

**FILED**  
**United States Court of Appeals**  
**Tenth Circuit**

**PUBLISH**

**UNITED STATES COURT OF APPEALS**  
**FOR THE TENTH CIRCUIT**

**November 14, 2022**

**Christopher M. Wolpert**  
**Clerk of Court**

---

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

TROY A. GREGORY,

Defendant - Appellant.

No. 20-3232

---

**Appeal from the United States District Court**  
**for the District of Kansas**  
**(D.C. No. 2:17-CR-20079-JAR-1)**

---

Solomon L. Wisenberg, Nelson Mullins Riley & Scarborough LLP, Washington, D.C. (Beverly A. Pohl, Nelson Mullins Broad and Cassel, Fort Lauderdale, Florida, and Reed J. Hollander, Nelson Mullins Riley & Scarborough LLP, Raleigh, North Carolina, with him on the briefs), on behalf of the Appellant.

Francesco Valentini, Trial Attorney, U.S. Department of Justice, Criminal Division, Appellate Section, Washington, D.C. (Nicholas L. McQuaid, Acting Assistant Attorney General, and Daniel S. Kahn, Acting Deputy Assistant Attorney General, U.S. Department of Justice, with him on the brief), on behalf of the Appellee.

---

Before **HARTZ**, **BACHARACH**, and **EID**, Circuit Judges.

---

**HARTZ**, Circuit Judge.

---

Defendant Troy A. Gregory, a former senior vice president of University National Bank (UNB) in Lawrence, Kansas, was charged with one count of conspiracy to commit bank fraud in violation of 18 U.S.C. § 1349, four counts of bank fraud in violation of 18 U.S.C. § 1344, and two counts of making false bank entries in violation of 18 U.S.C. § 1005. These charges arose from Defendant's arrangement of a \$15.2 million loan by 26 banks to fund an apartment development by established clients of UNB.

The four bank-fraud counts, each corresponding to a specific "victim bank," alleged that to secure the banks' participation in funding the loan, Defendant knowingly made three material misrepresentations: (1) that the borrowers were financially strong; (2) that the apartment-complex land would be "free and clear" of debt by the time of the loan; and (3) that the borrowers had \$1.705 million in two certificates of deposit (CDs) at UNB on April 11, 2008, to be pledged as collateral.<sup>1</sup> The two counts of making false bank entries were based on Defendant's listing two CDs as collateral, and creating corresponding security agreements, when no such CDs existed. After a ten-day trial, including two days of deliberations, a jury in the United States District Court for the District of Kansas found Defendant guilty on all counts except the conspiracy count, on which the jury could not reach a unanimous verdict. The court sentenced Defendant to 60 months in prison and three years of supervised release.

---

<sup>1</sup> A certificate of deposit (CD) certifies that a certain amount of money has been deposited in a bank to remain there for a certain period of time.

Defendant appeals the district court’s denial of (1) his motion for a judgment of acquittal and (2) his motion for a new trial on the ground that the government’s extended hypothetical in closing argument was not based on facts in evidence and constituted prosecutorial misconduct. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm. Defendant’s conviction was supported by sufficient evidence and the government’s closing argument was rooted in evidence presented at trial or reasonable inferences drawn from that evidence.

## **I. BACKGROUND**

Defendant was a longtime UNB employee and executive who served as the loan officer for dozens of loans to two limited liability companies, Big D Development and Big D Construction (collectively “Big D”), and their owners. Big D’s owners included David Freeman (the largest owner) and two limited liability companies—Opportune and JMD. Opportune was owned by William Skepnek and Brennan Fagan. JMD was owned by John Duncan Jr.

In 2006, Big D developed two residential subdivisions (the “Sutter developments”) in Junction City, Kansas, which comprised mostly single-family residences. Big D anticipated population growth in the area following the expansion of the nearby military base, Fort Riley. UNB financed the development, with Defendant acting as the loan officer; other banks also provided funds through a participation loan for which UNB was the originating bank. By including other banks, a participation loan allows a bank to lend some of the money for a project when the full amount would exceed the bank’s legal lending limit—a cap imposed by

regulators on the amount that a bank can lend to an individual borrower based on the bank's capital—or would otherwise be considered uncomfortably large for the bank. In a participation loan the “originating” or “lead” bank (here, UNB) is typically the only bank to deal with the borrowers directly. The lead bank may deal directly with each of the participating banks or deal solely with a “correspondent” bank that handles matters with the participants. Bankers' Bank of Kansas (BBOK) served as the correspondent bank for the Sutter developments.

The Sutter-development units did not sell as expected. By June 2007, 242 of the 538 lots remained unsold; and little changed through the fall, leaving Big D with virtually no income. In addition, Big D was unable to secure much-needed funding from the state's Rural Housing Incentive District program, which provides certain payments to developers in qualifying areas. According to Big D owner Fagan, by late 2007 Big D was in a “[t]errible” financial position. R., Vol. IV at 818. It still owed UNB \$1.9 million on the Sutter developments and was unable to keep up with payments on those and other debts to UNB. John Larkin, the owner of Larkin Excavating—which performed excavating work on the Sutter developments—testified that he was never timely paid for his work, with payments on invoices being 90, or even 120, days past due.

Individual Big D owners were struggling too. Duncan testified that he was having “cash flow issues” during this time and was unable to keep up with his debt at UNB. R., Vol. VII at 1693, 1700. By mid-2007 he owed more than \$1.9 million on his own loans at UNB. He testified that he was unable to make any payments on the

loans and that he worked with Defendant to renew or extend past-due loans, often just for a short period; he did not recall ever discussing with Defendant during this time how a loan would be repaid by the due date. For example, he testified that he took out a \$600,000 loan from UNB (for which Defendant was the loan officer) in March 2007 to pay down a \$3.8 million loan from another bank. When the UNB loan came due in June 2007, he was unable to pay it back and had to renew the loan “[c]ountless times.” R., Vol. VII at 1694. Fagan also testified that his personal financial position “wasn’t good” in late 2007. R., Vol. IV at 819. Still, in November 2007, Defendant arranged for Fagan to incur further debt by taking out a \$55,000 loan with UNB (for which Defendant was the loan officer) to help pay past-due interest on Big D loans. Just how bad the financial situation of the borrowers was will be described more fully in the discussion of the sufficiency of the evidence.

#### **A. Origins of the Bluejay Loan**

In an effort to end their financial distress, some of the Big D owners conceived of developing an apartment complex in Junction City—dubbed the Quinton Point Apartments. They believed that once Fort Riley expanded, there would be demand for rentals, particularly from military families. As Duncan put it, the Big D owners thought that this project was their “golden goose,” the “end-all, be-all” solution to their financial problems. R., Vol. VII at 1712, 1731.

The Big D owners formed a new limited liability company for the Quinton Point venture, Bluejay Properties. By the beginning of 2008, Bluejay’s owners included the above-mentioned Big D owners—Freeman, Skepnek, Fagan, and

# Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

## Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

## Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

## Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

## API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

## LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

## FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

## E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.