IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
v.	:	**CRIMINAL No. 15-398-3**
WAYDE MCKELVY,	:	
Defendant	:	

DEFENDANT'S MOTION TO DISMISS COUNTS 1-8
OF THE INDICTMENT, BASED ON THE STATUTE OF LIMITATIONS,
AS TO DEFENDANT McKELVY ONLY

AND NOW, this 27th day of March, 2017, defendant Wayde McKelvy, by his attorneys, Walter S. Batty, Jr. and William J. Murray, Jr., submits his Motion to Dismiss Counts 1-8 of the Indictment, Based on the Statute of Limitations, as to Defendant McKelvy only.

1. For the reasons stated in his Limitations Memorandum, McKelvy moves to dismiss Counts 1-8 of the indictment.

WHEREFORE, the defendant requests this honorable Court to dismiss Counts 1-8 of the indictment, as to Defendant McKelvy only, with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served by electronic mail a true and correct copy of the foregoing Motion to Dismiss Counts 1-8 of the Indictment, Based on the Statute of Limitations, upon Assistant U.S. Attorney Robert J. Livermore:

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Walter S. Batty, Jr.

Dated: March 27, 2017

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MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS COUNTS 1-8 OF THE INDICTMENT, BASED ON THE STATUTE OF LIMITATIONS

Defendant Wayde McKelvy, by his attorneys, Walter S. Batty, Jr. and William J. Murray, Jr., submits this "Limitations Memorandum" in Support of his Motion to Dismiss Counts 1-8 of the Indictment, Based on the Statute of Limitations ("Limitations Motion").

I. SUMMARY OF ARGUMENT.

The parts of Counts 1-8 which are relevant to this motion are as follows:

Count 1 of the indictment charges Wayde McKelvy and co-defendants Troy Wragg and Amanda Knorr with conspiracy to commit wire fraud "affecting a financial institution," in violation of 18 U.S.C. § 1343 and 18 U.S.C. § 371. See Count 1, ¶ 8 ("The Conspiracy" section).

Counts 2-8 charge McKelvy and his two co-defendants with committing wire fraud, "in circumstances affecting a financial institution," in violation of 18 U.S.C. §§ 1343, 2. See Counts 2-8, ¶ 2 ("The Scheme" section).

The indictment charges that defendants Wragg, Knorr, and McKelvy participated in a Ponzi scheme to defraud over 300 investors in Mantria Corporation ("Mantria"), which was then based in Bala Cynwyd, Pennsylvania. The indictment also charges that the gross amount of the loss by the investors was $54.5 million and that net amount of the loss was approximately $37.5 million.

The indictment charges that McKelvy persuaded the investors to extend existing credit lines, whether in the form of credit cards, second mortgages, and/or loans against life insurance, and to use proceeds of these credit lines to invest in Mantria. (The evidence in the case will show that McKelvy referred to this technique as "arbitrage," and that, prior to becoming involved with Wragg and Mantria, he used this technique in his small investment club in Colorado.)

In this memorandum, McKelvy argues that the traditional five-year statute of limitations is applicable in this case and that, accordingly, Counts 1-8 should be dismissed. The government's informal position is that the applicable statute of limitations is 18 U.S.C. § 3293(2), which states that a ten-year statute will apply in wire fraud prosecutions where the government can prove that a defendant willfully participated in an offense which "affect[ed] a financial institution."

The government has informally offered a first and second rationale as to why section 3293(2) is applicable here. The first rationale is that Mantria Financial, which was initially set up to issue mortgages on land sold by Mantria in Tennessee, later went bankrupt as a result of the fraud scheme. McKelvy responds that, under any common sense definition of "financial institution," Mantria Financial does not qualify as such. McKelvy further responds that, even if Mantria Financial is a "financial institution," it was not "affected" – as that term is used in the case law – by the alleged fraud.

In its second rationale, the government argues that (unnamed) "financial institutions" – presumably federally-insured banks - were "affected" because they lost money when Mantria investors defaulted on their credit or loan obligations, which they had extended based on McKelvy's urging them to utilize his "arbitrage" technique. McKelvy responds that the government has not yet identified any evidence to support this claim. McKelvy recognizes, however, that the statute of limitations is an affirmative defense and that the government has not yet had an opportunity to rebut the defendant's arguments on this point.

II. BACKGROUND.

A. <u>The general statute of limitations</u>.

For most federal crimes, the applicable statute of limitations, as stated in 18 U.S.C. § 3282, is five years. See, United States v. Leadbeater, 2015 WL 567025 (D.N.J. 2015).

McKelvy argues that Count 1, the wire fraud conspiracy count, and Counts 2-8, the wire fraud substantive counts, should be dismissed for violating the pertinent five-year statute of limitations.

B. Section 3293(2) is the government's basis for an extended statute of limitations.

Section 3293(2) provides a ten-year statute of limitations for the crimes charged in Count 1, the wire fraud conspiracy count, and Counts 2-8, the wire fraud substantive counts, "if [each] offense affects a financial institution." Cf. United States v. Anthony Allen, 160 F.Supp.3d 698, 705 (S.D.N.Y. 2016).

As to Count 1, absent a statutory extension under section 3293(2), "[f]or a conspiracy indictment to fall within the statute of limitations, it is 'incumbent on the Government to prove that … at least one overt act in furtherance of the conspiracy was performed' within five years of the date the Indictment was returned." United States v. Bornman, 559 F.3d 150, 153 (3d Cir. 2009)(citation omitted). As to Counts 2-8, they are traditional substantive counts, as to which the statute of limitations focuses on the dates of the substantive crimes alleged there.

Accordingly, unless section 3293(2) applies here, the statute of limitations on Count 1 would have run five years after November 20, 2009, the date of the last overt act (no. 55) alleged in Count 1; under this scenario, the statute would have run on November 20, 2014. The indictment here was returned on September 2, 2015, more than nine months after the statute would have run, absent grounds for an extension.

Likewise, unless section 3293(2) applies here, the statute of limitations on Counts 2-8 would have run five years after the dates of the substantive crimes of wire fraud alleged in those seven counts, the latest of which (Count 2) was on September 18, 2009; under this scenario, the statute would have run on September 18, 2014, and earlier for the other six counts. The

indictment here was returned more than 11 months after the statute for Count 2 would have run.

C. <u>The government's two rationales to support the applicability of sections 3293(2) and 20(10) to Counts 1-8</u>.

-- <u>The indictment</u>. The government's attorney has informed counsel that there are two rationales for its argument that it is entitled to the extended statute of limitations. We refer to these as the "first rationale" and the "second rationale." We will discuss here the parts of the indictment which pertain to each rationale.

As to the first rationale, the indictment alleges that "Mantria Financial was a financial institution and mortgage lending business which engaged in interstate commerce." Count 1, ¶ 5. McKelvy argues, for a number of reasons, that Mantria Financial was not a "financial institution."

Paragraph 5 in Count 1 also alleged (in the Background section) that:

> **Defendants Wragg, Knorr, and McKelvy used the funds raised by Mantria Financial to purchase or finance mortgages for undeveloped real estate in Tennessee owned by the Mantria or its subsidiaries in order to generate paper profits for Mantria and inflate the value of the undeveloped land.**

There is no allegation in paragraph 5 of any way in which Mantria Financial was "affected" by the fraud scheme. Rather, as noted above, paragraph 8 charged, in only the very broadest terminology, all three defendants with conspiracy to commit wire fraud "affecting a financial institution." The first rationale is considered below at sections IV-V.

As to the second rationale, although the indictment does not identify any financial institutions other than Mantria Financial which were purportedly "affected" by the fraud charged, it does allege that McKelvy advised potential investors "to obtain the maximum amount of funds in loans from [non-Mantria] financial institutions in the form of credit cards, insurance policies, home equity, and other loans, and invest all these funds in Mantria and its related entities." Count 1 at ¶ 2. This passage

is apparently the basis for the second rationale. The second rationale is considered below at section VI.

-- The government's "first rationale." In the government's first informal rationale, the government states:

> Mantria set up Mantria Financial as a financial institution as defined by 18 U.S.C. §§ 20(10) and 27. Under 18 U.S.C. § 20, all "mortgage lending businesses" qualify as financial institutions. [The government then quotes language from 18 U.S.C. § 27, which defines "a mortgage lending business" as is set out below by McKelvy.] …. [T]here is no question that Mantria Financial engaged in interstate commerce, qualified as a financial institution, and that the wire fraud affected Mantria Financial (i.e., it went bankrupt).

-- The government's "second rationale." The government has also described a second way in which one or more financial institutions were allegedly "affected" by the alleged fraud:

> [T]he wire fraud affected numerous other financial institutions, [in that] the defendants coached investors to take out the maximum possible mortgage on their homes and to withdraw the maximum amount of funds from credit cards to invest in Mantria. When the Mantria Ponzi scheme collapsed, those financial institutions which lent money to investors were affected because many of the investors could not repay those loans or at least were delinquent on those loans…. Thus, the Mantria fraud affected these financial institutions as well.

D. The statutory definitions of a "financial institution" and of "mortgage lending business."

As used in section 3293(2), the term "financial institution" is defined in 18 U.S.C. § 20(10)[1] as follows:

> As used in this title, the term "financial institution" means --

---

[1] Section 20(10) was added, by an amendment to section 20, on May 20, 2009.

> (1) an insured depository institution (as defined in section 3(c)(2) of the Federal Deposit Insurance Act);
>
> … or
>
> (10) a mortgage lending business (as defined in section 27 of this title) ….

As stated in United States v. Cardillo, 2015 WL 3409324 (D.N.J. 2015), "In 2009, Congress amended the definition of 'financial institution,'" as set out above in section 20(10), to include "a mortgage lending business (as defined in section 27)." Section 27, in turn, states, "In this title, the term 'mortgage lending business' means an organization which finances or refinances any debt secured by an interest in real estate, including private mortgage companies …, and whose activities affect interstate or foreign commerce."

Before the amendment in 2009 to the definition of "financial institution" in section 3293(2), that section had been codified part of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA). Cf. Allen, 2016 WL 615705 at *5. Section 3293(2), as initially enacted, was described in a Seventh Circuit opinion, United States v. Serpico, 320 F.3d 691, 694-95 (7th Cir. 2003), in this manner:

> [T]he whole purpose of § 3293(2) is to protect financial institutions, a goal it tries to accomplish in large part by deterring would-be criminals from including financial institutions in their schemes.

320 F.3d at 694-95.

As for section 20(10), which was a 2009 amendment to section 20, this change was "prompted" by "the subprime mortgage crisis, [which] threatened the financial stability of many federally insured financial institutions." United States v. Bouchard, 828 F.3d 116, 124 (2d Cir. 2016), referring to the Fraud Enforcement and Recovery Act ("FERA") of 2009.

III. PROCEDURAL ASPECTS OF THE DEFENDANT'S MOTION.

A. Rule 12(b)(3)(A) authorizes a pre-trial motion to dismiss based on the statute of limitations.

McKelvy's motion to dismiss Counts 1-8 is filed pursuant to Fed.R.Crim.P.12(b)(3)(A), which rule states that a motion to dismiss for a "defect in instituting the prosecution" must be filed pre-trial "if the basis for the motion is then reasonably available and the motion can be determined without a trial on the merits." "Generally, Rule 12(b) motions are appropriate to consider 'such matters as … statute of limitations, [etc.], [and] lack of jurisdiction.'" United States v. Nukida, 8 F.3d 665, 669 (9th Cir. 1993) (citation omitted).

While a challenge to the court's jurisdiction "may be made at any time while the case is pending," under Rule 12(b)(3)(A), an alleged violation of the applicable statute of limitations is a claim of a "defect in instituting the prosecution," under Rule 12(b)(3)(A), which means that unless a limitations defense is raised pre-trial, it will be considered as having been waived. As the Third Circuit said in United States v. Karlin, 785 F.2d 90 (3d Cir. 1986), cert. denied, 480 U.S. 907 (1987), "in criminal cases the statute of limitations does not go to the jurisdiction of the court but is an affirmative defense that will be considered waived if not raised in the district court before or at trial." Id. at 92-93 (citing opinions in five circuit court and two Supreme Court decisions). See also, United States v. Smith, 600 Fed.Appx. 991, 994-95 (6th Cir. 2015).

McKelvy argues that it is appropriate to litigate his statute of limitations defense pre-trial because the (factual) basis for the within motion to dismiss is "reasonably available," under Rule 12(b)(3)(A), and because there is no "good cause to defer a ruling," under Rule 12(d). McKelvy is filing today his proposed Findings of Fact and Conclusions of Law, because Rule 12(d) requires a court to "state its essential findings on the record."

The decisions in the securities fraud cases discussed below in section V, where the defendant(s) raised a statute of limitations defense and the government argued that section 3293(2) applied, are all consistent with these provisions in Rule 12.

The Third Circuit briefly analyzed the issue of the ripeness of a pre-trial motion to dismiss in United States v. DeLaurentis,

230 F.3d 659, 660-61 (3d Cir. 2000). In that case, the court ruled that a district court could grant a motion to dismiss on "a stipulated record." Id. The court noted that "evidentiary questions should not be determined at that stage," citing United States v. Knox, 396 U.S. 77, 90 (1969).

The Sixth Circuit has provided a more extensive analysis of the issue of the ripeness of a pre-trial motion under Rule 12 in United States v. Levin, 973 F.2d 463, 470 (6th Cir. 1992); see also United States v. Ali, 557 F.3d 715, 719-20 (6th Cir. 2009)(adopting reasoning in Levin). A succinct summary of the holding in Levin is found in a district court case: "Under Rule 12(b)(3), a motion to dismiss an indictment is appropriate if the undisputed facts establish that the offense charged cannot be proven as a matter of law." United States v. Fitzgerald, 2017 WL 74074, *2 (W.D.Mich. 2017); accord, United States v. Joyce Allen, 2014 WL 3368605, *12 (E.D.Tenn. 2014).

As the court in Levin said, in an extended excerpt:

> Rule 12 … encourage[s] district courts to entertain and dispose of pretrial criminal motions before trial if they are capable of determination without trial of the general issues. Moreover, district courts may make preliminary findings of fact necessary to decide questions of law … so long as the trial court's conclusions do not invade the province of the ultimate finder of fact.
>
> In the instant case the operative facts … were undisputed.

973 F.2d at 467 (citations omitted).

Moreover, the court in Levin also stated:

> [A] trial of the substantive criminal charges would not have assisted the district court or this court in deciding the legal issues joined by the defendant's pretrial motion to dismiss the controversial counts of the indictment.

Id. (citations omitted). See, United States v. Covington, 395 U.S. 57, 60 (1969); see also, United States v. Stewart, 2015 WL 5012645, *1 (W.D.Pa. 2015)(adopting reasoning of Sixth Circuit opinions in Levin and Ali).

Finally, "[i]n evaluating a Rule 12 motion to dismiss, a district court must accept as true the factual allegations … in the indictment." United States v. Stock, 728 F.3d 287, 299(3d Cir. 2013) (citation and quotation marks omitted). As part of the requirement that the defendant accept the factual allegations in the indictment, it should be noted that "[t]he indictment must be read as a whole, accepting the factual allegations as true, and construing those allegations in a practical sense with all the necessary implications." Fitzgerald, 2017 WL 74074 at *2 (citation and quotation marks omitted).

Accordingly, there are four requirements which a defendant, who requests a court to rule pre-trial on a motion to dismiss, must meet regarding "the basis for the motion." Rule 12(b)(3). First, any facts must be undisputed, Levin, supra; second, the issue must be able to be decided as a matter of law, without invading the province of the jury on the facts, Levin, supra; third, a trial of the disputed factual issues would not have "assisted the … court in deciding the legal issues," Levin, supra; and fourth, the defendant "must accept as true the factual allegations … in the indictment." Stock, supra. See also, Sewell v. United States, 406 F.2d 1289, 1292 (8th Cir. 1969) (Rule 12(b) serves the "purpose of preventing unnecessary trials and deterring the interruption of a trial … for any objection relating to the institution … of the charge").

McKelvy has found no relevant contrary authority on these points. As United States v. Weaver, 659 F.3d 353, 355 n. (4th Cir. 2011), summarized various decisions in other circuits,

> **[A] district court may consider a pretrial motion to dismiss … where the government does not dispute the ability of the court to reach the motion and proffers, stipulates, or otherwise does not dispute the pertinent facts.**

Id. (citations to the Third Circuit's DeLaurentis and eight other circuit court opinions omitted).

B. Carollo supports McKelvy's position that his Limitations Motion is ripe and that his proffers are pertinent.

The Carollo case consists of two decisions - United States v. Carollo ("Carollo I"), 2011 WL 3875322 (S.D.N.Y. Aug. 25, 2011) (defendants' motion to dismiss counts 4, 5, and 7 granted pre-trial), and United States v. Carollo ("Carollo II"), 2011 WL 5023241 (S.D.N.Y. Oct. 20, 2011)(government's motion for reconsideration as to counts 4 and 5 denied).[2]

The Carollo case is relevant here on two aspects of McKelvy's case: (1) the ripeness of his Limitations Motion to dismiss and (2) the role of proffers in deciding whether a party, here the government, has made out a colorable case that the scheme "affected" a financial institution, such as Mantria Financial.

In Carollo I, the defendants argued that the indictment should be dismissed due to a violation of the traditional five-year status of limitations. Carollo I, 2011 WL 3875322 at *1-*2. The district court granted the defendants' motion to dismiss on counts 4, 5, and 7. The government argued that these counts were within the extended statute of limitations provided by section 3293(2). The court ruled that section 3293(2) was inapplicable because "the government has not alleged that the financial institutions suffered any actual loss or at most the risk of loss is de minimis." Carollo I, at *2.

-- Ripeness. In Carollo II, the district court considered the government's motion for reconsideration. In that motion, the government "argued that it is not required to prove its case in advance of trial." 2011 WL 5023241 at *1. Specifically, the government contended that the court "ought not to have ruled on the Defendants' statute of limitations defense at the motion to dismiss stage." Id. at *2. The court first looked to the part of the 2002 version of Rule 12, which, as referred to in Levin, provided that: "A party may raise by pretrial motion any defense … that the court can determine without a trial of the general issue." Rule 12(b)(2).[3] The court rejected the government's

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[2] The defendants' convictions were affirmed on their appeals, at United States v. Grimm, 738 F.3d 498 (2d Cir. 2013), the correctness of the dismissals was not reached on appeal.

[3] The 2014 version substituted the (more modern) phrase "on the merits" for the (archaic) "general issue" language; "[n]o change in meaning [was] intended." 2014 Advisory Committee Notes.

argument that the defendants' motion to dismiss based on the statute of limitations could not be decided pre-trial.

In denying the government's motion for reconsideration, the district court provided its reasoning on the ripeness issue:

> **As the Second Circuit has explained, "[t]he general issue in a criminal trial is, of course, whether the defendant is guilty of the offense charged." [citation omitted]… [R]esolution of a statute of limitations issue pretrial does not go to the general issue of liability and "protects the defendant from having to defend against stale charges."**

Carollo II at *2, quoting United States v. Kerik, 615 F.Supp.2d 256, 268 (S.D.N.Y.), aff'd, 585 F.3d 726 (2d Cir. 2009).

In ruling that a district court can grant pre-trial a motion to dismiss on statute of limitations grounds, the court in Carollo II stated, "Courts have also denied pre-trial motions based on statutes of limitations grounds, not as premature, but on their merits." Carollo II at n. 1 (citations omitted).

-- Proffers. Carollo II also relied on the district court's decision in Kerik, supra, for the proposition that a dismissal is appropriate where the government did not proffer sufficient evidence "to overcome a statute of limitations defense." Carollo II, 2011 WL 5023241, at *3. McKelvy will more fully discuss the significance of this ruling below, at section V (F,G).

C. Likewise, Ghavami supports McKelvy's position that his Limitations Motion is ripe and that his proffers are pertinent.

Ghavami is the other leading case on the two points discussed above regarding the Carollo case. There are three decisions in the Ghavami case: United States v. Ghavami, 2012 WL 2878126, *7-*10 (S.D.N.Y. 2012) (opinion denying, on the merits, the pre-trial motion to dismiss Counts 1-5 as untimely)(Kimba M. Wood, J.), 23 F.Supp.3d 148 (S.D.N.Y. 2014) (opinion denying post-trial motions), aff'd sub nom., United States v. Heinz, 790 F.3d 365, 367 (2d Cir. 2015), cert. denied, 136 S.Ct. 801 (2016).[4]

[4] We will refer to the two district court opinions as Ghavami and the court of appeals opinion as Heinz.

-- Ripeness. While the district court in Ghavami noted that the question of "[w]hether an offense affected a financial institution is [ultimately] a question of fact for a jury to decide," it also ruled that "the Court must determine [pre-trial] whether the evidence the Government intends to submit [at trial] would be sufficient to permit a jury to find that the conduct alleged in the Indictment affected a financial institution within the meaning of § 3293(2)." Id. at *7 (emphasis added, citation omitted). As did Carollo II, Ghavami rejected the government's argument that it was premature to consider the defendants' motion. 2012 WL 2878126 at *6; see also Ghavami, Gov't Reply Memo, Dkt. #484, 10-CR-1217, at 9-10.

McKelvy asserts that the standard in Ghavami – "whether the evidence the Government intends to submit [at trial] would be sufficient to permit a jury to find that the conduct alleged in the Indictment affected a financial institution within the meaning of § 3293(2)" - is analogous, for example, to the standard for determining whether a defendant is entitled to a jury instruction on an affirmative defense. Cf. Government of Virgin Islands v. Fonseca, 274 F.3d 760, 766 (3d Cir. 2001)(generally, "a defendant is entitled to an instruction as to any recognized defense [in this case, self-defense] for which there exists evidence sufficient for a reasonable jury to find in his favor" (citation and internal quotation marks omitted)). Although Ghavami used the term "sufficient to permit a jury to find," other cases in analogous situations use interchangeable terms, such as "prima facie" and "colorable;" McKelvy will use the term "colorable" in the interest of clarity.

The district court's ruling in Ghavami that it would consider pre-trial the defendants' motion to dismiss, 2012 WL 2878126 at *6, is consistent with the provision in Rule 12(d) noted above that "[t]he court must decide every pretrial motion before trial unless it finds good cause to defer a ruling" (emphasis added).

The government in Ghavami appeared to recognize the strength of the argument by the defendants that the motions were ripe for decision pre-trial. Even though the government there made a 12-word argument that the pre-trial motion to dismiss was "premature," citing United States v. Martinez, 1995 WL 10849 (S.D.N.Y. 1995), it proceeded to emphasize instead that Carollo

I was distinguishable, by stating that in this case (Ghavami) it "provided a [five-page summary of its] proffer of evidence of actual loss, … infra." Dkt. #484, 10-CR-1217 (S.D.N.Y), at 9-14.

-- Proffers. The court in Ghavami ruled that, to support its response to the motion to dismiss, the government could proceed by way of proffers, as long as the substance of the proffers was supported by "agree[ments] to stipulate." Ghavami, 2012 WL 2878126, at *7-*10, n.9. The court engaged in a detailed discussion of the merits of the government's proffers on actual loss and substantial risk of loss. McKelvy will more fully discuss the significance of this ruling below, at section V(G).

-- Summary. Based on the Carollo and Ghavami decisions, McKelvy argues that there is no distinction between the ripeness of his motion under Rule 12(b) and the ripeness of the defense motions in those cases, as long as his proffers are undisputed.

D. By his proffers, adopted from the government's case, McKelvy meets the four requirements for litigating a Rule 12(b) motion pre-trial.

In the following section, McKelvy will set out his factual basis for the within motion, in the form of proffers ("Pr."), to comply with the "four requirements," supra at 9, for requesting a pre-trial ruling on his motion to dismiss Counts 1-8.

First, because his factual basis for this motion must be "undisputed," McKelvy proffers only evidence adopted directly from the government's case – the grand jury testimony; the deposition testimony taken by the SEC in its preliminary injunction case against Mantria, et al.; statements in FBI 302s; the documents furnished by the government in discovery; any stipulations between the parties; and clear inferences which can be drawn from the testimony, statements, and documents. McKelvy assumes that this evidence will be "undisputed," unless the government advises that it is disavowing a representation in the testimony, statements, and/or documents. (Such a disavowal could, of course, be a noteworthy event.) If the government, in response to this memo, suggests modifications in the proffers, or submits one or more proffers of its own, the defendant will make every effort to reach agreement with the government on the suggested changes and/or additions.

Second, because the issue must be decided as a matter of law, McKelvy represents that he has made his best efforts to distill the government's case, which he submits is overwhelming on the factual issues related to this motion.

Third, as of this stage, McKelvy knows of no disputed factual issues which are relevant to this motion and which would be clarified at a trial.

Fourth, as stated below, McKelvy agrees to stipulate that, for purposes of this motion, all the factual allegations in the indictment must be taken as true. The defendant, however, will not stipulate to the truth of any of the legal assertions in the indictment, including the allegations that Mantria Financial was a "financial institution" Count 1, ¶ 5, and that "the wire fraud affect[ed]" a "financial institution," Count 1, ¶ 8, which are the central legal issues in this motion.

McKelvy argues that the documents listed above can be properly considered pre-trial by this Court, just as the proffers were in <u>Ghavami</u> (or as the absence of proffers in <u>Carollo</u>) and just as was the defendant's (unopposed) affidavit in <u>United States v. Jones</u>, 542 F.2d 661, 664 (2d Cir. 1976). Although we know of no case which so holds, we contend that there is no functional difference between a memo titled "proffer," on the one hand, and grand jury testimony, FBI 302s, and documents which were provided as part of the discovery process, pursuant to Rule 16(a)(1)(E)(ii), on the other.

It should also be noted that, even though we are aware of no evidence that McKelvy participated, in any way, in owning or operating Mantria Financial, the defendant agrees, for purposes of this motion, that McKelvy also "controlled" Mantria Financial, as alleged in Count 1, ¶ 5.[5]

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[5] McKelvy plans to file a motion to strike the "controlled" allegation, as it applies to himself, because there is not a shred of evidence that he participated in operating Mantria Financial during 2008-09. But if the Court denies the motion to strike, that would not change McKelvy's position that Wragg and Knorr, as alleged in Count 1, ¶ 5, "controlled" Mantria Financial, which is all we need for the motion to dismiss.

IV. FACTUAL BACKGROUND – THE DEFENDANT'S PROFFERS.

A. The defendant's proffers are based on the grand jury and SEC testimony, FBI 302s, and other undisputed documents.

As argued above, McKelvy believes that "proffers" of evidence in this case – as long as they are undisputed – should be given the same consideration by this Court as if the government had made the proffers of its evidence, as the government did in the S.D.N.Y. cases discussed above and below, Ghavami and Carollo. As far as McKelvy can tell, this issue of the use of defense proffers in Rule 12 motions is a novel one in this circuit.

The types of proffers McKelvy uses in this memorandum are based on: (a) his representation that the motion can be determined as a matter of law; (b) his representation that any factual questions are resolved by also accepting the factual allegations in the indictment; (c) his submitting in this memo proffers, adopted directly from the government's case, which are, as far as we know, undisputable;[6] (d) his representation that he will agree, in good faith, to any relevant stipulation proposed by the government; and (e) his representation that, in his view, the "motion can be determined without a trial on the merits." 12(d).

Because the grand jury testimony was entirely in the hands of the government's attorney, the FBI case agent (S/A Annette Murphy), and the witnesses such as Daniel Rink, whom the government chose to call in support of the allegations in the indictment, McKelvy is submitting the proffers set out below as an expeditious means of providing the necessary factual background for his motion. For some of the proffers, McKelvy will provide a citation; for others, he believes that no citation is necessary.[7]

B. The defendant's proffers.

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[6] The government did not explicitly attempt to explain its position on section 3293(2) in the grand jury transcripts.

[7] If the government decides to dispute any of the defendant's proffers, McKelvy will file an appendix containing the documents referenced in this memo.

McKelvy submits, for purposes of the limitations motion and memo only, the following proffers ("Pr."):

1. The grand jury investigation focused on developing the facts about the involvement of co-defendants Troy Wragg, Amanda Knorr, and Wayde McKelvy with certain activities of Mantria Corporation ("Mantria"), Mantria Financial, and other entities related to Mantria.[8] As S/A Annette Murphy testified on August 5, 2015 ("8/5/15 GJ"), the essential charge against Wragg, Knorr, and McKelvy was that they illegally participated in a so-called Ponzi scheme, which used "new" (investor) money to pay off "old" debts. 8/5/15 GJ at 37. Troy Wragg "pretty much ran the show in Mantria." Id. at 6. As supported by numerous documents, Wragg owned 51% of Mantria and Knorr owned 49%, and Mantria owned 100% of Mantria Financial.

2. On 5/24/16, Knorr plead guilty to Counts 1, 2-8, 9, and 10. On 3/2/17, Wragg plead guilty to the same counts. By entering these pleas, Wragg and Knorr have admitted that they are guilty of the crimes charged and that the allegations in the indictment as to their conduct are accurate. Among the allegations they admit are accurate, as to themselves, is the allegation in Count 1 that "Mantria Financial was controlled by Mantria … and defendants Troy Wragg [and] Amanda Knorr," Count 1, ¶5, and that, as part of the manner and means section, they "claimed that Mantria made millions of dollars selling real estate and 'green energy' products, [when] they knew that Mantria had virtually no earnings, no profits, and was merely using new investor money to repay earlier investors." Count 1, ¶ 12. Wragg and Knorr have agreed to testify at trial against McKelvy.

3. As S/A Murphy testified, part of the approach taken by McKelvy to potential investors in Mantria at a "seminar" on May 7, 2009, was to advise that their investments would be in land sales at Mantria developments in Tennessee and that their investments were "secured" by "collateral" at a ratio of two (dollars of worth for the land in these developments) to every one (dollar for the investments), which McKelvy said could be

[8] Unless otherwise noted, "Mantria" includes all of its related entities. Any references to Mantria Financial in this memo will be made explicitly.

realized by the investors' foreclosing on the "collateral." Murphy 8/5/15 GJ at 43-45; see Murphy 8/19/15 GJ at 11, 23-24.[9]

4. Wragg made (contingent) purchases of land in Tennessee, possibly as early as 2005, from his sister's father-in-law, Dr. George Dixson. (These purchases were "contingent" because Dr. Dixson was obligated to buy them back at Wragg's option.) Wragg paid between $900 and $2,000 an acre. Murphy, 8/5/15 GJ at 6, 10-13. As S/A Murphy testified, it initially was Wragg's plan was to develop and then sell these parcels for a profit. Murphy, 8/5/15 GJ at 13.

5. The SEC calculated that Mantria raised a total of approximately $54 million from its investors, but received monies of no more than about $300,000 from its real estate project. Murphy, 8/5/15 GJ at 24.

6. The real estate communities envisioned by Wragg were never developed. Murphy, 8/5/15 GJ at 13-14. There were many obstacles to development of this land, including the lack of potable water, the lack of access roads, and the presence, under some of the ground, of unexploded ordinance from "a U.S. Army World War II military artillery range." Id. at 14-20.

7. Wragg paid appraiser Ray Bryant to value the land as if it had been fully developed, according to Wragg's plan of bringing water over a nearby mountain and constructing access roads; but none of these improvements was in place at the time of the appraisals. Murphy, 8/5/15 GJ at 14-17, 19.

8. Based on Wragg's representations and his sales figures on the lots, as set out in Pr. 7, above, Bryant calculated the appraised value of the land at approximately $80,000 per acre, based on future, rather than current, values of these undeveloped plots. Murphy, 8/5/15 GJ at 15-17.

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[9] In his sales pitch to prospective investors at the same seminar, Wragg used a different approach: "We want people to know that we're setting aside money to make sure that we can buy [your investments] back out at the end of [December 2011.]" Speed of Wealth seminar, 5/7/09, at 34; cf. Pr. 12.

9. As S/A Murphy (who is a licensed CPA) testified, mortgage loans began to dry up in or before January 2008, due to the looming national financial crisis, making it difficult for people to buy land. Murphy, 8/5/15 GJ at 5, 23.

10. As S/A Murphy testified, in approximately January 2008, defendants Wragg and Knorr formed Mantria Financial, which was initially supposed to function as "a bank in Tennessee" to lend "people money to buy this land" in Mantria's developments. Murphy, 8/5/15 GJ at 23; see also Pr. 34-36. (Based on the Mantria Financial Private Placement Memorandum ("PPM"), it appears that the actual date of Mantria Financial's formation was October 2007.)

11. Wragg solicited investors for Mantria Financial, with the assistance of McKelvy, to whom he (Wragg) had been introduced, sometime after Mantria Financial was formed in October 2007. Murphy, 8/5/15 GJ at 23. At that time, McKelvy was in Denver, while Mantria's offices, where Wragg and Knorr worked, were located in Bala Cynwyd, Pennsylvania. Id. at 23, 48.

12. McKelvy utilized his investment clubs, known at that time as "Speed of Wealth" investment clubs, to help market investments in Mantria and Mantria Financial. Murphy, 8/5/15 GJ at 24.

13. S/A Murphy did not mention, in any of her testimony, anything that McKelvy had allegedly done in the formation, control, or operation of Mantria Financial, but only that he had raised money from investors for that firm and that he frequently talked with Wragg over the phone.

14. Wragg had hired his aunt, Joan Bell, and his sister, Tisa Dixson, to help sell the lots in Tennessee. Murphy, 8/5/15 GJ at 22.

15. As S/A Murphy testified, despite Wragg's claim to potential investors that "we're developing Tennessee's largest master plan community," the development was "pretty much nonexistent." Murphy, 9/2/15 GJ at 57.

16. As S/A Murphy discussed, Marc Thalheimer, a former Mantria employee, arranged to purchase a lot in one of Mantria's planned developments in Tennessee, for the stated price of $134,999. Murphy, 9/2/15 GJ at 15, 18.

17. As S/A Murphy said, the Purchase Agreement – also referred to as the "Contract of Sale" or the "Sales Contract" - that Thalheimer utilized for this purchase, with the assistance of a mortgage through Mantria Financial, was not a typical real estate agreement. Murphy, 9/2/15 GJ at 21. According to the agent – whose testimony is consistent with a review of a typical Purchase Agreement – such an agreement provided that Thalheimer be given numerous "buyer incentives," including provisions that:

(a) the purchaser would receive a credit for two years of mortgage payments (which meant that he or she did not have to make any mortgage payments for two years);

(b) Mantria Communities would pay the interest on the mortgage to Mantria Financial for two years;

(c) the purchaser was "free and clear of all debt associated with the home site or sites;"

(d) Mantria Communities would pay all the real estate taxes "for up to two years;"

(e) after those two years "he [could] walk away" from the agreement of sale;

(f) Mantria Communities would pay the closing costs of approximately $3,800 which would be paid to the title company;

(g) Mantria Communities agreed to pay cash back - "buyer's bonuses" - (which are one of the "buyer incentives" discussed here) – of about three percent of the purchase price on the land, giving the purchaser an incentive to do the transaction;

(h) the purchaser did not have to put any money down to get the mortgage, Murphy, 9/2/15 GJ at 16;[10] and

(i) Mantria Communities guaranteed that the purchaser would be able to re-sell for 36 months at the contracted sales price of

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[10] The agent's testimony on this (and other) "buyer incentives" was consistent with a copy of the "Sales Contract" attached to the bankruptcy receiver's third quarterly report ("receiver's report"), which described the underlying mortgage loan as a "zero money down" loan. Receiver's report at 16.

the lot, plus a refund of any money paid by the purchaser plus 10% of that amount. Murphy, 9/2/15 GJ at 19-25, 78, 79.

18. As S/A Murphy said, "numerous" other sales agreements utilized by Mantria Financial were similar to Thalheimer's agreement. Murphy, 9/2/15 GJ at 19.

19. As S/A Murphy explained, Mantria's non-traditional arrangements with Thalheimer and others:

> **induc[ed] employees and other … individuals to take possession of these properties on paper to establish a sales price and potentially drive up the associated "value" of the remaining properties.**

Murphy, 9/2/15 GJ at 21-22.

20. Put differently, as S/A Murphy said, Mantria, by reaching purchase agreements with some of its employees such as Thalheimer, was attempting "to gin up purchases of the land in Tennessee to show the appearance that they had some revenue coming in." Murphy, 9/2/15 GJ at 21-22. As the agent explained, Mantria was losing money on each transaction where Mantria appeared to sell a plot of land to a purchaser. Id. at 23.

21. As S/A Murphy said, in answering the question by the government's attorney, "Is it fair to say it would be nearly impossible for them to make money with that business plan?," she answered, "Yes." Murphy, 9/2/15 GJ at 80-81.

22. Also during S/A Murphy's testimony, the government's attorney asked the agent to confirm that "there's no allegation in the indictment … that the people who were buying the land were defrauded. Is that fair to say?," to which question she answered, "Yes." Murphy, 9/2/15 GJ at 78-79.

23. Finally, S/A Murphy said that she agreed with the government's attorney that the investors in Mantria were "not being shown" those parts of the contracts which identified the "buyer incentives." The agent also said that "if the investors in the Mantria securities really understood the … real estate contracts, they probably would not have invested in Mantria in the first place." Murphy, 9/2/15 GJ at 82.

24. As Daniel Rink testified in the grand jury, he (Rink) was the Chief Financial Officer ("CFO") of Mantria during the period 2007-09. Rink, 8/19/15 GJ at 7-8, 13. Although Rink had responsibility for the overall functioning of the accounting systems at the company, it was Wragg and Knorr who "managed [Mantria's] cash very, very tightly." Id. at 14.

25. As Rink testified, almost all the money which came to Mantria was from the investors. The only money which came to Mantria as a result of Mantria's sales or other business activities - including green energy products - was approximately $300,000, which was, he "believe[d]," in 2007 from the sales of Mantria's lots in Tennessee. Rink, 8/19/15 GJ at 16, 18. (According to SEC accountant Tracy Mongelli, as discussed below, it appears that the plot sales took place in 2008-09 and were to a Mantria entity other than Mantria Financial.)

26. Rink's testimony on the "buyer incentives" was consistent with that of S/A Murphy. As Rink testified, among Mantria's arrangements with the "purchasers" were that they did not have to pay any taxes for 24 months; that they would receive "buyer's bonuses" of as much as $3,000; and that the buyers did not have to put any money down. Rink, 8/19/15 GJ at 21-27.

27. As Rink stated, Mantria Financial was to be an in-house mortgage company, similar in concept to General Motors Acceptance Corp. ("GMAC"), that "would finance [the purchases of] the Mantria home sites." Rink, 8/19/15 GJ at 19.

28. As Rink stated, it was his understanding that Mantria Financial would wire transfer "the money down to Tennessee to do the real estate closings" and from there the funds would go to the Mantria entities which owned the land (presumably including Mantria Communities,[11] as had been mentioned by S/A Murphy (see Pr. 17, above)). Rink, 8/19/15 GJ at 19-20.

29. As Rink said, Mantria "as a whole entity" was "losing cash" on each of the sales of the lots, because it was, among other things, paying commissions to inside salespeople, paying the

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[11] Among the other Mantria entities which may have owned this land were Mantria Real Estate and the individual subsidiary LLCs for each of the five "communities."

real estate taxes, and paying the closing costs, as well as the "buyer incentives." Rink, 8/19/15 GJ at 21. He advised Wragg of this serious problem, but the practice of "losing cash" on each transaction continued. Id. at 23.

30. As Rink testified, the development of the real estate in Tennessee continued until sometime in early 2009, when Mantria "had a change in focus" and turned to concentrating on green energy, purchasing a large stake in Carbon Diversion, Inc. for $2.1 million and paying $2.3 million for the construction of a new plant at Dunlap, Tennessee. Rink, 8/19/15 GJ at 21-27.

31. As Rink stated, Mantria's "standard rate" for paying McKelvy for raising money from investors was 12.5% "of what he was raising." Rink, 8/19/15 GJ at 36. Rink said that Wragg and Knorr did not get any fees from fundraising, but that they did get fees from the sales of the parcels in Tennessee, each at the rate of 0.5% of the sales price. Id. at 42. Because Mantria Financial paid a high interest rate to investors, "it never made any money." Id. at 60.

32. Although a press release issued by Mantria Financial on March 26, 2008, stated that "Mantria Financial [was] a minority-owned business with 51% owned by President and Chief Operating Officer Amanda Knorr," it now appears that the ownership figures were incorrect. Instead, a spreadsheet supplied to the SEC on behalf of Mantria, presumably by Wragg and Knorr, showed that Mantria Financial was 100% owned by Mantria and that 51% of Mantria was owned by Wragg and 49% by Knorr.

33. The spreadsheet described in Pr. 32 is inconsistent, in several respects, with the Mantria Financial LLC Private Placement Memorandum ("PPM"). McKelvy and the government agree that the representations in the spreadsheet as to Mantria Financial were correct.

34. The documents which corroborate S/A Murphy's testimony, as summarized in Pr. 20 and 21, as well as Rink's testimony, summarized in Pr. 29, are: (a) the testimony during a hearing on the SEC's motion for a preliminary injunction against Mantria, et al. ("12/2/09 SEC Tr."); (b) the cash disbursements spreadsheets which were supplied to the SEC, apparently by Wragg

and/or Knorr on behalf of Mantria; and (c) the Mantria bankruptcy receiver's third quarterly report.

35. At the preliminary injunction hearing, Tracy Mongelli, an accountant with the SEC, testified, based on the cash disbursements spreadsheets, that there had been various expenditures for the years 2008 and 2009 by Mantria and Mantria entities. Included in her testimony were references to the Mantria developments in Tennessee. Specifically, Ms. Mongelli testified that the total amount of "buyer's bonuses" (one of the "buyer incentives" mentioned in S/A Murphy's testimony) paid to the "purchasers" of Mantria lots was $351,852 in 2008 and $429,205 in 2009. 12/2/09 SEC Tr. at 112, 115-16. Ms. Mongelli also testified that the amount of sales "commissions" for 2008 was $952,631 and for 2009 was $410,651. Id. at 112, 116.

36. Moreover, although Ms. Mongelli did not mention that Mantria assumed what is traditionally the buyer's expense of closing costs in the form of title insurance fees, the spreadsheets show that Mantria paid such fees in the amount of $239,346 for 2008 and $433,755 for 2009.

37. Neither Ms. Mongelli nor the spreadsheets provide any figures as to how much Mantria and Mantria entities may have made for any of the other "buyer incentives" identified by S/A Murphy in her testimony.

38. However, the spreadsheets referred to above did supply figures for Mantria Financial's total operating expenses of $3,296,643.87 in 2008 and $916,281 in 2009. (It should be noted that these figures do not include any repayments to the investors.)

39. Regarding the sales of the lots which were financed through Mantria Financial during 2008 and 2009, Ms. Mongelli testified that Mantria/Mantria Financial "realized no cash up front" on these "loans." Id. at 120-21, 148. She also testified that Mantria made three "cash sales" [12] of lots during 2008-09 sales for a total of $138,647 in 2008 and of $55,999 in 2009. Id. at

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[12] The term "cash sales" was used by Ms. Mongelli (and Rink) for lot sales which were not financed through Mantria Financial, all of which were 100% financed, with no down payments. Cf. 12/2/09 SEC Tr. at 120.

121. The main inference to be drawn from her testimony is that Mantria was losing huge amounts of money in 2008-09.

40. Moreover, there is no indication in Ms. Mongelli's testimony, Rink's testimony, or the available documents that any of the money from these "cash sales" went to Mantria Financial; to the contrary, because Mantria Financial's claimed function was to provide mortgages, there would be no reason for that entity to be involved in a "cash sale," where the proceeds of the sale would presumably go to the Mantria entity which purportedly owned those lots.

41. Ms. Mongelli testified that, aside from the investor funds which were deposited into Mantria and its related entities, the only cash "income" which Mantria had on their books was "under $300,000" from the cash sales. 12/2/09 SEC Tr. at 115; Pr. 37.

V. THE GOVERNMENT'S FIRST RATIONALE – THE "FINANCIAL INSTITUTION" REQUIREMENT.

A. <u>The factual and legal allegations in the indictment which are relevant to the government's first rationale</u>.

The indictment alleges that Mantria Financial was one of the "11 operating divisions" of Mantria Corporation ("Mantria") and that Mantria Financial was a "wholly-owned or affiliated" division of Mantria, but does not specify which. Count 1, ¶ 1. Count 1 also alleges that Mantria Financial "was a financial institution and mortgage lending business which engaged in interstate commerce" and that "Mantria Financial was licensed in Tennessee to finance real estate mortgages." Id. at ¶ 5.

B. <u>Mantria Financial was not a "financial institution" within the meaning of sections 3293(2) and 20(10)</u>.

McKelvy argues that, as a matter of law, Mantria Financial – the only organization identified in the indictment as a "financial institution" – should not be considered to be such because it fails to meet several of the requirements in the applicable statutes. The defendant will also argue, as an independent ground, that the government has not made a showing that, under section 3293(2), the scheme "affected" such an institution.

As set out above, the statutory definition of "financial institution" in section 3293(2) has, since May 20, 2009, also included "a mortgage lending business (as defined in section 27[13] of this title) or any person or entity that makes in whole or in part a federally related mortgage loan." 18 U.S.C. § 20(10).

C. The term "mortgage lending business" has not been developed by the courts in the context of section 3293(2).

There are only seven reported cases which McKelvy has found which consider the term "mortgage lending business" in sections 20(10) and 27 as this term applies to section 3293(2), but none of these cases included any development of this term by the courts. Cf. United States v. Brown, 2016 WL 4363135(3d Cir. 2016); United States v. Bennett, 621 F.3d 1131, 1137-38 (9th Cir. 2010); United States v. Walker, 2016 WL 1175134, *3 (M.D.Ga. 2016); Cardillo, 2015 WL 3409324, *3; United States v. Leadbeater, 2015 WL 567025 (D.N.J. 2015); United States. v. Abakporo, 959 F.Supp.2d 382, 387 (S.D.N.Y. 2013); United States v. Brester, 2013 WL 11325234, (M.D.Fl. 2013). Accordingly, McKelvy needs to use other ways to define this term.

As McKelvy analyzes section 20(10) and section 3293(2), we first cite the law in this Circuit on the relationship between the plain meaning rule and legislative intent. As the Court said in United States v. Fontaine, 697 F.3d 221 (3d Cir. 2012):

> **"A court's primary purpose in statutory interpretation is to discern legislative intent." In determining legislative intent, "[t]he plain meaning of legislation should be conclusive, except in ... rare cases in which the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters." (internal quotation marks and citation marks omitted). In those rare cases, we are obligated "to construe statutes sensibly and avoid constructions which yield absurd or unjust results."**

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[13] **As also set out above, section 27 states, "In this title, the term 'mortgage lending business' means an organization which finances or refinances any debt secured by an interest in real estate, including private mortgage companies …, and whose activities affect interstate or foreign commerce."**

697 F.3d at 227 (citations omitted). Because McKelvy believes that the "plain meaning" of the statute is clear, as set out below, he will not look to the statutes' legislative history.

D. Dictionary definitions should provide the meanings of the pertinent words in sections 3293(2) and 20(10).

McKelvy will discuss the statutory definition of "a mortgage lending business" provided by sections 3293(2) and 20(10), as well the "plain meaning" of these two statutes.

The statutory definition of "a mortgage lending business" is: an "organization which finances or refinances any debt secured by an interest in real estate … and whose activities affect interstate or foreign commerce." 18 U.S.C. § 27 (emphasis added). McKelvy argues that the five key words here are "mortgage," "lending," "business," "finances," and "debt," and that, after examining several definitions, it is apparent that Mantria Financial was not "a mortgage lending business."

Recent decisions of the Supreme Court have used dictionary definitions as central points in their analysis. See, e.g., Board of Trustees of Leland Stanford Jr. University v. Roche Molecular Systems, Inc, 563 U.S. 776, 788-89 (2011). As was stated in a recent article in the New York Times, "A new study … found that the justices had used dictionaries to define 295 words or phrases in 225 opinions in the 10 years starting in October 2000. That is ... an explosion by historical standards." "Justices Turning More Frequently to Dictionary, and Not Just for Big Words," http://www.nytimes.com/2011/06/14/us/14bar.html

-- Definition of "mortgage."

The most pertinent dictionary definition of "mortgage" which McKelvy has found is: "a conveyance of an interest in property as security for the repayment of money borrowed," Dictionary.com, definition no. 1.

-- Definition of "lending."

The most pertinent dictionary definition of "to lend" or "lending" which McKelvy has found is: "the activity of lending

money to people and organizations which they pay back with interest," Cambridge English Dictionary, definition no. 1.

-- Definition of "business."

The most pertinent dictionary definition of "business" which McKelvy has found is: that "which occupies the time, attention, and labor of men for the purpose of a livelihood or profit," Black's Law Dictionary.

-- Definition of "finances" (verb).

The most pertinent dictionary definition of "finances" (verb) which McKelvy has found is: "to buy (something) by borrowing money that will be paid back over a period of time," Merriam Webster, definition no. 2.

-- Definition of "debt."

The most pertinent dictionary definition of "debt" which McKelvy has found is: "something, typically money, that is owed or due," Oxford English Dictionary, definition no. 1.

E. The facts of the government's case refute its allegation that Mantria Financial was a "mortgage lending" institution.

McKelvy argues that the "plain meaning" of section 20(10) shows that this section does not apply to Mantria Financial, under the defendant's factual proffers. To construe this section "sensibly," as required by the Third Circuit in Fontaine, should mean, according to the dictionary definitions of the five key words listed above - "mortgage," "lending," "business," "finances," and "debt" - that a "mortgage lending business" would be defined as: an entity, intending to make a profit, which made loans secured by real estate, where the entity lent money to the prospective purchaser(s) on the condition of repayment of the loan, which would result in the creation of a debt.

Based on the defendant's proffers, McKelvy asserts that this Court should enter the proposed Findings of Fact and Conclusions of Law, which document has been filed separately. In essence, the proposed Findings and Conclusions state the reasons why

Mantria Financial is not, as a matter of law, a "financial institution."

VI. THE GOVERNMENT'S FIRST RATIONALE – THE "AFFECTED" REQUIREMENT.

A. McKelvy cannot move to dismiss for insufficient allegations on how the fraud "affected" a financial institution.

As noted above, McKelvy recognizes, based on the law in this circuit and elsewhere, that the statute of limitations is not jurisdictional and can be waived. See, Karlin, supra, 785 F.2d at 92-93 (discussed above at 7-8). McKelvy concedes that it follows, from this and from the Third Circuit and Supreme Court cases cited below, that he cannot argue that the indictment is defective due to the insufficiency of the factual allegations there as to how the fraud affected the one financial institution identified in the indictment, Mantria Financial.[14]

Although a defendant can move to dismiss an indictment under Fed.R.Crim.P. 12(b)(3)(B) for failure to state an offense, see United States v. Kemp, 500 F.3d 257, 280 (3d Cir. 2007), this authority concerns only situations where the indictment fails to include elements of the crime charged – or their functional equivalents -- which, of course, would not include affirmative defenses such as the one here.

McKelvy's concession on this point is also driven by the well-established principle that a defendant cannot challenge an indictment for an alleged absence of probable cause on an element on the offense. The Supreme Court does not permit pre-trial challenges to a grand jury's probable cause determination or to the adequacy of the evidence supporting an indictment. See Costello v. United States, 350 U.S. 359, 363 (1956)("An indictment returned by a legally constituted and unbiased grand jury, … if valid on its face, is enough to call for trial of the charge on the merits."); see also United States v. Williams, 504 U.S. 36, 54-55 (1992)(relying on Costello).

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[14] **This concession only concerns the "affected" allegation as it would relate to the statute of limitations.**

B. In Carollo, the government did not make sufficient allegations for section 3293(2), but in Ghavami it did.

Even though McKelvy concedes here that the government need not include any allegation in the indictment to explain how the fraud "affected" a financial institution, he argues that the government needs to give the defense sufficient notice of its precise grounds for invoking section 3293(2), by means of detailed allegations in a responsive memo and/or a formal proffer. In dealing with this issue, the district courts in Carollo and Ghavami said, in effect, that the government had (or had not) provided adequate notice of the manner in which the fraud allegedly "affected" a financial institution. We will examine the Carollo and Ghavami cases, on the sufficiency of the allegations there.

-- "Affected" allegations - Carollo. In the Carollo cases, the court stated that one of the reasons it initially granted the motion to dismiss as to Counts 4, 5, and 7 was that the government did not allege in the indictment or in any proffer that a financial institution had suffered "actual loss." Carollo I, at *2. The court also ruled that the extended statute of limitations was not applicable because the government "merely argue[d] that the [fraud scheme] exposed [two financial institutions] to a risk of loss without providing much explanation as to what that risk [was] other than the expenses associated with litigation." Id. at *2.

In response to the government's motion for reconsideration of its dismissal order, the court denied this motion and amplified its initial ruling by stating that the government only argued, in response to the motion to dismiss, that an [unnamed] institution's "prospect of litigation expenses" was sufficient to carry the government's burden on the "affected" issue. Carollo II at *3. The court noted that had the government "made the proffer of evidence at the motion to dismiss phase that it has made in this motion for reconsideration, the outcome may have been different." Id.

-- "Affected" proffer – Carollo. In response to government's motion for reconsideration, the court stated that the government argued, as noted above, that the court should wait until trial to decide the applicability of section 3293(2) issue "because an

indictment need not negate an affirmative defense based on the statute of limitations," Carollo II at *3, citing, inter alia, the Supreme Court's decision in United States v. Cook, 17 Wall. 168, 84 U.S. 168 (1872). In denying reconsideration, the district court distinguished Cook, on the grounds that the government could have "provide[d] evidence, or at least allege[d] facts [arguably] sufficient to withstand the statute of limitations defense," but did not do so. Carollo II, at *3. As such, the court found both that the government's failure to provide evidence, or at least to have initially made a proffer as to what they expected to be able to prove, justified its granting the defendants' motion to dismiss Counts 4, 5, and 7.

McKelvy argues, following the ruling in the Carollo cases and for the reasons explained more fully below, that the allegations in the indictment, together with the government's claimed explanation that section 3293(2) was satisfied because Mantria Financial had gone bankrupt, did not provide a sufficient "explanation" on the "affected" issue, by way of a proffer, or even an allegation in the indictment or otherwise, "sufficient to withstand the statute of limitations defense." Carollo II, at *3.

-- "Affected" allegations - Ghavami. In contrast to the insufficiency of the government's explanations in Carollo, the government in Ghavami made allegations explaining how the fraud affected one or more financial institutions. Specifically, the government alleged

> **that the ten-year statute of limitations period applies to Counts One Through Five because the charged conduct "affect[ed]" certain financial institutions within the meaning of § 3293(2) by exposing them to the risk of financial loss and causing them to experience actual financial loss, in the form of civil monetary settlements with the Securities & Exchange Commission ("SEC") and other regulators, as well as attorneys' costs and fees associated with reaching resolutions of non-prosecution agreements with the Department of Justice Antitrust Division ("DOJ").**

2012 WL 2878126, at *4. The court found that these allegations were sufficient, if supported by adequate proffers, to explain how the "affected" element in section 3293(2) was satisfied -

because the alleged fraud had exposed four financial institutions to "a new or increased risk of loss" and that its position was supported by "persuasive" authority. Id. at *5-*6.

-- "Affected" proffer – Ghavami. In its proffer of the evidence it intended to introduce at trial, the government in Ghavami stated that it would call a representative of each of four financial institutions to testify about the actual losses suffered by each entity and/or the associated susceptibility to a substantial risk of loss, which were a direct result of the fraud scheme. Dkt. #484 at 6, 9, 10. In its four proffers – one for each of the four financial institutions - the government alleged that Financial Institutions A, C, and D, as well as Provider B, entered into agreements to pay a total of hundreds of millions of dollars to the IRS, the SEC, and various municipalities "affected by the [fraudulent] conduct." 2012 WL 2878126, at *8.

In addition, one of the three victim banks was "not only exposed to substantial risk but experienced actual losses," including over $28 million in settlement costs and attorneys' fees. 2012 WL 2878126, at *6. A memo filed by the government in the district court provided a five-page summary of its proffer of evidence on the "affected" issue. Dkt. #484 at 10-14. Even a cursory reading of the section in the court's opinion concerning the proffered evidence on the "affected" element shows that the government went into extremely deep detail to make its case and shows how complex the proffers were. Id. at *7 - *9.

-- Summary. In summary, in Carollo, the defendants' prevailed on their motion to dismiss, in part because the government failed to make sufficient allegations or to submit any proffers to support its invoking section 3293(2). Contrastingly, in Ghavami, the government prevailed, because it both made sufficient allegations in its memoranda and provided the court with detailed proffers.

C. A "financial institution" which was an "active participant in the fraud" can be "affected" under section 3293(2).

As explained in Ghavami and other cases, depending on the circumstances, even though a financial institution may have been an "active participant in the fraud," that will not

automatically bar the application of the extended statute of limitations, section 3293(2), to such a case. For this proposition, Ghavami relied on the following three cases:

> **See United States v. Ohle, 678 F.Supp.2d 215, 228–29 (S.D.N.Y. 2010) … (holding that financial institution was affected within meaning of § 3293 even where it was "active participant in the fraud"); United States v.. Daugerdas, … 2011 WL 6020113, at * 1 (S.D.N.Y. Apr. 5, 2011) … ("[N]othing in [§ 3293(2)]'s language precludes its application to a financial institution that participated in the fraud."); see also United States v. Serpico, 320 F.3d 691, 695 (7th Cir. 2003) ("[T]he mere fact that participation in a scheme is in a bank's best interest does not necessarily mean that it is not exposed to additional risks and is not 'affected' [under § 3293(2)] …").**

Ghavami, at *5; see, Agne, 214 F.3d at 51. McKelvy agrees that this is, generally speaking, an accurate statement of the law.

McKelvy also argues that all of the requirements for finding that a "financial institution" was "affected," including the various definitions of "affected" set out below in section V (H), are still fully applicable. In other words, while we agree that just because an institution is a participant in a fraud does not mean that the government is automatically prohibited from invoking the ten-year statute, we assert that it also does not mean that the government is automatically entitled to utilize the extended statute – all the usual requirements are still in effect.

D. To make a case that Mantria Financial was "affected" by the fraud, the government must make four different showings.

Although McKelvy believes that the best practice - which was adopted in Ghavami – is for the government to be required to make both sufficient allegations in its memo and to provide a sufficient summary of its expected proofs and its proffers – he recognizes that there is no "bright line" between these two approaches. Accordingly, McKelvy will summarize here the requisite aspects of both the necessary allegations and the necessary proffers to make a colorable case that it is entitled to the ten-year statute of limitations.

-- First, the government's allegations and proffers must be sufficiently detailed to overcome the defense. The government must make sufficiently detailed allegations and proffers to "allege[] facts [arguably] sufficient to withstand the statute of limitations defense." Carollo II, at *3. It is not enough to make allegations which are vague or insufficiently detailed – it is not enough, for example, for the government to say that a financial institution had a "prospect of litigation expenses" as a result of a fraud, because this would not carry the government's burden on the "affected" issue. Id.

-- Second, the government must show that the fraud directly caused actual loss and/or a risk of loss. The government must provide, in its allegations and/or proffers, an "explanation as to what [the actual loss or the] risk [was]." Carollo I, 2011 WL 3875322, at *2-*3. The government must also articulate how the fraud "caused" the financial institution to suffer any such losses. Id. Moreover, the government must demonstrate that the fraud was a "sufficiently direct" cause of such loss or risk of loss. Heinz, 790 F.3d at 367(citation omitted); Bouyea, 152 F.3d at 195. A "mere use of a financial institution in a scheme to defraud is not enough to demonstrate that the financial institution was affected by the wire fraud." United States v. Mullins, 613 F.3d 1273, 1278 (10th Cir. 2010).

This explanation is necessary, no matter how complicated the underlying fraud, cf. Ghavami at *1, *7-*10 (government provided sufficient explanation in proffers of actual losses and/or substantial risks of loss in case involving municipal bond trading, derivatives, competitive bidding procedures, federal tax law, and IRS regulations), to give the defendant(s) the information they need to respond to and probe the validity of the government's assertion that an institution was "affected.")

The Second Circuit has ruled that the term "affects" in section 3293(2) "expresses a broad and open-ended range of influences." Heinz, 790 F.3d at 367 (citation omitted). Accordingly, section 3293(2) "broadly applies to any act of wire fraud which affects a financial institution," provided the effect of the fraud is "sufficiently direct." Id. (citing United States v. Bouyea, 152 F.3d 192, 195 (2d Cir. 1998) (per curiam) (quotation marks omitted); cf. Allen, 2016 WL 615705 at *5.

Moreover, the government does not have to show that the designated "financial institution" was a "victim" of the fraud charged in the indictment. See United States v. Pelullo, 964 F.2d 193, 215-16 (3d Cir. 2012) ("Pelullo's argument would have more force if [section 3293] provided for an extended limitations period where the financial institution is the object of fraud. Clearly, however, Congress chose to extend the statute of limitations to a broader class of crimes."); accord, Ghavami, 2012 WL 2878126 at *5.

-- Third, the government must specify the amount of any alleged actual loss. The government, if it is relying, as is apparently the case, on the theory that there was an actual loss, must articulate the extent of any such loss. Carollo I, at *2. As of now, there is nothing in the case against McKelvy which even approaches what the indictment, the government's memoranda, and government's proffers in Ghavami alleged as to the manner in which the fraud "affected" the financial institutions there.

-- Fourth, the government must allege that any risk of loss was "new or increased" and that it was "substantial." If the government's theory is that Mantria Financial was made susceptible by the fraud to a risk of loss, then it has to show, as part of its allegations and/or proffers, that such exposure was "to a new or increased risk of loss." See Ghavami, 2012 WL 2878126 at *5, citing Mullins, 613 F.3d at 1278, United States v. Rubin/Chambers, Dunhill Ins. Services (CDR), 831 F.Supp.2d 779, 783-84 (S.D.N.Y. 2011); Carollo I, at *2, citing United States v. Ohle, 678 F.Supp.2d 215, 228–29 2010), aff'd, 441 F.App'x 798 (2d Cir. 2011); see also Serpico, 320 F.3d at 694. The government also has to show that the risk was "substantial." United States v. Murphy, 2013 WL 5636710 at *1 (W.D.N.C. 2013); Ghavami, at *6; CDR; Carollo I, at *2; Ohle, 678 F.Supp.2d at 229.

As the First Circuit said in United States v. Agne, 214 F.3d 47, 52 (1st Cir. 2000):

> **We conclude that this is a case in which the consequence to the bank, if any, is too remote to sustain the conviction. [A]ssuming … that being exposed to a risk of loss is sufficient to "affect" a bank, within the ordinary meaning**

> **of that term, we cannot agree with the district court that this defendant created such a risk.**

Id. at 52 (citing in prior paragraph Pelullo, 964 F.2d at 216).

As a number of decisions recognize, there is a point beyond which courts will not consider a financial institution to have been at a risk of being "affected." Terms used by the courts to draw this line – which terms are functionally similar to the "substantial risk" test -- are: "[not] too remote," Agne, 214 F.3d at 52, Pelullo, 964 F.2d at 216, Bouyea, 152 F.3d at 195; not "too attenuated," Carollo I, 2011 WL 3875322 at *3, Agne, 214 F.3d at 52; and "[a] realistic prospect of loss," citing Agne, 214 F.3d at 53; other such terms are: the financial institution has been "prejudiced" by the fraud charged, citing Agne, 214 F.3d at 52, Bouyea, 152 F.3d at 195, and Pelullo, 964 F.2d at 216; and the impact of the fraud has been more than "de minimis," as used in Carollo I, 2011 WL 3875322 at *2, and Carollo II, 2011 WL 502 3241 at *1, *4. McKelvy asserts that all of these terms are equally suitable and interchangeable. Because there is ample case law on the meaning of "affects" in section 3293(2), we agree with the observation by the district court in Daugerdas that "[t]he term "affects" is broad but not ambiguous." 2011 WL 6020113, at *1.

E. The government's allegations have not met the four requirements set out in section VI (D).

By analogy to Ghavami, 2012 WL 2878126 at *7-*10, and Carollo I, 2011 WL 3875322 at *1-*2, where the government did (and did not) submit sufficient allegations and/or proffers, McKelvy argues that this Court can take into account proffers by the defendant, as well as by the government. Here, as noted above, McKelvy asks this Court to consider his pre-trial proffers and proposed findings of fact and conclusions of law, in support of his position that Mantria Financial was not "affected" by the alleged fraud, because it (the government), as of the date of this submission, has not shown and will not be able to show the four requirements set out in section VI (D), above: first, the government's allegations and proffers must be sufficiently detailed to overcome the statute of limitations defense; second, the government must show that the fraud directly caused an actual loss and/or a risk of loss; third, the government must

specify the amount of any alleged actual loss; and forth, the government must allege that any risk of loss was "new or increased" and that it was "substantial."

-- First, the government's allegations and proffers are not sufficiently detailed to overcome the defense. McKelvy asserts that, as in Ghavami, this Court can determine, as a matter of law, whether there is any likelihood that the government will be able to show at trial a colorable basis to invoke section 3293(2), once the government has responded to the within motion. The court in Ghavami found, in effect, that the government's proffers made colorable showings that the four institutions in question were substantially "affected." Id. at *7-*10.

As noted above, the allegation in paragraph 5 of Count 1 of any specific manner in which Mantria Financial was "affected" by the fraud scheme. Rather, the only attempted explanation of how McKelvy's conduct in the alleged fraud "caused" Mantria Financial to be "affected," under its informal first rationale, is that Mantria Financial suffered an actual loss because it went bankrupt, an argument that is, for the following reasons, without merit.

-- Second, the government has not shown that the fraud directly caused an actual loss and/or a risk of loss. One of the reasons the government has not been able to show that the fraud "directly caused" an actual loss or a risk of loss is that Mantria's bankruptcy was inevitable. According to the government's evidence, including the testimony of S/A Murphy and former CFO Rink, bankruptcy was, in effect, inevitable. This effect came directly as a result of the actions by Wragg and Knorr (the only two co-owners of Mantria and the only two co-founders, co-principals, and co-operators of Mantria Financial) to use this entity as a totally sham mortgage company, the sole purpose of which, between 2008 and early 2009 was to "gin up" the property values of the parcels in Tennessee by adding to the sales pitch for Mantria investments that they were made safe by "collateral," at a ratio of two (dollars of worth for the land) to every one (dollar for the investments). Pr. 3, 20. Other than the approximately $300,000 Mantria received for sales of parcels in 2008-09, Mantria in fact did not make, and, starting in 2008,

did not intend to make, any revenue, let alone any profit, on such "sales." Pr. 5, 25, 39. There is no evidence that Mantria Financial was in any way involved in such "cash sales" and no reason for it to have been involved, because by definition, such sales would not have involved mortgages. Pr. 38.

It is evident that an organization which does not make and does not intend to make any money will, at some point, have to declare bankruptcy or some other form of insolvency and, accordingly, that the charged illegal activity could not possibly be said to have "caused" the actual loss or a risk of loss, as required by Carollo I, et al.

-- Third, there was no effort to specify the amount of an actual loss or of a risk of loss. There is nothing in the indictment or in the government's statement of its first rationale which sets out the amount of any actual or risk of loss. Because the government, in its first rationale, did not identify the amount of an alleged actual loss or the amount as to which there was a substantial risk of loss, there is no way to know if that entity had been "affected" under the case law cited above, which requires the government to show that the actual loss or substantial risk of loss was, inter alia, "sufficiently direct" and not remote or "de minimis." As the defendant understands the relevant case law, there is no case which found that a "financial institution" was affected, without the government's providing at least an estimate of the amount of money involved, which claim was then verified by the court. Otherwise, neither McKelvy nor the Court would have any idea of the merits of the government's purported explanation as to how McKelvy's fraudulent conduct may have affected Mantria Financial.

-- Fourth, there was no "new or increased risk of loss." The inevitability of bankruptcy is also disqualifying under language used in the Second Circuit for the proper test for "causing" a financial institution to be "affected." Serpico, 320 F.3d at 695, confirming the correctness of the district court's jury instruction that the alleged schemes "affected" the banks if they "exposed the financial institution[s] to a new or increased risk of loss;" see also Ghavami, 2012 WL 2878126 at *5; Ohle, 678 F.Supp.2d at 228; Carollo II, 2011 WL 5023241 at *4. McKelvy is aware of no evidence to suggest that Mantria Financial was

rendered susceptible "to a new or increased risk of loss." To the contrary, the risk of loss was already at 100%, based on the testimony of S/A Murphy and of former CFO Rink, described above. Hali

VII. THE GOVERNMENT'S SECOND RATIONALE FOR APPLYING SECTION 3592(2) TO THIS CASE IS LIKEWISE UNSUPPORTABLE.

A. The government's second rationale is also unsupportable, based on the discovery which McKelvy has reviewed.

McKelvy argues that the government's second rationale for its position that a "financial institution" has been "affected," see section III(D), above, is also unsupportable, based on the documents we have received as of the date of filing this memo. McKelvy contends, among other things, that, as to this rationale, the indictment, together with the government's informal statement, and the discovery which the defendant has reviewed, do not, when considered in light of the case law referred to above, supply the sufficiently detailed explanation and the necessary four kinds of allegations and/or proffers to make a colorable case that it can invoke section 3592(2), as set out in section V (G).

B. The government's second rationale regarding the applicability of sections 3293(2) and 20(10) to Counts 1-8.

-- The indictment.

The relevant part of the indictment alleges that:

> **During Speed of Wealth seminars, defendant McKelvy advised prospective investors to liquidate other investments, including retirement accounts, and to obtain the maximum amount of funds in loans from financial institutions in the form of credit cards, insurance policies, home equity, and other loans, and invest all these funds in Mantria and its related entities.**

Count 1, ¶ 2 ("Background" section)(emphasis added).

-- The "second rationale," summarized.

The government's informal summary of its second rationale, stated more fully in section III(D) of this memo, states that the "affected" element is met in the following, added manner:

> When the Mantria Ponzi scheme collapsed, those [unnamed] financial institutions which lent money to investors were affected because many of the investors could not repay those loans or at least were delinquent on those loans.

Id.[15]

C. McKelvy's proffer on the second rationale.

McKelvy represents that he has made his best effort to conduct a review of any of the documents, provided by the government, which are relevant to this second rationale. He makes the following proffer at this time, recognizing that the government may be able to locate documents which he has not found. He will refer to this proffer as Pr. 42, to follow Pr. 1-41, set out earlier in this memo.

42. The documents which McKelvy has reviewed, including all the grand jury testimony; all the SEC depositions; all the FBI 302s; all the reports of the receiver appointed by the bankruptcy court; all the testimony and exhibits at the hearing on the SEC's motion for a preliminary injunction against Mantria; hundreds of emails between Wragg, Knorr, and McKelvy; approximately 104 SEC questionnaires submitted by investors and the supporting documents submitted by the investors; and the several thousands of other documents reviewed by the defendant, provide no apparent support for this second rationale.

D. The reasons why the second rationale fails.

[15] Once the government has supplied the necessary details, as set out below at section VI (D), as to the identity of the financial institution(s) which allegedly suffered a loss and a representation that such financial institution(s) were federally insured at the time, McKelvy may be in a position to stipulate that such institutions would be qualified as such under sections 3293(2) and 20(10).

Based on the documents made available to the defense, this second rationale is unsupportable for several reasons. The defendant's arguments here are similar to his arguments made above at section V (G), concerning the first rationale.

-- First, the government has not yet made any detailed allegations or proffers as to how the particular financial institution(s) were "affected." Under this second rationale, the government needs first to make allegations similar to those required for the first rationale, at section III-V, supra. Specifically, the government must meet all the requirements of section V (G) of this memo, including the requirement to make detailed factual allegations "sufficient to withstand the statute of limitations defense." Carollo II, at *3. These allegations would need to include, among other things, the identity of the financial institution(s) which allegedly suffered a loss.

-- Second, the government must make allegations and/or proffers explaining how the fraud directly caused an actual loss and/or a risk of loss." As argued by McKelvy in his limitations memo at section V (G), the second requirement, to overcome a statute of limitations defense that there was no evidence of the "affected" element, is for the government to provide an "explanation as to how the fraud "caused" the financial institution to suffer any such losses, id., and how the fraud was a "sufficiently direct" cause of any such actual loss or risk of loss. Heinz, 790 F.3d at 367 (citation omitted). As asserted above, these requirements apply no matter how complicated the underlying fraud. Cf. Ghavami, at *1, *7-*10.

-- Third, the government must specify the amount of any alleged actual loss. The government, if it is relying, as is apparently the case, on the theory that there was an actual loss, must articulate the extent of any such loss. Carollo I, at *2. As of now, there is nothing in the second rationale which even approaches what the indictment, the government's memoranda, and government's proffers in Ghavami alleged as to the manner in which the fraud "affected" the financial institutions there.

-- **Fourth, the government must allege that any risk of loss was "new or increased" and that it was "substantial."** To overcome the statute of limitations defense, the government must provide, if the government's theory is that Mantria Financial was made susceptible by the fraud to a substantial risk of loss, allegations and/or proffers, that (1) such exposure was "to a new or increased risk of loss," Ghavami, 2012 WL 2878126 at *5 (citations omitted); (2) the risk was "substantial," Ghavami, at *6; and, among other things, (3) the impact of the fraud has been more than "de minimis," as used in Carollo I, 2011 WL 3875322 at *2.

E. For the government to adequately support the second rationale, it must supply the following information.

Moreover, because there is extremely sparse information in the indictment which is relevant to the second rationale and because there is no explicit reference in the discovery, as set out in Pr. 42 and section VI (D), immediately above, to any of the aspects of the detailed explanation required to show how a financial institution has been affected, the government needs to provide information to McKelvy and to the Court.

The defendant maintains that, to satisfy the four requirements set out in this limitations memo at section VI (D), the government's explanation, allegations, and/or proffers or proposed stipulations would need to, at least:

(a) Identify the "financial institution(s)" which were allegedly affected by the fraud.

(b) State the dollar amount of any alleged loss.

(c) Identify the Mantria investor(s) who allegedly defaulted on or were otherwise unable to pay what was owed on a credit card, line of credit, or other loan which the investors took out as a result of McKelvy's advice that they maximize such extensions of credit, in accordance with his recommended "arbitrage" technique.

(d) Describe and document the financial condition of the investor(s) before, during, and after the extensions of credit and after the extensions of credit, so as to permit the defendant and the Court to assess the alleged effect of the fraud, as opposed to other factors such as downturns in the economy or business practice errors, on the ability of the investor(s) to repay the loan(s).

(e) Explain and document how the loan to a financial institution was a "direct" effect of the fraud, i.e., "but for" the fraud, there would have been no such loss.

(f) If the government's theory is that financial institution(s) were made susceptible to a risk of loss, explain how that risk of loss was "substantial," direct, and not de minimis.

-- The government will not be able to make a colorable case of entitlement to the ten-year statute of limitations, unless it can produce documentation to support each of the elements of the tests established by the above cases. Because the government must satisfy the reasonable doubt standard, to prove that it is entitled to the application of section 3293(2), see Pelullo, supra, McKelvy argues that the government should be held to the same standard that it would be in its case-in-chief in a traditional criminal case where it had to prove details of an individual's financial dealings. Specifically, because the requirements of the above-cited cases are so specific, McKelvy contends that any claim that a particular financial institution was "affected" due to the fraud should be rejected unless the government supplies sufficient documentary evidence to meet the reasonable doubt test. This is especially true in a case where,

here, the operative facts concerning the second rationale took place in 2008-09, all of which were more than six years ago.

Respectfully submitted,

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Dated: March 27, 2017

CERTIFICATE OF SERVICE

I hereby certify that I have served by electronic mail a true and correct copy of the foregoing Memorandum in support of the defendant's Motion to Dismiss Counts 1-8 of the Indictment, Based on the Statute of Limitations, upon Assistant U.S. Attorney Robert J. Livermore:

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/s/ Walter S. Batty, Jr.
Walter S. Batty, Jr.

Dated: March 27, 2017

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
v.	:	CRIMINAL No. 15-398-3
WAYDE MCKELVY,	:	
Defendant	:	

ORDER

AND NOW, this day of , 2017, upon consideration of the defendant's Motion to Dismiss Counts 1-8 of the Indictment, as to defendant McKelvy only, and the memorandum in support thereof, and any response by the government, the Court herby

ORDERS

that the defendant's Motion to Dismiss Counts 1-8 of the Indictment, as to defendant McKelvy only, is herby

GRANTED.

BY THE COURT:

____

JOEL H. SLOMSKY, J.