

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

UNITED STATES OF AMERICA	§	
	§	
v.	§	Criminal No. 5:16-CR-00618-FB
	§	
CHARLES AUGUSTUS BANKS, IV	§	
	§	
Defendant	§	
	§	
	§	

**DEFENDANT’S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW
WITH REGARD TO DEFENDANT’S MOTION TO TRANSFER VENUE**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the Defendant Charles A. Banks, by and through the undersigned counsel, and files these proposed findings of facts and conclusions of law regarding the Defendant’s Motion to Transfer Venue:

The Court, having considered the Motion of the Defendant, the Government’s Response, as well as the testimony and credibility of witnesses, makes the following findings of fact and conclusions of law regarding the Defendant’s Motion to Transfer Venue:

Findings of Fact

Tim Duncan is a well-known sports star in San Antonio, Texas

Tim Duncan is a retired professional basketball player who lives in San Antonio, Texas. He played his entire career, from 1997 to 2016, with the San Antonio Spurs of the NBA. (*Tim Duncan*, https://en.wikipedia.org/wiki/Tim_Duncan (visited on December 12, 2016), Attachment No. 3 to Peele Decl.) He is widely considered one of the greatest power forwards of all time. (*Id.*) With the Spurs, he won the NBA championship five times. Individually, he was a two-

time NBA MVP, three-time NBA Finals MVP, and NBA Rookie of the Year. (*Id.*) He was a 15-time NBA All-Star, and was the only player in NBA history to be selected to both the All-NBA and All-Defensive Teams for his first thirteen consecutive seasons in the NBA. (*Id.*)

Mr. Duncan is known not only for his success on the court, but is also known for his service to the community and philanthropy. (*Id.*) He established the Tim Duncan Foundation to serve the areas of health awareness and research, education, and youth sports and recreation in San Antonio, Texas; Winston-Salem, North Carolina; and the United States Virgin Islands. (*Id.*) The foundation's major events have included the Tim Duncan Bowling for Dollar\$ Charity Bowl-A-Thon and the Slam Duncan Charity Golf Classic. (*Id.*) In 2001 and 2002, Mr. Duncan was named by Sporting News as one of the "Good Guys" in sports. (*Id.*) He also supports the Children's Bereavement Center, the Children's Center of San Antonio, and the Cancer Therapy and Research Center. (*Id.*)

“To date, the Tim Duncan Foundation has raised over \$650,000 to support its mission by supporting non-profit organizations and programs in South Texas, U.S. Virgin Islands, and in North Carolina.” (*The Tim Duncan Foundation*, <http://www.slamduncan.com/about-foundation.php> (visited on December 12, 2016), Attachment No. 4 to the Peele Decl.) Mr. Duncan’s positive impression on the residents of San Antonio begins at an early age, through the Tim Duncan's Character Program. (*Tim Duncan’s Character Program*, <http://www.slamduncan.com/news-character.php> (visited on December 12, 2016), Attachment No. 5 to Peele Decl.) This educational incentive program “reward[s] 3,000 Bexar County students each year who show outstanding character traits and make good character choices. . . . Students who show strong character are then rewarded with items ranging from Spurs, Rampage

and Silver Stars tickets to Character Program t-shirts to SeaWorld passes to achievement certificates.” (*Id.*)

Mr. Duncan retired from professional basketball after the 2015 - 2016 NBA season. (Attachment No. 3 to Peele Decl.) On July 21, 2016, the Mayor of San Antonio declared it to be “Tim Duncan Day.” (*Mayor Taylor Signs Proclamation Declaring Tim Duncan Day*, <https://www.sanantonio.gov/Commpa/News/ArtMID/1970/ArticleID/7990/Mayor-Taylor-signs-proclamation-declaring-Tim-Duncan-Day> (visited on December 12, 2016), Attachment No. 6 to Peele Decl.) A large celebration, attracting such a sizable crowd that the price of tickets to the AT&T Center for the ceremony multiplied in price, was held Sunday, December 18, 2016. The purpose of the event was the “retirement” of Duncan’s number, and the raising of his jersey to the rafters of the AT&T Center. The ceremony was televised live and was broadcast live on two local radio stations.

Media coverage of Tim Duncan during his time in San Antonio has been significant, totaling over 22,000 hits when searching his name online in the local newspaper. (Tr. 25:26:12.) Even after his retirement, Mr. Banks is a consistent presence in the San Antonio media market. For instance, Mr. Duncan has his own cereal, sold by the local grocery chain HEB, which is heavily marketed in the San Antonio area. (Tr. 26:13-15.)

Neither Charles Banks nor the facts of the case have strong ties to San Antonio or the Western District of Texas.

Charles Banks lives in the Atlanta, Georgia area with his wife and his two school-age children. (Declaration of Charles A. Banks, ¶ 1, attached as Exhibit B hereto.) He spent his high school and college years in Georgia, playing basketball for the University of Georgia. (Banks Decl., ¶ 2.) He married his wife in 1991, and began a career with CSI, a company that specialized in working with sports figures to manage their individual wealth. (Banks Decl., ¶ 3.)

It was in this role that Mr. Banks first met Tim Duncan in approximately 1997, when Mr. Duncan had been drafted as the number one pick in the NBA draft and was interviewing various wealth management firms. (Banks Decl., ¶ 4.) Mr. Duncan and his lawyers selected CSI to help manage Mr. Duncan's wealth and thus began a long term relationship between Mr. Banks and Mr. Duncan that lasted until approximately 2013. (Banks Decl., ¶ 5.)

Mr. Banks moved with his family to San Francisco in 2000, and eventually became the President of CSI. (Banks Decl., ¶ 6.) During this time, Mr. Banks became involved in the wine business as an investor, eventually moving to Santa Barbara in 2001 when he and some other individual investors created a winery named Jonata. (Banks Decl., ¶ 7.) Jonata was very successful. (*Id.*) In 2003, Mr. Banks and the son of one of CSI's founders started an investment fund focused on hotel and resort properties; Tim Duncan was one of the individuals that invested money with the fund. (Banks Decl., ¶ 8.) In 2006, Mr. Banks worked with one of the other hotel and resort fund investors, Mr. Stan Kroenke, to purchase the Screaming Eagle winery located in Napa, California. (Banks Decl., ¶ 9.) Again, Mr. Banks' business sense proved profitable as Screaming Eagle was also very successful. (*Id.*)

In 2007, based on the success he was having in his other business ventures, Mr. Banks decided to step down from his role at CSI and focus more on his own individual deals in the wine and hospitality industries. (Banks Decl., ¶ 10.) Mr. Banks specifically communicated with Tim Duncan in 2007 to tell Mr. Duncan that he was leaving CSI. (Banks Decl., ¶ 11.) Mr. Banks explained he was leaving to focus on private deals and that he would bring opportunities to Mr. Duncan for his review. (*Id.*) By this time, Mr. Banks had founded two other investment funds, and Mr. Duncan was an investor in each of those funds as well. (Banks Decl., ¶ 12.) All of those

investments by Mr. Duncan were made while Mr. Banks lived and operated his businesses in California. (Banks Decl., ¶ 13.)

It was also in this time frame that Mr. Banks made his first initial investment, along with several professional sports figures, with Jeff Neal in connection with a company that would eventually come to be known as Gameday Entertainment, LLC (hereinafter “Gameday”). (Banks Decl., ¶ 14.) Mr. Banks’ investment was made via a separate company that he and Mr. Kevin Garnett owned. (*Id.*) Gameday was a company that contracted with professional sports teams to sell their licensed apparel and merchandise at locations within the sporting arenas and venues where those sports teams played. (Banks Decl., ¶ 15.) Only a couple of years later, Mr. Banks and Mr. Garnett, again operating through the separate company that they owned, guaranteed a sizable loan to Gameday. (Banks Decl., ¶ 16.) Still, Mr. Banks lived in California at the time of these investments in Gameday, and Gameday and its employees were at all times located in Colorado. (Banks Decl., ¶ 17.)

In 2011, CSI was sold to SunTrust Bank. (Banks Decl., ¶ 18.) Mr. Banks and Mr. Duncan continued their personal relationship after CSI was sold to SunTrust. (Banks Decl., ¶ 19.) Communicating primarily through emails and texts, Mr. Banks would bring various business deals to Mr. Duncan, as Mr. Duncan had expressed to Mr. Banks on numerous occasions that he wanted to make greater returns on his investments – especially as Mr. Duncan’s retirement from the NBA grew nearer. (Banks Decl., ¶ 20.) Mr. Banks did not travel to San Antonio to have these communications with Mr. Duncan, but instead sent and received these texts and emails while living in California. (Banks Decl., ¶ 21.) One of these opportunities Mr. Banks brought to Mr. Duncan in 2012 was Gameday. (Banks Decl., ¶ 22.)

In late 2012, Mr. Banks, while living in California, communicated with Mr. Duncan about making a loan to Gameday. (Banks Decl., ¶ 23.) Mr. Duncan had previously made loans or investments with other individuals, such as loans to Malik Rose and Bruce Bowen, as well as an investment in an automotive performance shop in San Antonio, so Mr. Banks believed Mr. Duncan would be interested in this opportunity. (Banks Decl., ¶ 24.)

After reviewing the business opportunity, Mr. Duncan decided to loan \$7.5 million to Gameday. (Banks Decl., ¶ 25.) It was Mr. Banks' understanding that Mr. Duncan decided to take out a loan from a bank and then loan the money to Gameday. (Banks Decl., ¶ 26.) It was also Mr. Banks' understanding that Mr. Duncan's goal was to make money on the difference between the interest he had to pay to the bank and the interest and fees that Gameday would pay to him. (Banks Decl., ¶ 27.) Based upon this understanding, Mr. Banks introduced Mr. Duncan to two bankers in California working for Comerica Bank, Msrs. Brandt Daniel and Nathan Croyle. (Banks Decl., ¶ 28.) These bankers, along with Mr. Jeff Neal of Gameday, negotiated the terms of the loan with Mr. Duncan, closed the loan, and funded money to Gameday – all from their respective offices in California and Colorado. (Banks Decl., ¶ 29.) Mr. Duncan traveled to Los Angeles, California and met with Brandt Daniel to sign the loan documents. (*Id.*) Mr. Banks did not travel to Texas or Colorado in connection with Mr. Duncan's initial \$7.5 million loan to Gameday, nor was he present when Mr. Duncan and Brandt Daniel met to sign the loan documents. (Banks Decl., ¶ 30.) Any communication Mr. Banks had with anyone regarding this loan would have been made from his state of residence at that time, California. (Banks Decl., ¶ 31.)

Although the Superseding Indictment filed by the government (the "Indictment") mentions Mr. Duncan's first \$7.5 million loan to Gameday in 2012, it does not allege there was

any fraudulent activity in connection with that loan. (Indictment, Dkt. No. 27) Instead, the Indictment contains four counts of wire fraud which are all based on a subsequent loan guaranty transaction entered into by Tim Duncan and Comerica in late June 2013. (Indictment, pages 7-9.)

With regard to the loan guaranty transaction, the Indictment alleges that Mr. Jeff Neal explored with Comerica the possibility of Gameday obtaining a new line of credit. (Indictment, page 4.) The Indictment goes on to allege that Charles Banks arranged for Tim Duncan to sign a new agreement guaranteeing the new line of credit and subordinating Mr. Duncan's original loan to Gameday to the new line of credit. (Indictment, page 4.) But the Indictment alleges that the communications between Charles Banks and Tim Duncan took place while Charles Banks was in California and Tim Duncan was in Florida. (Indictment, pages 7-9.)

In the section of the Indictment entitled "Manner and Means," the government identifies eleven separate manner and means by which it alleges Mr. Banks carried out the alleged "Scheme to Defraud." (Indictment, pages 4-5.) Of those eleven manner and means, only one is identified as occurring within the Western District of Texas: Tim Duncan allegedly faxing two signature pages from San Antonio to employees of Charles Banks and Comerica on June 26, 2013. (Indictment, page 6.) The other manner and means wherein the government alleges that Mr. Banks made misrepresentations to Mr. Duncan are listed in the paragraphs numbered 3 through 5 on page six of the Indictment. (*Id.*) As explained above, however, those communications took place while Charles Banks was in California and Tim Duncan was in Florida. The remaining manner and means consist of allegations that the loan guarantee transaction was closed by Comerica and that Gameday then drew against the new line of credit – and all of those acts or events took place either in California or in Colorado, or both. (Banks Decl. ¶ 32.)

Moving on to the specific counts of the Indictment against Mr. Banks, only one count alleges that an act actually took place within the Western District of Texas. Specifically, Count Two alleges that Charles Banks caused Mr. Duncan to send the two faxed signature pages from San Antonio, Texas to an unspecified location in California. (Indictment, Count Two, pages 7-8.) The remaining three counts do not allege acts that took place in the Western District of Texas. Instead, Counts One, Three, and Four all allege that Charles Banks caused faxes or text messages to be sent between California and Florida. (Indictment, pages 7-9.)

With respect to the entities described in the Indictment, the Indictment alleges that Gameday is a corporation incorporated in and operating in Colorado. (Indictment, page 1.) It alleges that Comerica Bank was founded in Michigan and has headquarters in Dallas, retail-banking operations in those two states plus six others, and select business operations in several other United States. (Indictment, page 1.) The Indictment does not specify that the Comerica operations mentioned in the Indictment are specifically located in California. (Indictment, page 1; cf. Banks Decl. at ¶ 33.) SunTrust is identified in the Indictment as being headquartered in Georgia, and having offices in San Diego, Los Angeles, Charlotte, Daytona Beach, and Nashville – but not in San Antonio or Texas. (Indictment, page 2.) The Indictment also explains that SunTrust acquired CSI, a company also located in California, in 2011. (Indictment, page 1.)

With respect to the individuals mentioned in the Indictment, Charles Banks is identified as the defendant, and Tim Duncan is identified by the initials “T.D.” (Indictment, page 3.) The Indictment fails to allege where either of the men currently live or work, or where they lived or worked at the time of the events alleged in the remainder of the Indictment. (*See, generally*, Indictment.) As already stated above, Charles Banks lived in California at all periods described in the Indictment.

Dr. Edelman's Opinion

For his undergraduate studies, Dr. Bryan Edelman attended Florida State University where he received a bachelor's degree in psychology. (Hearing Transcript 8:23-9:1, January 18, 2017). He then attended the University of Nevada in Reno and studied social psychology, eventually receiving his Ph.D. there. (Tr. 9:2-3.) The program he took part in at the University of Nevada in Reno is unique, in that its main focus is on psychology and law. (Tr. 9:3-5.) Also while in Reno, he worked at the Grant Sawyer Center for Justice Studies where he worked on a number of different research projects, ranging from the impact of pretrial publicity and how jurors respond during voir dire when asked about exposure to media coverage. (Tr. 9:6-10.) He did research on how jurors make sentencing decisions in capital cases. (Tr. 9:10-11.) He worked on a program to design an interview process for reducing the jail population for Washoe County. (Tr. 9:11-13.) He also did a number of survey exercises or research projects focusing on judicial workload. (Tr. 9:13-15.) Once he finished his Ph.D., he went to the University of Kent in England on a Rotary scholarship where he received an LLM in international humanitarian law. (Tr. 9:16-18.)

Apart from his formal education, Dr. Edelman did study and work on the effects of pretrial publicity. (Tr. 10:4-5.) He worked under Dr. Ed Bronson who is a leading expert in the field on pretrial publicity and venue issues. (Tr. 10:4-5.) Beginning in 1999 he worked for a jury consulting firm in Reno. (Tr. 10:15-17.) Once he graduated, Dr. Edelman worked for a company called the Jury Research Institute, from approximately 2005 through 2010. (Tr. 10:17-19.) He then cofounded a jury consulting company called Trial Innovations in 2011. (Tr. 10:19-20.)

With regards to the use of surveys, Dr. Edelman's graduate school classes emphasized survey methodology, design, and the use of mail and telephone surveys. (Tr. 11:2-5.) He has

conducted more than 75 telephone and online surveys, written about online survey design, and been involved in about 37 legal cases where a change of venue was examined by at least one party. (Tr. 11:10-17.) His approach to surveys is consistent with the guidelines promulgated by the American Society of Trial Consultants. (Tr. 11:22-25.)

Dr. Edelman's background and education, as evidenced by his testimony and his curriculum vitae (admitted into evidence as Defense Exhibit #1) justify a finding by the court that he is qualified to provide an opinion on whether or not the pretrial publicity surrounding Tim Duncan and his career in San Antonio make it so that Mr. Banks cannot receive a fair and impartial trial when jurors are drawn from the San Antonio Division of the Western District of Texas. (Tr. 15:20-21 and 16:12.)

Dr. Edelman's survey, admitted as Defense Exhibit 2, and his testimony, support the following findings:

1. The survey was conducted in a reasonable and scientifically valid method, based on the best practices in this area of study.
2. The alleged victim of the crimes alleged in the Superseding Indictment, Mr. Tim Duncan, is a very positive figure in the San Antonio area. (Tr. 18:11-21.)
3. Pretrial publicity affects potential jurors' perceptions of guilt, and that is true whether the pretrial publicity is negative towards the defendant or is positive towards the victim. (Tr. 19:2-10; 23:23-25:1.)
4. Questions to prospective jurors that ask if they can be fair and impartial are not very effective in revealing a juror's actual biases, as most jurors will respond that they can be fair and impartial despite strong beliefs about the guilt of the defendant. (Tr. 20:6-21:6.)

5. Witness credibility has one of the strongest impacts on the outcome of trials, and witness credibility will be particularly important in this case where the government will rely upon Tim Duncan's testimony regarding his knowledge or ignorance of various facts and his perception of alleged misrepresentations by Charles Banks. (Tr. 23:2-14.)
6. 96 percent of the people who participated in Dr. Edelman's survey, had read, seen or heard of Tim Duncan. (Tr. 30:24-25.)
7. Almost 60 percent of survey participants identified Tim Duncan as the most-liked professional athlete in San Antonio. (Tr. 30:25-31:2.)
8. 74 percent of the survey participants had a very favorable opinion of Tim Duncan. (Tr. 31:5-6.)
9. Almost three quarters of the survey participants believe that he would be a very credible witness. (Tr. 31:8-9.)
10. In response to a question that gave the jurors no facts other than the basic statement that Mr. Banks had been accused of defrauding Mr. Duncan and had denied the accusation, over half the survey participants favored Tim Duncan at the outset. (Tr. 31:32-25.)
11. In comparison, in the Central District of California, Western Division, over half the survey participants had no opinion as between Mr. Banks and Mr. Duncan after being asked the question described above. (Tr. 33:25-34:15.)
12. Based on the survey results, it is likely that any jury panel brought in for jury selection will consist of approximately 80% San Antonio Spurs fans. (Tr. 39:8-40:1.)

13. It will be difficult, if not impossible, for people on the jury panel who are predisposed to believe Tim Duncan is a credible witness to set that belief aside.

(Tr. 40:2-16; 41:8-17.)

14. Another survey could be conducted by Dr. Edelman in one of the other divisions in the Western District within about two weeks for less than \$10,000. (Tr. 66:3-17.)

Based on the evidence filed with the Court, as well as the evidence and testimony presented at the hearing, the Court finds that there is a significant prejudice in favor of Tim Duncan among the population in the San Antonio Division of the Western District.

Conclusions of Law

A presumption of prejudice has been established and warrants transfer of this case out of the San Antonio Division of the Western District of Texas.

A criminal defendant by the United States Constitution is the right to trial by an impartial jury. U.S. Const. amend. VI. Courts have long held, therefore, that the Constitution's preference for a trial in the district where the alleged crime occurred can be overcome "if extraordinary local prejudice will prevent a fair trial—a 'basic requirement of due process,'" *Skilling v. United States*, 561 U.S. 358, 378 (2010) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)).

While most case law analyzing a transfer for prejudice under Rule 21(a) is focused on prejudice against the defendant, there is nothing in Rule 21(a) or the Constitution that requires that the prejudice be against the defendant. Prejudice is "defined as '(a) an adverse judgment or opinion formed beforehand or without knowledge or examination of the facts and (b) a preconceived preference or idea.'" *U.S. v. McVeigh*, 918 F. Supp 1467, 1472 (W.D. Okla. 1996)(citing *The American Heritage Dictionary of the English Language* (3d ed.1992)). Thus,

“prejudice” for the purposes of Rule 21(a) can just as easily be a prejudice in favor of the alleged victim which is so great as to deny the defendant a fair and impartial trial.

As the District Court in in the *McVeigh* case noted in its decision to transfer the Oklahoma City bombing case from the Western District of Oklahoma to the District of Colorado, prejudice may not even be recognized by people who are affected by it. *Id.* Importantly for the case at bar, the court also noted that

The prejudice that may deny a fair trial is not limited to a bias or discriminatory attitude. It includes an impairment of the deliberative process of deductive reasoning from evidentiary facts resulting from an attribution to something not included in the evidence. That something has its most powerful effect if it generates strong emotional responses and fits into a pattern of normative values.

(*Id.*) The court went on to explain that while a careful voir dire process and proper jury instructions might allow jurors in *some* cases to disregard prior awareness of the facts of a case, that ability to set aside prior knowledge dissipates when “jurors feel a sense of obligation to reach a result which will find general acceptance in the relevant audience.” *Id.* at 1473. The court in the *McVeigh* case openly acknowledged the understandably strong desire of the community in the Western District of Oklahoma to attend the trial, but found that the defendants’ right to a fair and impartial trial outweighed the concerns for the many thousands of people touched by the explosion in Oklahoma City. *Id.* at 1474.

In *United States v. Sablan*, 2014 WL 7335210 (E.D. Cal. Dec. 19, 2014), the district court granted a motion to transfer after conducting an analysis under Rule 21(a) and 21(b), where the alleged murder victim was a federal corrections officer and the district included an unusually high concentration of correctional facilities. In addition to the likelihood of a long and difficult voir dire and the associated increased cost, the court also found it “reasonable to presume that

some potential jurors will be influenced by the fact that a major highway running through the middle of the Fresno Division has been named [in honor of the slain correctional officer].” *Id.*

Courts undertaking this analysis are concerned not only with the actual prejudice a defendant may face in a particular judicial district, but must also consider the appearance that a defendant will not receive a fair trial. In *United States v. Wright*, 603 F. Supp. 2d 506 (E.D.N.Y. 2009), the court held that a transfer was warranted where the victim of an alleged assault was a member of the court family. Specifically, the court held that transfer was warranted to preserve the appearance of justice. *Id.* at 509.

In the case at hand, there is no doubt that the juror pool will be comprised of people who have, over the course of nearly twenty years, come to love and admire Tim Duncan. Unlike much of the publicity described in the case law relating to Rule 21(a) motions, the media attention to the alleged victim in this case has not been transitory – the quantity and nature of the media coverage to be considered in this case has been consistent when it comes to the positive image and reputation of Mr. Duncan. This community has been saturated with a steady flow of positive and praising media coverage of Tim Duncan for nearly two decades. When compared with even the significant negative publicity in some of the more high profile cases discussed during the hearing on January 18, 2017 (such as the *Skilling* case, the Boston Bomber case, and the trial of Dylan Roof), the media coverage of Tim Duncan has lasted much longer. And much of that coverage focused on the good character of Mr. Duncan, with the not-surprising result that Tim Duncan is liked and respected by a significant number of residents in this community (as evidence by the survey conducted by Dr. Edelman). The Court is not convinced that the impact of this coverage can be set aside, even though well-meaning and fair San Antonio citizens would surely attempt to do so.

With regard to the passage of time between the alleged crime and the trial, the Court finds that this factor does not mitigate the presumed prejudice in this case. While there has been some passage of time between the dates of the alleged crimes in the summer of 2013 and the planned trial in mid 2017, this is not the normal situation where a heinous crime is covered intensely in the media and a cooling off period between the crime and trial helps ameliorate the effects of the media coverage. Instead, it is the very calm and steady media adulation of Tim Duncan over 20 years that has created this bias in his favor, and that media coverage continues unabated even today as Mr. Duncan makes commercials to promote his cereal and the media discusses what the San Antonio Spurs will be like without the great Tim Duncan. Thus, in this case, there is no cooling off period which might mitigate the effects of the pretrial publicity.

With respect to the characteristics of the community in the San Antonio division, this factor also supports a decision to transfer. San Antonio is large city, but it is not a large media market. There are no stars bigger than Tim Duncan in San Antonio. Comparing this case to the facts of the *Skilling* case, it is likely that very few people knew who Jeffrey Skilling was before he was indicted in the Enron scandal. On the other hand, 96% of people surveyed in San Antonio have heard of Tim Duncan, and have been hearing about him for nearly 20 years. Thus, the media coverage in this case is far more pervasive and long lasting. And this fame of Tim Duncan is not without its potential effect on jurors in this case. If any impartial jurors from this community were selected for a jury in this case (could any be found), it is likely they would take into consideration how a “not guilty” vote would be received by their friends, family and co-workers in this community. Voting “not guilty” would be seen as a betrayal of the community of San Antonio. This heavy burden on San Antonio jurors would unfairly tilt the scales of justice against the defendant in this case. The *McVeigh* court expressly noted that the pressure that

community expectations would place on a juror in the case is a valid reason to transfer. 918 F. Supp. at 1473.

The people of San Antonio are clearly devoted to Tim Duncan, as set forth in the Court's Findings of Fact above. This same love and admiration, however, will make it impossible for a jury comprised of people from the San Antonio area and surrounding counties to fairly judge the Defendant and evidence in this case. A transfer under Rule 21(a) is therefore appropriate.

A transfer of this case out of the Western District of Texas is warranted under Rule 21(b) as well.

“[I]t is the public policy of this Country that one must not arbitrarily be sent, without his consent, into a strange locality to defend himself against the powerful prosecutorial resources of the Government.” *Dupoint v. United States*, 388 F.2d 39, 44 (5th Cir. 1967).

Transfer of a criminal proceeding to another district is appropriate under Rule 21(b) “for the convenience of the parties, any victim, and the witnesses, and in the interest of justice.” Fed. R. Crim. P. 21(b). Courts determine whether transfer is appropriate under Rule 21(b) by applying the ten factors announced in *Platt v. Minnesota Mining & Manufacturing. Co.*, 376 U.S. 240, 243-44 (1964):

(1) location of . . . defendant; (2) location of possible witnesses; (3) location of events likely to be in issue; (4) location of documents and records likely to be involved; (5) disruption of defendant's business unless the case is transferred; (6) expense to the parties; (7) location of counsel; (8) relative accessibility of place of trial; (9) docket condition of each district or division involved; and (10) any other special elements which might affect the transfer.

See also, e.g., United States v. Ubak-Offiong, 364 Fed. App'x 859, 862-863 (5th Cir. 2010) (citing *Platt* factors); *United States v. Morris*, 176 F. Supp. 2d 668, 671-72 (N.D. Tex. 2001)

(granting transfer motion based on application of *Platt* factors). All of these factors favor a transfer of this case to the Central District of California.

“Nothing in Rule 21(b) or in the cases interpreting it place[s] on the defendant seeking a change of venue the burden of establishing truly compelling circumstances for such a change. It is enough if, all relevant things considered, the case would be better off transferred to another district.” *In re Balsimo*, 68 F.3d 185, 187 (7th Cir. 1995) (internal quotation marks omitted); *see also United States v. Benjamin*, 623 F. Supp. 1204, 1211 (D.D.C. 1985) (“This Court has liberally construed [Rule 21(b)] so as to minimize inconvenience to a defendant.” (internal quotation marks omitted)).

The *Platt* factors, when applied to the facts of this case, support transfer: First, as explained above, Charles Banks cannot receive a fair trial in San Antonio, Texas due to the prejudice in favor of the alleged victim in this case, Tim Duncan. This finding fits within the last *Platt* element: “any other special elements which might affect the transfer.” This *Platt* factor, therefore, favors the transfer of this proceeding to the Central District of California. *See Sablan*, 2014 WL 7335210 at *2; *Wright*, 603 F. Supp. 2d at 509.

Second, the events at the heart of the government’s indictment occurred primarily in California at a time when the Defendant was living in California. “[T]he proper venue for criminal actions is normally ‘in the district in which the offense was committed.’” *United States v. Morrison*, 946 F.2d 484, 490 (7th Cir. 1991) (internal alteration omitted) (quoting Fed. R. Crim. P. 18); *see also United States v. Strain*, 396 F.3d 689, 693 (5th Cir. 2005). When allegations of misconduct include events in multiple districts, the district that serves as the nexus for these events—the “nerve center” of the alleged crimes—should be the venue for trying the matter. *See, e.g., United States v. Donato*, 866 F. Supp. 288, 293-294 (W.D. Va. 1994)

(concluding that venue should be in district where defendants “hatched their alleged scheme [and] carried it out”); *United States v. Haley*, 504 F. Supp. 1124, 1128 (E.D. Pa. 1981) (transferring case from Pennsylvania to Georgia because “[m]any of the overt acts described in the indictment purportedly occurred in Georgia” and Georgia “appears to be the ‘nerve center’ of the alleged illicit operations”); *United States v. Alter*, 81 F.R.D. 524, 526 (S.D.N.Y. 1979) (granting transfer from New York to Florida since most conduct in furtherance of the alleged scheme to defraud occurred in Miami, and Miami “was the ‘nerve center’ of the alleged illicit operations”); *see also United States v. Bein*, 539 F. Supp. 72, 74-76 (N.D. Ill. 1982) (same); *United States v. Atwood*, 538 F. Supp. 1206, 1209-11 (E.D. Pa. 1982) (same).

In the case before the Court, the bulk of the conduct alleged in the Indictment occurred in California. Mr. Banks lived and worked in California during the relevant period of the Indictment, the bankers and bank to which Mr. Duncan gave his guarantee were also in California, and communications alleged in the Indictment between Mr. Banks and Mr. Duncan took place primarily in California. The strong nexus to California is reflected in the facts alleged in the Indictment. The Indictment alleges multiple acts on the part of Jeff Neal in Colorado in his dealings with the California bankers, multiple acts on the part of the California bankers, and two text messages between Charles Banks and Tim Duncan that took place while they were in California and Florida, respectively.

It follows that the Indictment is almost completely bereft of acts that took place in the Western District of Texas. In fact, reading through of the nine pages of Indictment, there is only one act that the government alleges occurred in the Western District of Texas: the government alleges that Mr. Duncan faxed two signature pages for the loan guarantee from San Antonio to California. Given that this appears to be the only act or event that occurred in San Antonio, and

balanced against the number of allegations in the Indictment that focus on California and elsewhere, this one alleged fax does not provide a sufficient basis for keeping the case in the Western District of Texas. The location of the alleged events favors a transfer out of the Western District of Texas.

Third, trying this case in Texas would inflict substantial, unnecessary costs on the defendant, his family, and the witnesses because almost none of them reside in Texas or have attorneys from Texas. “Under Rule 21(b), the district court is to consider the convenience of the witnesses as well as the convenience of the parties.” *United States v. Pry*, 625 F.2d 689, 691 (5th Cir. 1980). When a defendant resides outside the district in which he is being tried, transfer is often appropriate. *Morris*, 176 F. Supp. 2d at 672-73 (“[T]his factor clearly weighs in favor of transfer.”). And when a majority of both the government and the defense witnesses reside outside the district, transfer is even more clearly warranted. *Id.* at 673.

Based upon the Indictment itself, as well as discovery materials provided to date by the government, the Defense compiled a list of potential witnesses for trial (both those the Defense might call and those the Government might call), and most of them reside outside the state of Texas¹:

1. Charles Banks: Defendant, lives in the Atlanta, Georgia area with his wife and children. (Banks Decl. ¶ 1.)
2. Kevin McGee: Terroir Capital employee, lives in the Healdsburg, California area. (Banks Decl. ¶ 34.)
3. Jeff Neal: CEO of Gameday, lives and works in the Denver, Colorado area. (Banks Decl. ¶ 35.)

¹ The Government noted at the hearing that it had many custodial witnesses that it hoped to dispense with by reaching agreements with the Defense on preliminary admissibility issues. Those witnesses are therefore not considered in this analysis.

4. Marty Garafalo: Gameday employee, resides in the Santa Barbara, California area. (Banks Decl. ¶ 36.)
5. Justin Mangall: Gameday employee, on information and belief, lives and works in the Denver, Colorado area. (Banks Decl. ¶ 37.)
6. Brandt Daniel: former Comerica banker, on information and belief, lives and works in the Orange County, California area. (Banks Decl. ¶ 38.)
7. Nathan Croyle: former Comerica banker, on information and belief, lives in the Miami, Florida area. (Banks Decl. ¶ 39.)
8. Penni Wasserman: former CSI employee, lives and works in the Los Angeles, California area. (Banks Decl. ¶ 40.)
9. Gia Doutre: former CSI employee, lives and works in the Atlanta, Georgia area. (Banks Decl. ¶ 41.)
10. Leland Faust: CSI chairman, lives and works in the San Francisco, California area. (Banks Decl. ¶ 42.)
11. Aaron Faust: former CSI employee, lives and works in the San Francisco, California area. (Banks Decl. ¶ 43.)
12. Steve Cutcliffe: former CSI employee, lives and works in the San Francisco, California area. (Banks Decl. ¶ 44.)
13. Todd LaRocca: former CSI employee, lives and works in the San Diego, California area. (Banks Decl. ¶ 45.)
14. Thomas Carroll: SunTrust employee, lives and works in the Atlanta, Georgia area. (Banks Decl. ¶ 46.)
15. Kevin Garnett: co-guarantor on \$6 million loan from Comerica to Gameday, maintains residences in Malibu, California and Minneapolis, Minnesota. (Banks Decl. ¶ 47.)
16. George Grkinich: business associate of Jeff Neal, on information and belief, lives in the Denver, Colorado area. (Banks Decl. ¶ 48.)

17. Teo Albigovic: business associate of Jeff Neal, lives in Serbia. (Banks Decl. ¶ 49.)
18. Tim Duncan: alleged victim of the alleged fraud, on information and belief, lives in San Antonio. (Banks Decl. ¶ 50.)
19. Sue Hall: divorce attorney for Tim Duncan, on information and belief, lives in San Antonio. (Banks Decl. ¶ 51.)
20. Wendy Kowalik: accountant engaged by Tim Duncan during his divorce proceedings, on information and belief, lives in San Antonio. (Banks Decl. ¶ 52.)

Seventeen of the twenty potential witnesses listed above reside outside of the Western District of Texas, and outside of Texas in general. Nine of those witnesses live in California, making it the state where the plurality of witnesses reside.² And while he does not reside there anymore, California is the place Mr. Banks spent most of his adult life and career, and certainly where he was when the events at issue in this case took place. Considering the lost time and disruption the out-of-state witnesses would suffer if they were all forced to travel to San Antonio for a trial, a transfer to a venue more convenient for most of the witnesses, specifically the Central District of California, makes sense.³

Similarly, Mr. Banks' pre-indictment attorneys have no connection to the Western District of Texas. Mr. Banks' SEC counsel, Mr. Marlon Paz of the law firm of Seward & Kissel LLP, resides and maintains offices in Washington, DC. (Banks Decl. ¶ 53.) Seward & Kissel

² Kevin Garnett is counted in this group of nine as a person living in California, since he maintains a residence there.

³ There is no need to consider the residence of Agent Jeff Jenson, a likely witness for the government. The "convenience of the prosecution" is not a factor to consider in deciding a motion to transfer venue. *United States v. Lipscomb*, 299 F.3d 303, 340 (5th Cir. 2002). Thus, the fact that AUSA Surovic or FBI Agent Jeff Jenson reside in the Western District of Texas makes no difference to the analysis. The government is "ubiquitous," and "[i]n any federal district, the government lawyers have a built in office, complete with local logistical support from parallel local staffs of the U.S. Attorney . . . and the F.B.I." *Benjamin*, 623 F. Supp. at 1212; *see also Ferguson*, 432 F. Supp. 2d at 567 ("It is true that Defendants are people of significant financial means, however, when compared to that of the government's resources, they pale in comparison."); *United States v. Coffee*, 113 F. Supp. 2d 751, 757 (E.D. Pa. 2000) ("The United States of America has, for all practical purposes, unlimited financial resources to bring to bear.").

does not have offices in the Western District of Texas. (*Id.*) Mr. Banks' civil litigation attorney, Mr. Antroy Arreola of the law firm of Locke Lord LLP, resides and maintains offices in Houston, Texas. (Banks Decl. ¶ 54.) Locke Lord LLP does not have offices in San Antonio. (*Id.*) These attorneys represented Mr. Banks and potential witnesses at his company Terroir Capital throughout various pre-suit communications and interviews with the SEC, as well as throughout the various lawsuits and arbitration filed by Tim Duncan before the Indictment. (Banks Decl. ¶ 55.) When particular attorneys have represented a defendant throughout a pre-indictment investigation, their location is "highly significant" to the transfer decision. *United States v. Lima*, No. 94CR800, 1995 U.S. Dist. LEXIS 7796, at *9 (N.D. Ill. May 31, 1995).

Also, while they did not represent him before the Indictment, Mr. Banks has current counsel in California. Therefore, transferring this criminal proceeding to the Central District of California, will not require Defendant to locate and hire new defense counsel – thus avoiding any possible delay for that reason. (Banks Decl. ¶ 58.)

Fourth, judges in the Western District of Texas are laboring under a substantially more burdensome caseload than those in the Central District of California. *See United States v. Campestrini*, 993 F. Supp. 2d 69, 72 (D.P.R. 2014) ("[T]he docket conditions of the District Court of Puerto Rico relative to that of the Southern District of Florida support transfer of the case."). The resources that will have to be allocated to this case are more readily available the Central District of California because it has fewer cases per judge.

Because it is not under a judicial emergency, the Central District of California is far better situated to handle the complicated pre-trial issues and trial of this matter. Between June 30, 2015, and June 30, 2016, each Western District of Texas judge heard more than ten times as many criminal cases as the Central District of California: there were 508 criminal cases filed per

judgeship in the Western District of Texas, while there were only 40 criminal cases filed per judgeship in the Central District of California. *Federal Court Management Statistics, June 2016*, United States Courts Website, <http://www.uscourts.gov/statistics-reports/federal-court-management-statistics-june-2016> (last visited Dec. 9, 2016). Even looking at the Federal Courts Administrative Office's "weighted filings" metric (which assigns "weights" to criminal cases to account for the length of time it takes a federal district court to resolve different kinds of criminal cases), the Western District of Texas' case load per judge still greatly exceeds that of the other district: the Western District judges face a weighted filing caseload of 753 cases per judge, versus a weighted filing caseload of 566 cases per judge in the Central District of California. *Federal Court Management Statistics, June 2016*, United States Courts Website, <http://www.uscourts.gov/statistics-reports/federal-court-management-statistics-june-2016> (last visited Dec. 9, 2016). Thus, despite some perception that the Western District's number are inflated by the high number of immigration cases (which are considered relatively easy to resolve) there is no doubt the courts in the Western District still face an overall case load that is approximately 25% higher than the caseload in the Central District of California.

Further, the Western District of Texas is operating with two of its judgeships vacant, and the Western District vacancies have been declared "judicial emergencies" by the Administrative Office of the U.S. Courts. *Judicial Emergencies*, United States Courts Website, <http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies/JudicialEmergencies.aspx> (last visited Dec. 9, 2016). By comparison, the Central District of California has just one vacant judgeship that has been declared a judicial emergency. *Id.*

Applying the Rule 21(b) *Platt* factors to this case, therefore, results in the same finding as that which arises under a Rule 21(a) analysis – this case should be transferred out of the San Antonio Division of the Western District of Texas.

Conclusion

Based upon the foregoing Findings of Fact and Conclusions of Law, transfer of this case is warranted under Federal Rule of Criminal Procedure Rule 21(a), 21(b), and Local Rule 18, and Defendant’s Motion to Transfer Venue is therefore granted. The Court hereby order this case transferred to the [Western Division of the Central District of California / the El Paso Division of the Western District of Texas].

WHEREFORE, PREMISES CONSIDERED, the Defendant prays that this Court adopt these proposed findings of fact and conclusions of law in support of its decision to grant Defendant’s Motion to Transfer Venue.

Respectfully Submitted,

Dated: January 27, 2017

/s/ Johnny Sutton
Johnny Sutton
Bar No. 19534250
jsutton@ashcroftlawfirm.com
Christopher L. Peele
Bar No. 24013308
cpeele@ashcroftlawfirm.com
Ashcroft Sutton Reyes, LLC
919 Congress Ave., Ste. 1500
Austin, TX 78701
Telephone: (512) 370-1800
Facsimile: (512) 397-3290

/s/ Thad A. Davis
Thad A. Davis
California Bar No. 220503
TDavis@gibsondunn.com
555 Mission Street
Suite 3000
San Francisco, CA 94105-0921
Telephone: (415) 393-8251
Facsimile: (415) 374-8414

/s/ John E. Murphy

John E. Murphy
Bar No. 14701500
Johne.murphy@icloud.com
14439 NW Military Hwy., Suite 108-133
San Antonio, TX 78231
Telephone (210) 885-2700

/s/ Benjamin B. Wagner

California Bar No. 163581
BWagner@gibsondunn.com
1881 Page Mill Road
Palo Alto, CA 94304-1211
Telephone: (650) 849-5395
Facsimile: (650) 849-5095

**Attorneys for Defendant Charles Augustus
Banks, IV**

CERTIFICATE OF SERVICE

I hereby certify that on January 27, 2017, I electronically filed the foregoing motion via the CM/ECF system, which will effect service upon on all counsel of record who are properly registered with the CM/ECF system.

By: /s/ Christopher L. Peele
Christopher L. Peele