**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** | : | |

**PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW 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 these Proposed Findings of Fact and Conclusions of Law in Support of his Motion to Dismiss Counts 1-8 of the Indictment, in conjunction with his Limitations Memorandum.

Based on his Limitations Memorandum, including the proffers at 15-24, and pursuant to Fed.R.Crim.P. 12(d), which requires a court, which is ruling on a motion to dismiss, to "state its essential findings on the record," McKelvy requests this Court to enter the following Findings of Fact and Conclusions of Law.

I. PROPOSED FINDINGS OF FACT RE: GOVERNMENT'S "FIRST RATIONALE."

A. The defendant's admission for the limitation motion, the defendant's proffers.

1. As set out in the defendant's limitations memo, McKelvy stipulates that, for purposes of this motion, all the factual allegations in the indictment must be taken as true.[1]

[1] As noted in the limitations memo at section III (D), the defendant 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.

2. The Court adopts the proffers (Pr.) contained in Pr. 1-41, either as undisputed or as demonstrated by the documents later furnished to the Court by the defendant, based on the government's evidence.

B. Background – Wragg, Knorr, Mantria, and Mantria Financial.

3. According to Count 1 of the indictment, to which defendant Troy Wragg plead guilty, he was the co-founder, chairman of the board of directors, and chief executive officer of Mantria Corp. ("Mantria"). According to Count 1 of the indictment, to which co-defendant Amanda Knorr plead guilty, she was the co-founder, president, vice-chairman of the board, and chief operating officer of Mantria. As supported by numerous documents, Wragg owned 51% of Mantria and Knorr owned 49%. See generally, Pr. 1-2, 10-13, 17-18, 25, 27-28, 31-33, 39-40.

4. Mantria Financial, one of Mantria's related entities, was founded in October 2007. Wragg was the founder, CEO, and Chairman of Mantria Financial, and owned 51% of the company. Knorr was the President and Chief Operating Officer and owned 49% of the company. Wragg and Knorr received commissions, each at the rate of 0.5%, from any sales of the parcels in Tennessee, almost all of which were purportedly financed by Mantria Financial. Pr. 31-33. McKelvy did not receive commissions on the sales of the lots. Pr. 31-39.

5. Both Wragg and Knorr plead guilty to Counts 1, 2-8, 9, and 10 of the indictment. By entering these guilty pleas, Wragg and Knorr have admitted, among other things, the truth of the allegations in the indictment as to their conduct. Among the allegations they admit are accurate, as to themselves, is the allegation that "Mantria Financial was controlled by Mantria … and defendants Troy Wragg [and] Amanda Knorr." Count 1, ¶ 5; Pr. 2.

6. By their guilty pleas, Wragg and Knorr have also admitted the truth of the allegation in Count 1 that as part of the manner and means of the conspiracy charged, they fraudulently "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; Pr. 2.**

**7. The Court rules that a clear inference from the evidence summarized in this section is that Wragg had to have known that his actions concerning Mantria Financial in 2008-09, including "selling" the properties at a loss, were fraudulent as to the investors and that the "financing" through Mantria Financial was likewise fraudulent as to the investors. Pr. 1-41.**

**8. Wragg and Knorr formed, owned and operated Mantria; Wragg and Knorr formed and operated Mantria Financial, which was owned by Mantria. Pr. 1-2, 31-39.**

**C. Mantria Financial and the definitions of the elements of the term "mortgage lending business" in 18 U.S.C. §§ 20(10) and 27 – "mortgages," "lending," "business," "financed," and "debt."**

**9. The parcels at the Mantria residential holdings in Tennessee could not be developed because of numerous difficulties with, among other things, the lack of potable water; the presence of live military ordinance beneath some of the properties; and the absence of nearby access roads. Pr. 6-8, 15.**

**10. Co-defendant Wragg contracted with a local appraiser to appraise the plots at prices based on their future, developed value, based on comparables he (Wragg) provided. Pr. 6-8. By such mechanisms as the inflated appraisals, Mantria Financial was used to make it (falsely) appear that there were substantial market values for the land in the Mantria developments in Tennessee, which appearance was used to make Mantria investments more attractive because they were, in effect, guaranteed by purported "collateral," of a claimed ratio of two (dollars of worth for the land) to every one (dollar for the investments), that were at the heart of the scheme. Pr. 2, 14-15, 19-20.**

**11. From S/A Annette Murphy's testimony, the government has substantial evidence that the plot sales agreements between**

**Mantria Communities[2] and/or Mantria Financial, on the one hand, and "purchaser" Marc Thalheimer and other "purchasers," on the other, had the following provisions which were considered "buyer incentives," the first four of which are listed here: (1) the purchaser would receive a credit for two years of mortgage payments, which meant that the purchaser did not have to make any mortgage payments for two years; (2) Mantria Communities would pay the interest on the mortgage to Mantria Financial for two years (3) the purchaser "is free and clear of all debt associated with the home site or sites;" and (4) Mantria Communities would pay all the real estate taxes "for up to two years." Pr. 17-21.**

**12. The second group of five of the total of nine "buyer incentives" are: (5) after those two years "[Thalheimer could] walk away" from the agreement of sale;" (6) Mantria Communities would pay the closing costs of approximately $3,800 to the title company; (7) Mantria Communities agreed to pay cash back (also referred to as a "buyer's bonus") of about three percent of the purchase price on the land – thereby giving the purchaser an incentive to do the transaction; (8) the purchaser did not have to put any money down on the mortgage; and (9) Mantria Communities guaranteed that the purchaser could re-sell for 36 months at the contracted sales price of the lot, plus a refund of ten percent of any money the purchaser(s) put down. Pr. 17-21, 35.**

**13. As S/A Murphy testified, the above-described groups of "buyer incentives" did not operate to encourage "purchasers" to actually borrow from Mantria Financial or for Mantria Financial to engage in actual "lending," but rather was designed "to gin up" the apparent price of "purchases" of the land in Tennessee to give the appearance that Mantria had substantial revenues, for purposes of deceiving the investors. Pr. 19-20.**

**14. As agent Murphy testified, Mantria and Mantria Financial were losing money on each sale of a parcel in its developments**

---

[2] **As alleged in Count 1, ¶ 5, Mantria Communities is a related entity of Mantria.**

in Tennessee over a period of about two years. Pr. 20-21, 29; cf. Pr. 39.

15. As summarized in Pr. 17(c), S/A Murphy stated that the "mortgages" (or "deeds of trust") provided by Mantria Financial for the sales of the lots in Tennessee to a number of "purchasers," such as Marc Thalheimer, included a provision that the "mortgage" "is free and clear of all debt associated with the home site or sites." As S/A Murphy said, "numerous" other sales agreements utilized by Mantria Financial were similar to Thalheimer's agreement.

16. The Court finds that the government's only attempted explanation, under the government's informal first rationale, of how McKelvy's conduct in the alleged fraud "caused" Mantria Financial to be "affected," is that Mantria Financial suffered an actual loss because it went bankrupt, as quoted by McKelvy in his limitations memo at section II (C).

17. Other than the (at most) approximately $300,000 Mantria received for sales of parcels in 2008-09, Mantria (the 100% owner of Mantria Financial) in fact did not make and did not intend to make any profit on such "sales." Pr. 17, 25-29, there is no evidence that Mantria Financial was in any way involved in such "cash sales" and no reason for it (Mantria Financial) to have been involved, because by definition, such sales would not have involved mortgages. See Pr. 38. As both S/A Murphy and former Mantria Chief Financial Officer ("CFO") testified, during the period 2008-09, there is no evidence that Mantria Financial had any income and there is evidence that Mantria, as a whole, was losing money on each "sale" of a plot in the Mantria developments in Tennessee, . Pr. 20-21, 25, but there is substantial evidence that it had many hundreds of thousands of dollars of expenses. Specifically, as SEC staff accountant Tracy Mongelli testified, 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. Pr. 35.

18. Ms. Mongelli also testified that the amount of sales "commissions" for 2008 was $952,631 and for 2009 was $410,651.

**Pr. 35. She also stated that the cash disbursements spreadsheets which were supplied to the SEC, apparently by Wragg and/or Knorr on behalf of Mantria, Mantria Financial's total operating expenses were $3,296,643.87 in 2008 and $916,281 in 2009. Pr. 34, 38. Absent countervailing evidence - which was not presented to the grand jury - bankruptcy or some other form of insolvency was inevitable.**

**19. Based on the Court's review of the materials initially supplied by the government to the defense, as well as of a materials which are provided by the government in response to the limitations motion and memo, the Court finds that the government has given no precise or even estimated figure of the extent of any alleged actual loss or risk of loss. Cf., the government's first rationale, as quoted by McKelvy in his limitations memo at section II (C).**

**20. There is no evidence to suggest that Mantria Financial was rendered susceptible, by the alleged fraud, "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.**

**II. PROPOSED FINDINGS OF FACT RE: GOVERNMENT'S "SECOND RATIONALE."**

**Based on his Limitations Memorandum at section VI (A-E), McKelvy requests this Court to enter the following Findings of Fact.**

**21. 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.**

**22. McKelvy asks the Court, pending a response by the government to the defendant's limitations motion, to accept the defendant's representation in his limitations memo at section VI (C), Pr. 42, that there is no support in the discovery documents for the second rationale.**

**III. PROPOSED CONCLUSIONS OF LAW RE: GOVERNMENT'S "FIRST RATIONALE."**

**A. The charges in the indictment and the positions of the parties.**

**1. The parts of Counts 1-8 which are relevant to the defendant's limitations 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).**

**2. The indictment charges that defendants Wragg, Knorr, and McKelvy participated in a Ponzi scheme to defraud over 300 investors in Mantria Corporation, 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.**

**3. 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.**

**4. 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."**

**5. McKelvy argues that the traditional five-year statute of limitations is applicable in this case and that, accordingly, Counts 1-8 should be dismissed.**

**6. The government has offered a first and second rationale as to why section 3293(2) is applicable here. The government's 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 alleged in the indictment.**

**7. McKelvy first 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.**

**8. 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.**

**9. As is more fully developed below, McKelvy responds to this second rationale 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 reply to the defendant's arguments on this point.**

**B. The two different statutes of limitations.**

**10. The central issue on the limitations motion is which of two different statutes of limitations is applicable here.**

**11. For most federal crimes, the applicable (general) 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).**

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

13. 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).

14. 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.

15. 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.

16. Similarly, 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 seven counts. The indictment here was returned more than 11 months after the statute for Count 2 would have run.

17. As to the government's first rationale, paragraph 5 of Count 1 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.

Paragraph 8 of Count 1 (in the Conspiracy section) charged all three defendants with conspiracy to commit wire fraud "affecting a financial institution," without any further elaboration.

18. As to the government's 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 [presumably non-Mantria-related] 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 (Background section). This passage in the indictment is apparently the basis for the second rationale.

C. As to the government's first rationale, the statutory definition of a "financial institution" and the statutory definition of "mortgage lending business."

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

> As used in this title, the term "financial institution" means --
>
> (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) ….

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

20. As stated by the court 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 18 U.S.C. § 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." As such, the Court must determine whether Mantria Financial issued "mortgages," engaged in "lending" money, was a "business," and/or "financed" or "refinanced" any "debt."

**D. The defendant's pre-trial motion to dismiss based on the statute of limitations, under Rule 12(b)(3)(A).**

**21. McKelvy's motion to dismiss Counts 1-8 is cognizable under 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." The Court rules that McKelvy has satisfied these requirements of Rule 12(b)(3)(A).**

**22. 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. See United States v. Karlin, 785 F.2d 90 (3d Cir. 1986), cert. denied, 480 U.S. 907 (1987).**

**23. For the reasons stated in the defendant's limitations memo at section III (A), the Court rules that it is appropriate to litigate this 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). See United States v. Levin, 973 F.2d 463, 470 (6th Cir. 1992); United States v. Fitzgerald, 2017 WL 74074, *2 (W.D.Mich. 2017).**

**24. 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." United States v. Stock, 728 F.3d 287, 299(3d Cir. 2013). See also, Sewell v. United States, 406 F.2d 1289, 1292 (8th Cir. 1969).**

**25. The Court rules that, as a matter of law, McKelvy has satisfied the four requirements set out immediately above from the Levin and Stock cases and, accordingly, that the limitations motion is ripe for pre-trial determination by the Court. See sections III (B-D) of the limitations memo; see generally United States v. Carollo ("Carollo I"), 2011 WL 3875322 (S.D.N.Y. Aug. 25, 2011); United States v. Carollo ("Carollo II"), 2011 WL 5023241 (S.D.N.Y. Oct. 20, 2011); United States v. Ghavami, 2012 WL 2878126, *7-*10 (S.D.N.Y. 2012), aff'd sub nom., United States v. Heinz, 790 F.3d 365, 367 (2d Cir. 2015), cert. denied, 136 S.Ct. 801 (2016).**

**26. In the event that the government does not dispute the defendant's proffers 1-41, which are included in the first rationale section of the limitations memo, the defendant has undertaken to re-submit these proffers as undisputed/stipulations of the parties. In the event that the government disputes any of the defendant's proffers 1-41, McKelvy has stated that he would submit an appendix containing the referenced documents as to the disputed issue and ask the Court to resolve, whether with or without a hearing, that there is no merit to any such objection(s), because the defendant has properly adopted parts of the government's case, for purposes of the limitations motion. McKelvy's limitations memo at 15, n.7.**

**E. Mantria Financial and the definitions of the terms used in 18 U.S.C. §§ 3593(2), 20(10), and 27.**

**27. The Court rules, based on the doctrine of judicial notice, Fed R. Evid. 201(b), that no legitimate "mortgage" lending business would have issued mortgage loans (or "deeds of trust") on the properties described above, because no legitimate mortgage lender would have taken the risk of having to foreclose on land worth substantially less than the appraised value, in which case an interest in property would not be a mortgage (sometimes referred to as a "deed of trust"), one of the definitions of which is "security for the repayment of money borrowed" (Dictionary.com).**

**28. From the recitations above of S/A Murphy's testimony concerning the "buyer incentives" offered by Mantria Communities and/or Mantria Financial, Mantria Financial did not engage in "lending" money, in the sense that it (Mantria Financial) was**

not ready to lend, or to have a customer "borrow" money or "pay [it] back with interest" (Cambridge English Dictionary). Instead, Mantria Financial operated not to engage in traditional lender/borrower relationships, but had undisclosed, fraudulent reasons for giving out "buyer incentives" to the seeming "purchasers."

29. From a consideration of FoF 14, 17 and of the dictionary definitions of "business," this Court rules that Mantria Financial was not a "business," in that it was not designed to, and did not, in fact, make a profit or earn money (Black's Law Dictionary, Merriam Webster).

30. There is a second reason why Mantria Financial was not a "business," as that term is defined in FoF 14,17 above. As Rink said in the grand jury, Mantria paid for the closing costs for each parcel, paid a sales commission to the inside salespeople, paid a high interest rate to investors (approximately two percent a month), often paid the real estate taxes, paid "bonuses" of as much as $3,000 to the "purchasers," and never made any profit - because it (Mantria Financial) was not designed to be profitable. Pr. 17, 29, 32-33, 38, 39.

31. There is a third reason why Mantria Financial was not a "business," as that term is defined in Conclusion of Law ("CoL") 29, above. As Rink testified, despite his having advised Wragg on several occasions about the practice of losing money on each parcel, the practice continued. Rather, as S/A Murphy told the grand jury and as noted above, Mantria Financial was used to "gin up" the profit picture, to falsely make it appear that Mantria was making money. Pr. 20.

32. As compared with the dictionary definition of "debt" – "something, typically money, that is owed or due," Oxford English Dictionary, definition no. 1, see McKelvy's limitations memo at section V(D), the Court rules that Mantria Financial did not "finance[] or refinance[] any debt," as required by 18 U.S.C. § 27.

33. The Court rules that the "mortgages" (or "deeds of trust") issued by Mantria Financial did not create any "debt," in the normal sense, because it was never intended to be repaid for what the purchasers had supposedly borrowed, but only served as

a vehicle to permit co-defendants Wragg and Knorr to make it appear that the investments in Mantria were secured by collateral - the plots in the Mantria developments in Tennessee - worth twice the supposedly fairly-appraised valuations of those plots.

34. Accordingly, the government's investigation demonstrates that Mantria Financial was not a "mortgage lending business," within the meaning of 18 U.S.C. § 20(10), or other entity which would qualify as a "financial institution," within the meaning of 18 U.S.C. § 3293(2).

35. The Court rules as a matter of law, as argued by McKelvy in his limitations memo at section VI (D), that there are four relevant requirements for the government to be able to show that a financial institution was "affected" – first, to overcome the statute of limitations defense, the government must provide a sufficiently detailed explanation of how the fraud "affected" a financial institution, by means of allegations in a responsive memo and/or formal proffers. Cf. generally, Carollo I, at *2; Carollo II at *3; Ghavami, at *4, *7-*10. The government must be mindful that 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, 1278-79 (10th Cir. 2010); United States v. Agne, 214 F.3d 47, 52 (1st Cir. 2000).

36. The Court rules as a matter of law, as argued by McKelvy in his limitations memo at section VI (D), that second, to overcome the statute of limitations defense, the government must provide a sufficiently detailed "explanation as to what [the actual loss or the] risk [was]." Carollo I, 2011 WL 3875322, at *2-*3; how the fraud "caused" the financial institution to suffer any such losses, id.; and how the fraud was a "sufficiently direct" cause of such loss or risk of loss. Heinz, 790 F.3d at 367 (citation omitted).

37. The Court rules as a matter of law that the informal, first rationale was not sufficiently detailed to lay out the relationship between the bankruptcy and the asserted loss, for the reasons set out in the defendant's limitations memo at section VI (E).

**38. As argued in the defendant's limitations memo at section VI (E), the government has not met the second requirement to show that a financial institution was "affected," because the government has not submitted a proffer that an actual loss and/or a risk of loss were "directly caused" by the fraud, in that the bankruptcy of Mantria and Mantria Financial was inevitable.**

**39. 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. An important part of the sales pitch for Mantria investments was 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. 2, 20, 32.**

**40. The Court rules, based on the doctrine of judicial notice, Fed R. Evid. 201(b), 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 substantial risk of loss, as required by Carollo I, et al.**

**41. The Court rules as a matter of law, as argued by McKelvy in his limitations memo at section VI (E), that third, to overcome the statute of limitations defense, the government must provide, if it is relying on the theory that there was an actual loss, an allegation of the extent of any such loss and that the government has failed to meet that requirement. Carollo I, at *2.**

**42. The Court rules as a matter of law, as argued by McKelvy in his limitations memo at section VI (E), that fourth, the government has not overcome the statute of limitations defense, 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, because it has not provided an**

allegation or proffer that such exposure was "to a new or increased risk of loss." Cf. Ghavami, 2012 WL 2878126 at *5 (citations omitted), 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. Moreover, the government also has not shown 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. Lastly, the government also has not shown that any such risk was "[not] too remote," Agne, 214 F.3d at 52, not "too attenuated," Carollo I, 2011 WL 3875322 at *3, and the impact of the fraud has been more than "de minimis," as used in Carollo I, 2011 WL 3875322 at *2.

43. Because, as set out above, there was a 100% chance of bankruptcy for Mantria and Mantria Financial in 2008-09, any actual loss or risk of loss was not "new or increased." The inevitability of bankruptcy is disqualifying under rulings in the Second Circuit that the proper test for "causing" a financial institution to be "affected." Serpico, 320 F.3d at 695, is whether the alleged scheme "affected" financial institutions by "expos[ing] 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. There is no evidence to suggest that Mantria Financial was rendered susceptible "to a new or increased risk of loss."

44. Accordingly, pending the filing of a responsive memorandum and/or relevant proffers, the government has not made out a colorable case for application of the extended statute.

IV. PROPOSED CONCLUSIONS OF LAW RE: GOVERNMENT'S "SECOND RATIONALE."

45. The Court adopts the proffers contained in Pr. 42, either as undisputed or as demonstrated by the defendant, based on the government's evidence. As to the second rationale, the Court rules that the government has not, as of the date of the Order approving these proposed findings of fact and conclusions of law, provided references to any documents which would alter Pr.

**42 or satisfied any of the four requirements set out in the defendant's limitations memo at section VI (D).**

**46. The Court rules that there is insufficient specificity to the government's summary of its informal second rationale for invoking section 3592(2). Accordingly, for the government to satisfy the four requirements set out in the defendant's 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 investor(s) who 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.**

**(d) Describe and document the financial condition of the investor(s) before 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 errors, on the ability of the investor(s) to repay the loan(s).**

**(e) Explain and document how the loss 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 both "substantial" and not de minimis.**

**Respectfully submitted,**

***/s/* Walter S. Batty, Jr.**
**Walter S. Batty, Jr., Esq.**
**101 Columbia Ave.**
**Swarthmore, PA 19081**

**(610) 544-6791**
**PA Bar No. 02530**
**tbatty4@verizon.net**

**/s/ William J. Murray, Jr.**
**William J. Murray, Jr., Esq.**
**Law Offices of**
**William J. Murray, Jr.**
**P.O. Box 22615**
**Philadelphia, PA 19110**
**(267) 670-1818**
**PA Bar No. 73917**
**williamjmurrayjr.esq@gmail.com**

**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 Proposed Findings of Fact and Conclusions of Law in Support of his Motion to Dismiss Counts 1-8 of the Indictment, upon Assistant U.S. Attorney Robert J. Livermore:**

**Robert J. Livermore, Esq.**
**U.S. Attorney's Office**
**615 Chestnut Street**
**Philadelphia, Pa 19106**
**215-861-8505**
**Fax: 215-861-8497**
**Email: robert.j.livermore@usdoj.gov**

***/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 Proposed Findings of Fact and Conclusions of Law in Support of his Motion to Dismiss Counts 1-8 of the Indictment, and any response by the government, the Court herby**

**ORDERS**

**that the defendant's Proposed Findings of Fact and Conclusions of Law are herby**

**APPROVED**

**by the Court.**

**BY THE COURT:**

_____
**JOEL H. SLOMSKY, J.**