.

I would like to know what his financial situation is. His assets. His liabilities.

I want to speak to Mr. Neiman, please. I will give you an opportunity. Right now let's just start from the beginning.

MR. NEIMAN: All right, Your Honor. First off, his advisory guideline range would max out at 60 months, the statutory max. In fact, there would be 73 months under the guidelines.

THE COURT: All right.

MR. NEIMAN: So the statutory maximum is what is in control here.

THE COURT: All right.

MR. NEIMAN: The defendant was a former employee at a Swiss bank.

THE COURT: Right.

MR. NEIMAN: Who reported in the chain of command to other bankers at the bank.

THE COURT: Right.

MR. NEIMAN: He came into the United States and assisted U.S. clients and set up nominees and sham entities in order to conceal their assets.

THE COURT: Right.

MR. NEIMAN: And that they were the beneficial owner of these assets so that the Swiss bank wouldn't have to report to the IRS certain tax information.

THE COURT: Right. Did he fabricate documents?

MR. NEIMAN: He caused the filing of false what they call W-8 bends which basically falsely state that a non-U.S. client is the beneficial owner of accounts which he knew was not to be the case.

THE COURT: All right. So he fabricated documents?

MR. NEIMAN: Yes. By way of his financial resources, he has, our understanding is some assets in Switzerland, although not much.

In the United States he has about 700 or \$650,000 in a Fidelity brokerage account, which is predominantly, this is again being told to us by the defendant, one stock which is thinly traded. So it is not as if this is a truly liquid brokerage account.

His father has a residence in Massachusetts. My understanding is there is equity in excess of a million dollars in the residence, and his brother also has a residence in Massachusetts with equity of about \$300,000.

The brother also has a 401-K brokerage account with about 150,000 in it as well, and these are the assets which they were willing to pledge to the Clerk of the Court in order to assure his appearance down here.

THE COURT: But as you know, this court for many, many years has not accepted pledges of collateral.

MR. NEIMAN: Which is why, Your Honor, we come to you with another recommendation.

Do you have anymore questions about the facts of the case and the development of

the case?

THE COURT: What was Mr. Birkenfeld's role in this scheme?

MR. NEIMAN: With regards to the count charged in the indictment --

THE COURT: Well, just tell me what he did, not what is charged.

MR. NEIMAN: He had a series of clients here in the United States who he did this, set up the sham entities for. He was their private banker for his clients.

THE COURT: What is the loss in the fraud on the government?

MR. NEIMAN: In this particular instance?

THE COURT: No, no. Total. How much is he responsible for defrauding the United States Government?

MR. NEIMAN: Around \$7,000,000 in this one case. It was by far and away his largest client here in the United States.

THE COURT: All right. What was the total fraud that he engaged in?

MR. NEIMAN: I do not know the specifics, Your Honor. We know he had a handful of clients.

One problem we face in the investigation is having difficulty getting records from Switzerland and identifying the true U.S. clients, the amount of money they had offshore, but we do know that Mr. Birkenfeld had several other clients here in the United States.

THE COURT: All right. And so he would receive a statutory maximum, if convicted, of 60 months on this charge. And are there going to be other charges forthcoming based upon any additional fraud?

MR. NEIMAN: Not at this time, Your Honor.

THE COURT: All right. And tell me what the basis is for your bond recommendation, given, I take it, it is true that this is non-extraditable; that if he were to return to Switzerland we could not get him back; is that correct?

MR. NEIMAN: That's correct, Your Honor.

THE COURT: All right. Given that this is a non-extraditable offense, and he has been living the last 13 years in Switzerland, explain to me, and I take it you feel you have a strong case?

MR. NEIMAN: Yes, we do, Your Honor.

THE COURT: All right. So that you believe the likelihood of conviction is high. Explain to me then why you would be recommending a personal surety bond?

MR. NEIMAN: We are no longer recommending that, Your Honor.

THE COURT: All right. Then let me hear what your new recommendation is.

MR. NEIMAN: Our recommendation would be a \$100,000 corporate surety bond, coupled with a \$2,000,000 personal surety bond to be signed by both his brother and his father, whereby they would pledge as collateral the assets which we know they have those assets which would cover the basis for the bond.

THE COURT: What about the \$600,000 in the brokerage account?

MR. NEIMAN: That would be part of it.

THE COURT: But he would have access to that, correct?

MR. NEIMAN: He would be willing to forfeit that as well and pledge that as part of the personal surety bond.

THE COURT: We don't take pledges. So what will you do?

MR. NEIMAN: It will serve as collateral.

THE COURT: What is he willing to do so that is outside of his reach so he cannot have access to that \$600,000? What is he willing to do on that, Mr. Neiman?

MR. NEIMAN: I think, Your Honor, he will sign it over to the government and he will not have any access to it.

THE COURT: All right. Now, how do you know he does not have any additional assets in Switzerland?

MR. NEIMAN: We are going upon his representations, Your Honor, and he does have a home over there, we know, and small amounts of stock.

THE COURT: Yes.

MR. NEIMAN: Not small?

THE COURT: Not small, no.

MR. NEIMAN: Judge --

THE COURT: Look, I have been doing this long enough that just by looking at this indictment and the little bit that is in the Pretrial Services report to have sufficient concerns that there are far more assets than what you are telling me about, but I will give Mr. Onorato an opportunity to disclose that.

MR. ONORATO: Thank you, Your Honor. First, I wanted to clarify one point. The Court indicated that Mr. Birkenfeld might be a risk of flight to go back home to Switzerland.

THE COURT: Yes.

MR. ONORATO: The reason that that is not really an option here is because actually, as Mr. Neiman referred to, he is cooperating here in the United States.

He is actually violating Swiss law by talking about his private clients, and the Swiss would prosecute him for that if he were to go back there.

THE COURT: Well, flight just means actually leaving or not showing up for court.

MR. ONORATO: No.

THE COURT: But he doesn't have to go back to Switzerland.

MR. ONORATO: Understood.

THE COURT: But my concern is his foreign assets and our ability to get him back.

MR. ONORATO: Sure.

THE COURT: I would like to know what all of his assets are and where they are.

MR. ONORATO: As Mr. Neiman told the Court, he does have about 650 to \$700,000 in a small stock.

In fact, when I was outside in the ante room before, I checked the volume on that stock. So far today it has traded 11,000 shares.

I think it is worth \$8.00 a share. So he owns about \$100,000 to get them up to that 6 or \$700,000 figure that I told the court.

If he were to try to unload that, the stock price would plummet because it can only handle about 10 or 11,000. The average volume on that stock a day is 10,000 shares

being traded.

THE COURT: All right. So what other assets does he have?

MR. ONORATO: He has about 1.5 million dollars worth of that same stock held overseas in trust in Lichtenstein.

THE COURT: In Verdune?

MR. ONORATO: I am sorry?

THE COURT: In Verdune? Verdune, Lichtenstein?

MR. ONORATO: Yes. Yes. And the co-defendant in the case, Your Honor, Mario Staggl, is the person who was supervising that money. At this point in time based on Mr.

--

THE COURT: The DOJ has a representative in Verdune. I guess he can find out more about that.

MR. ONORATO: He could, and Mr. Birkenfeld has been directed to have no contact with Mr. Staggl.

He has not been in touch with him, and he does not have access to those funds. That's simply where he stands with respect to that money.

He does own a home in Switzerland. The home is worth approximately one million francs or about \$1,000,000 U.S. dollars.

It is encumbered; about three-quarters of it. So about 700 to 750,000. There is roughly 250 to \$300,000 in equity there.

THE COURT: Is that in Zermatt?

MR. ONORATO: Yes. He has some bank accounts, Your Honor; I believe a Bank of America in Boston account that has about 2 or \$3,000, and he has two other bank accounts which have about 2 or \$3,000 in them.

Other than those bank accounts and the \$650,000, the home, and he owns a BMW which is worth roughly about \$50,000 which is overseas in Switzerland as well.

THE COURT: I thought there were no motorized vehicles in Zermatt?

THE DEFENDANT: There aren't, sir.

THE COURT: So where do you keep the car?

MR. ONORATO: Geneva.

THE COURT: Geneva.

MR. ONORATO: He has an apartment in Geneva.

THE COURT: All right. Is that another property?

MR. ONORATO: He rents it, Your Honor.

THE COURT: He rents an apartment in Geneva. Now, tell me why he does not have access to the money in Lichtenstein; the stocks in Lichtenstein?

MR. ONORATO: Well, because they are being held in trust by Mr. Staggl who now is aware that Mr. Birkenfeld is cooperating against him.

Mr. Birkenfeld would have to have communication with Mr. Staggl who the government I think is going to want to extradite back here to the U.S.

There has been no cooperation between those two gentlemen to get him to provide Mr. Birkenfeld the funds, but even if he were to be able to have access to those funds, Judge, they are still subject to that same stock.

So we are talking about only being able to liquidate about 10,000 shares a day. I looked today.

The stock started out at about \$8.60 a share, and it is now down to \$8.30, and that's based upon 11,000 shares being sold.

THE COURT: All right.

MR. ONORATO: So it is a small stock. It is something that cannot absorb the kind of volume that Mr. Birkenfeld would put through it to raise the money.

THE COURT: All right.

MR. ONORATO: Your Honor, I would like to tell the Court a couple of other things.

THE COURT: All right.

MR. ONORATO: Although he has lived overseas, he did know about this case. In fact, he has had discussions with the United States Government about this case for more than a year.

My firm has been representing him for about two years in this matter. I don't want to say too much in that regard, but he has been cooperative with the government in a number of different respects.

He finds himself in this position because we were trying to work out an immunity agreement vis-a-vis he being charged, and we lost that battle, as the court can see, but that being said, Mr. Birkenfeld knew that Licdee was incarcerated overseas.

He knew that by coming over here, because we talked to him about it, that he could be arrested. Nevertheless, he came over here with that knowledge.

He did not want to run from this potential case. What I tell the Court is he has a father who is --

THE COURT: Well, you are not saying that he surrendered on this. My understanding was that he came here for a high school reunion and got arrested.

MR. ONORATO: That's true, but he knew coming over here that Mr. Licdee back in April was arrested.

THE COURT: Right.

MR. ONORATO: He knew that he provided Mr. Licdee's name to the United States Government authorities, and he knew that there was a substantial chance that he would be caught up in the net.

THE COURT: Right. But he did not come here to surrender on this case?

MR. ONORATO: No. He did not come here to surrender. There was no warrant or we would still be in the posture where we are still talking to the government, but on the same point, he didn't literally stay out of the country.

He came into the country knowing this was a possibility.

Judge, his father is a neurosurgeon who lives in Massachusetts. His brother is a lawyer who lives in Massachusetts.

He is going to be living with his brother. He is very close to his father. He has a brother in Seattle.

Mr. Birkenfeld has no desire to put himself and his family at any greater risk by not appearing in any court on appearance, and I can tell the court that since he was released

last Wednesday, he has complied with everything that he has been asked of, including, you know, going to Washington and meeting with the prosecutors on two different days and going to pretrial and meeting with the pretrial supervisors up in Massachusetts.

I mean, I have had daily contact with him and will continue to have daily contact with him.

I understand the court's concerns, and we don't come here lightly, but I do think that Mr. Birkenfeld has made efforts to kind of rectify what he has done with the wrong that he has done and is trying to fashion himself in a situation where he can benefit from cooperating with the government further.

THE COURT: All right. Mr. Kay?

MR. KAY: Judge, the only thing I can add is based on my familiarity with the case, and I've been with the case since Mr. Neiman started the case in this district, is based on what counsel has said, everything is correct as far as the government --

THE COURT: Will you approach.

MR. KAY: With everything the government knows, we are also going to recommend, Your Honor, if the court would want to do it, some type of electronic monitoring or house arrest while he is in the Boston area.

It is our opinion and it is Justice's opinion, Judge, that it is an unusual situation, seeing that things with Mr. Birkenfeld have progressed much faster than anyone ever expected, and he has been somewhat cooperative with the government, which I know is not a consideration for you, Judge, but it is a major consideration for the United States.

THE COURT: Yes, but that is important because the government's agenda is not my agenda or the court's agenda, and it is different than the defendant's agenda.

And when I hear people proffer cooperation, to suggest that that somehow shields them from a bond that is appropriate, as we all know, people have put themselves in a position where they have represented they are going to cooperate and, in fact, have cooperated and used that opportunity then to jump bond.

MR. KAY: Judge, your concern is our concern, Judge, as far as Mr. Birkenfeld's continuing appearances.

Obviously, if Mr. Birkenfeld would go back to Switzerland, it puts the United States Government and the Department of Justice in a very bad weak position as far as future bargaining with the Swiss authorities with where this case is ultimately going.

It is the collective opinion, and I think I can say this on behalf of the Department and the United States Attorney's Office, that we are trying to fashion a bond, Judge, that is reasonable for Mr. Birkenfeld to continue the situation he is in and make the court comfortable at the same time and make us comfortable at the same time.

We have his passport. We have his travel documents. I cannot say anymore than that, Judge.

We are trying to bend over and be as reasonable as we can to accommodate everybody's concern here to do the right thing.

THE COURT: All right. Mr. Raben?

MR. RABEN: Judge, everything has been adequately set forth before the Court. I just came into the case recently as local counsel, but I would remind the court that

although that Mr. Birkenfeld did live in Switzerland, he is a U.S. citizen.

And so while the court is, of course, concerned about where he would flee to, it is not likely that he is going to flee to Switzerland, and it is not likely he is going to jeopardize the property that his family has.

Also, although the statutory maximum is 5 years, the authorities in Washington, D.C. and Boston thoroughly went over this case, and Mr. Birkenfeld has been cooperating with them, and there is a substantial degree of trust and hope that exists in both parties that is ultimately going to result in a much lower sanction against Mr. Birkenfeld.

I think that what he has done in the last week would suggest to the Court that this court can adopt the trust that the Boston magistrate put on the parties and accept that trust.

THE COURT: All right. Mr. Birkenfeld, if you would approach the lectern, please.

Mr. Birkenfeld, I am going to put you under oath. Therefore, the answers that you give must be truthful.

They are subject to the penalties of perjury. Please raise your right hand.

BRADLEY BIRKENFELD WAS DULY SWORN BY THE COURT

THE COURT: All right. I want to go over the assets that Mr. Onorato had proffered. You heard his proffer; is that correct?

THE DEFENDANT: Yes I did.

THE COURT: All right. And he indicated that you have 650,000 or \$700,000 in a stock account here in the United States?

THE DEFENDANT: Yes, Your Honor, at Fidelity Brokerage.

THE COURT: And, Mr. Onorato, what are you going to do now again to put that out of your client's control?

MR. ONORATO: Your Honor, I will work with the government in figuring out a way to either put it in a trust or to sign over ownership to them or agree to some type of lis pendens; whatever we need to do to satisfy them.

THE COURT: All right. You will put it outside of your client's control?

MR. ONORATO: Yes, Your Honor.

THE COURT: All right. Now, you have additionally 1.5 million dollars in stock in Lichtenstein in a trust; is that correct?

THE DEFENDANT: It is in a company, yes, Your Honor. It is the same stock. That is correct.

THE COURT: Okay.

THE DEFENDANT: Controlled by Mr. Staggl.

THE COURT: All right. And you have no access to that; is that correct?

THE DEFENDANT: I have been told not to speak to anybody.

THE COURT: All right. Who is the gentleman behind you there?

MR. NEIMAN: He is an IRS agent.

THE COURT: Oh, okay. You were looking at him. That's why I didn't know. So you would have access to it through the co-defendant Mr. Staggl; is that correct?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Other than that, is there any other way you can access it?

THE DEFENDANT: No, Your Honor.

THE COURT: All right. You have a house in Switzerland worth \$1,000,000 with a lien of about or a mortgage of about 750,000 roughly?

THE DEFENDANT: That's correct, Your Honor.

THE COURT: In Zermott. You have three bank accounts with roughly 2 to \$3,000 in each?

THE DEFENDANT: That's correct, Your Honor.

THE COURT: The Bank of America?

THE DEFENDANT: There might be a very small pension of about 10,000 with Credit Swiss in Switzerland. 10 or 15. I can't remember.

THE COURT: All right. And you have got a BMW vehicle in Geneva. Do you have any other assets anywhere in the world, for that matter?

THE DEFENDANT: No, Your Honor.

THE COURT: Do you have any accounts receivable? Does anybody owe you any monies?

THE DEFENDANT: To the contrary. I actually owe some people money.

THE COURT: Okay. All right. The court will do the following: I will set a \$100,000 corporate surety bond. What is the source of the premium on that, Mr. Onorato?

MR. ONORATO: We are going to ask leave of the court and the government to liquidate just a few shares of that Fidelity account to come up with that premium.

THE COURT: Well, you have a Nebbia issue. Is that the proceeds of the illgotten, the proceeds of the fraud? I suspect the fraud money has been commingled.

MR. ONORATO: I believe it is his own money, Your Honor.

THE COURT: Well, I know it is his money, but did he earn it through the type of fraudulent activity that we have talking about?

MR. ONORATO: That becomes a hard question to answer.

THE COURT: Because if it is commingled, is there somebody else that can post the premium for that?

MR. ONORATO: Your Honor, I am sure that we can figure out a way to do that.

THE COURT: All right. There will be a Nebbia requirement on the \$100,000 corporate surety, a \$2,000,000 personal surety co-signed by the defendant's brother and father and a condition of electronic monitoring.

Mr. Onorato, I will take you at your word that you are going to devise a manner with the government through which the money and the stock account here will not be accessible, and your client is not to have any contact with Mr. Staggl with regard to this 1.5 million dollars.

What about the house in Switzerland? What are we going to do to make sure he doesn't liquidate that and use that?

MR. ONORATO: Your Honor, what the court can do is direct him, to the extent that he is going to, first of all, he can't get back to Switzerland to do any of those things.

THE COURT: Correct, but he can give somebody power of attorney who could resell it.

MR. ONORATO: Well, logistically it would be very difficult. In fact, he has a lot of affairs that need to be attended to in Switzerland that he just simply cannot attend to.

That being said, if the Court would order him to have contact before he is to do anything with that property, to seek leave of the Court before he does anything, and I think Mr. Birkenfeld would, of course, respect the court's order.

THE COURT: Other than his word, how do we enforce that?

MR. KAY: It can be a condition of the bail. It is common as a condition that an individual not be able to mortgage, pledge, hypothecate or lien any properties that he owns.

THE COURT: No, I understand that, but how do we enforce that? How do we know that, other than his own representations?

THE DEFENDANT: I guess it is with the bank.

MR. ONORATO: Other than making any conditions of his bail --

THE COURT: But you understand the problem is, and please don't take this personally, Mr. Birkenfeld, but the problem is I am not willing to rely upon his word, and it is not a personal thing, but we have to have some way --

MR. ONORATO: No I understand.

THE COURT: -- just as with this \$650,000 in stock Mr. Onorato was going to devise a method of or a means by which that will be outside of his custody and control, I want to do the same thing with regard to his home; that he does not liquidate that and take the funds and then has a quarter of a million dollars at his disposal.

MR. ONORATO: He does not have the deed because, as the Court heard, he only owns 25 percent of the property. The bank holds the deed.

THE COURT: Right.

MR. ONORATO: So it is not a matter of surrendering the deed, other than giving the government permission to lien on it or entering into an agreement that, you know, with the government that it is not only a violation of the bond, but a violation of the decree that he will enter into with the government.

I can't think of anything else that can assure the court he can't sell it.

MR. KAY: Judge, as a suggestion to the Court, and I don't know the answer to it, my own theory here is to give us some time to see whether or not the United States Government would be allowed to put some type of lien on the property in Switzerland, and I would have to go through OAA and through our asset forfeiture people to find out the answer to that, Judge, but that's a possibility.

THE COURT: Well, what I want to do is be relatively assured that all of his assets are tied up and he does not have access to any of them.

Again, we would not be able to extradite him, and this is a relatively lenient bond.

MR. ONORATO: Judge, I have one idea.

THE COURT: Yes.

MR. ONORATO: I do know that Mr. Birkenfeld has counsel in Switzerland.

THE COURT: Yes.

MR. ONORATO: I would be happy to reach out to counsel in Switzerland and seek his assistance --

THE COURT: All right.

MR. ONORATO: -- to see if there is a way that we can somehow encumber the property in a manner which would make the court comfortable.

THE COURT: All right.

MR. ONORATO: And if the Court would allow me about 10 days, I would be happy to --

THE COURT: Report back?

MR. ONORATO: -- report back to your staff.

THE COURT: All right. And file a status report. All right. In addition, the court is going to set the following standard and special conditions of bond:

Mr. Birkenfeld, I will ask that you please listen carefully. When I am done, I will ask whether you understand each and everyone of the conditions of bond that I have set forth.

First and foremost, you are to appear in court as at such times and places as directed to appear. Your failure to do so may result in a straight indictable offense of bond jumping.

Your travel will be restricted. You are going to be living in Massachusetts?

THE DEFENDANT: Yes.

THE COURT: Where? Boston?

THE DEFENDANT: With my brother, yes, sir.

THE COURT: In Boston?

THE DEFENDANT: It is South Boston.

THE COURT: South Boston. Your travel will be restricted to the District of Massachusetts and the Southern District of Florida and any intermediate jurisdictions traveling to and from your court appearances.

I will also permit you to go to D.C. to meet with counsel in D.C. You are to continue to reside at your brother's address and not change that address without prior approval from the court.

You will be affixed with a bracelet; an ankle or a wrist bracelet. You are to be present inside the home between 10:00 a.m. and 6:00 a.m. barring an emergency every day.

MR. ONORATO: Your Honor, is that 10:00 p.m.?

THE COURT: What is that?

MR. ONORATO: Is it 10:00 a.m. or 10:00 p.m.?

THE COURT: 10:00 p.m. to 6:00 p.m. each day.

MR. ONORATO: Thank you.

THE COURT: You shall not commit any violation of local, state or federal law. Do you possess any passports other than the American passport?

THE DEFENDANT: No, Your Honor.

THE COURT: And that has been seized?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Are you a citizen of any country other than the United States?

THE DEFENDANT: No, Your Honor.

THE COURT: All right. This isn't a Mark Rich situation. No. All right.

MR. RABEN: Not at all.

THE COURT: So you are not a Swiss citizen?

THE DEFENDANT: I am just a U.S. citizen, Your Honor.

THE COURT: Okay. You are to report to the Pretrial Services Office in Boston with the frequency that they instruct you to report.

With regard to employment, what about that?

MR. ONORATO: Your Honor, Mr. Birkenfeld is going to have to seek employment. Obviously things have changed single last Tuesday when he arrived here, and he is trying to figure out, you know, what comes forward, but he will be seeking employment.

THE COURT: All right. You are to seek and maintain full time legitimate, verifiable employment outside of the finance services industry.

You are to avoid any contact with any victims or witnesses to this offense, except through and with your attorneys as they deem necessary in preparing your defense. Do you have any guns?

THE DEFENDANT: They were removed. We had those removed by the Wayman Police Department, and they were taken out of the safe.

THE COURT: Okay. Very well. While out on bond, you are not to be in the possession of any guns or other dangerous weapons.

You shall, of course, refrain from the consumption of any illegal narcotics and from the excessive use of alcohol and submit to any random urine analysis that the Pretrial Services officer deems necessary, as well as any recommended follow-up treatment.

Let me ask whether the government or the defense has any other recommended additions or modifications of bond? First from the government?

MR. NEIMAN: Just one second, Judge.

THE COURT: Anything else?

MR. KAY: Nothing else from the United States, Judge.

THE COURT: And from the defense?

MR. ONORATO: No, Your Honor, other than I am going to ask the court to be lenient regarding the maintaining and seeking employment.

I want the court to be aware that his only background is in the financial services area in Switzerland, and suddenly he is going to find himself that he is going to be virtually unemployable, so that the probation officer is probably going to say to him, "Where did you go looking for work today?"

Ultimately, we are going to be back before the court, and it is not to say that because he has not tried.

THE COURT: Well, for obvious reasons he is not going to be able to work in the financial services industry, but it seems to me that somebody of his intellect and ability should be able to find employment.

It may not be the employment of his first choice, but, you know, obviously pretrial,

you know, up there can work with him and give him a little time to find a job, but it has got to be outside the financial services industry.

MR. ONORATO: I just wanted to put that out there.

THE COURT: All right. Mr. Birkenfeld, do you understand each and everyone of the conditions of bond that I have set forth?

THE DEFENDANT: Yes, Your Honor.

THE COURT: In just a moment we are going to give you a form entitled, "Conditions of release." I would like you to please read and sign it, but don't sign it until you have read it and thoroughly understand it.

Finally, I need to inform you, as I inform all defendants, that for a violation of any one or a combination of conditions of release, that you may have a warrant issued for your arrest and your bond may be revoked and you may be subjecting yourself to contempt of court, as well as further and additional criminal penalties. Do you understand?

THE DEFENDANT: I understand, Your Honor.

THE COURT: All right. And, Mr. Onorato, you are going to within 10 days file a status report with the court as to what you are doing with the stocks and what you have devised in that regard and also with regard to the home in Switzerland, correct?

MR. ONORATO: Yes, Your Honor.

THE COURT: All right. Does the government or the defense have any other matters as to Mr. Birkenfeld that they wish to raise?

MR. NEIMAN: No, Your Honor.

THE COURT: Okay.

MR. ONORATO: No, Your Honor.

THE COURT: All right.

MR. ONORATO: The only request that I would have of the court is that the court would allow us a period of time to get both bonds in place. He is going to have to have time.

THE COURT: Yes. I was going to mention that. Thank you, actually, for reminding me.

With regard to the personal surety bond, the brother and the father can co-sign up in Massachusetts. They are both in Massachusetts?

MR. ONORATO: Yes, Your Honor.

THE COURT: They can go into the Clerk's Office there. Today is Tuesday. I will give them until the close of business on Friday to go into the Clerk's Office in Boston to sign on the paperwork there.

You can speak to Aaron down here and he can make those arrangements for the paperwork to be faxed up there for their signatures.

With regard to the corporate surety bond, how long will you need to have that posted?

MR. ONORATO: Your Honor, if I could have a week because I have to find Mr. Birkenfeld's funds to do that.

THE COURT: All right. And there is a Nebbia requirement. I will waive the

Nebbia if the government is satisfied, Mr. Neiman, that the funds are free; absolutely free of any taint.

MR. NEIMAN: Yes, Your Honor.

THE COURT: It cannot be commingled. All right. It is to be free of taint. Whether it is the father or the brother, that is fine, but, obviously, you know, if Mr. Birkenfeld is putting up the funds, there is an issue there.

It would be virtually impossible, as Mr. Onorato indicated, to sever out the legitimate from the illegitimate.

All right. Does the government or the defense have any other matters?

MR. NEIMAN: No, Your Honor.

MR. RABEN: No, Your Honor.

MR. ONORATO: No, Your Honor.

THE COURT: All right. Mr. Birkenfeld, do you have any questions that I can answer, either about what we have done today, about the terms and conditions of your bond or about what will be occurring next in your case?

THE DEFENDANT: No, Your Honor.

THE COURT: All right.

THE DEFENDANT: Just one other thing: I made an appointment to see pretrial at 10:00 a.m. on Thursday in Boston.

THE COURT: All right.

THE DEFENDANT: Two days ago I made that appointment.

THE COURT: All right. You will be released today. Unless there are any other holds, you will be released today. So you should be able to be back in Boston later today.

MR. ONORATO: We have the business card.

THE COURT: What is that? I am going to permit him to, what I said was I will give him a week to post the corporate surety bond and give him until Friday to get the co-signatures on the personal surety bond.

MR. ONORATO: We have the business card for the Pretrial Services Officer in Massachusetts, and what we would ask is that the clerk fax those documents directly to the clerk and the Pretrial Services officer report.

So he will be there on Thursday and his parents or his father and brother can go in on Thursday.

THE COURT: Well, why don't you do this: As soon as we are done, give the information to Aaron and he will take care of getting the documents up there that need to be signed.

The only thing that I am thinking of that maybe we didn't touch on that I might want is a waiver of extradition.

MR. KAY: Judge, generally, I've been through this before. It is my obligation to tell the court that usually it is useless, especially in foreign countries.

The foreign country says, "It is nice, but we are not obligated to it." I just want to make the court aware of that.

Especially in this situation, Judge, we know right up front that in a tax offense in Switzerland, it is not an extraditable offense.

MR. ONORATO: Judge, if it is a concern to the Court, it maybe be meaningless legally, but as a gesture to the court, we have no problem signing it.

THE COURT: All right. Why don't you go ahead and have one prepared for signature. He may wind up in a country that will honor it.

MR. KAY: Judge, you may be right on that one.

THE COURT: But let's hope we don't have to put it to the test.

Mr. Birkenfeld, your lawyers have made certain representations with regard to your word and your honor in this matter, and that you do not intend to put your brother and your father's financial well-being, as well as your own well-being at risk by violating a condition of the bond.

I trust that you will behave in a manner that supports their representations.

THE DEFENDANT: You are correct, Your Honor. Absolutely.

THE COURT: All right. Very well. We will stand in recess

MR. RABEN: Thank you.

MR. NEIMAN: Thank you, Judge.

THE DEFENDANT: Thank you, Your Honor. **(Whereupon the proceedings were concluded)**

CERTIFICATE

I hereby certify that the foregoing is an accurate transcription of proceedings in the above-entitled matter.

DATE

JERALD M. MEYERS, RPR-CM
Miami, FL 33128-7797