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	**:**	

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

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DEFENDANT'S REPLY MEMORANDUM OPPOSING THE GOVERNMENT'S RESPONSE TO MCKELVY'S MOTION TO DISMISS COUNTS 1-9 OF THE INDICTMENT, AND TO STRIKE PART OF COUNT 10, FOR A FAILURE TO STATE AN OFFENSE

Defendant Wayde McKelvy, by his attorneys, Walter S. Batty, Jr. and William J. Murray, Jr., submits this "Limitations Reply Memo" in reply to the Government's Response to Defendant Wayde McKelvy's Amended Motion to Dismiss Counts One through Eight of the Indictment Based on the Statute of Limitations ("Amended Response," Doc. No. 113). The Court granted leave to file this Reply Memo (Doc. No. 103).

I. INTRODUCTION.

In reply to the government's Amended Response (Doc. No. 113), McKelvy files this Reply Memo, which is consistent with his Amended Motion to Dismiss Counts 1-8 of the Indictment, Based on the Statute of Limitations ("Amended Limitations Motion" and supporting Memo ("Amended Limitations Memo," Doc. No. 105).

A. Section 3293(2).

In its Amended Response, the government confirms that it is relying on the ten-year statute of limitations found at 18 U.S.C. § 3293(2). Response at 4. The government correctly notes that, to be entitled to this extended statute, it must show that "the offense affects a financial institution." United States v. Heinz, 790 F.3d 365, 367, (2d Cir. 2015). Id.

B. Summary of argument.

As we argued in our Amended Limitations Memo, McKelvy contends that the government has not shown, under its "first rationale"

(as articulated in our Amended Memo at 2, 4-5) that Mantria Financial was a "financial institution" or that any such institution which was "affected" by the fraud. Under the "second rationale," McKelvy argues that, while in theory there could be evidence that a qualifying "financial institution" was "affected," the government offers in its Amended Response no such evidence, by way of a proffer, or even an allegation. Each of the defendant's arguments remains fully intact.

C. Summary of assertions made by McKelvy to which the government does and does not object.

As demonstrated below, the government does not object to:

-- McKelvy's summary of the five procedural requirements for a defendant filing a motion to dismiss based on an alleged violation of the statute of limitations under section 3293(2). See below at 3-4.

-- In terms of McKelvy's compliance with these five procedural requirements, the government's only objection concerns the fifth requirement, that the defendant "must accept as true the factual allegations … in the indictment." See below at 4-10.

-- Although the government previously objected, in its initial Limitations Response (Doc. No. 99), to the completeness of one of McKelvy's proffers, McKelvy notes that the government has not made any specific objection to the proffers in McKelvy's Amended Limitations Memo, where he added more details to his proffers. See below at 12-17.

-- McKelvy's argument that, because the government does not now object to the accuracy or completeness of any of his proffers, it follows that he has met the third of the five requirements – a trial of the disputed factual issues would not have "assisted the … court in deciding the legal issues." See below at 4.

-- McKelvy's quotations from several online dictionaries for the definitions of the statutorily defined elements of "mortgage lending business," i.e., "mortgage," "lending," "business," "finances" (verb), and "debt." See below at 18-25.

The parties disagree, however, as to the following issues:

-- Whether the burden of proof lies with the defendant, as the government asserts. See below at 12-14.

-- The legal interpretation of the statutory elements of "mortgage lending business." See below at 18-25.

-- Whether the government has made a colorable case that it could prove at trial that Mantria Financial was "affected," within the meaning of the statute. See below at 28-35.

-- With respect to the government's argument concerning its "second rationale," whether the government has made a colorable case on the issue of other "financial institutions" were "affected." See below at 35-40.

II. PROCEDURAL ASPECTS OF THE DEFENDANT'S MOTION.

A. The government did not object to McKelvy's summary of the five procedural requirements which have to be met at this stage.

In his discussion of the procedural posture of his Amended Limitations Motion, McKelvy cited Fed.R.Crim.P.12(b)(3)(A), which rule states that a motion to dismiss for a "defect in instituting the prosecution," such as for an asserted violation of the statute of limitations, 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." See Amended Limitations Memo (Doc. No. 105) at 8 ff.[1]

The government's suggestion that McKelvy was not aware of the well-established law that a motion to dismiss cannot challenge

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[1] **In his Amended Limitations Memo, McKelvy noted that when the Sixth Circuit in Levin and the district courts in Carollo and Ghavami, discussed below, issued their opinions, they were considering the 2002 version of Rule 12(b)(2), which, provided that: "A party may raise by pretrial motion any defense … that the court can determine without a trial of the general issue." As noted in McKelvy's Amended Limitations Memo (Doc. No. 105), at 12 n. 4, when the 2014 version of Rule 12(b)(2) 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.**

"the sufficiency of the government's evidence," Amended Response at 4, citing United States v. DeLaurentis, 230 F.3d 659, 660–61 (3d Cir. 2000), is refuted by our Amended Limitations Memo at 9, where DeLaurentis is cited for the obverse – a motion to dismiss can be granted if the factual assertions were based on "a stipulated record." Amended Limitations Memo at 10.

Because, despite McKelvy's numerous proffers (two of which, as explained below, were added to correct what the government complained was a deficiency), the government has not made any proffers of its own, the defendant argues that his proffers should be taken as "undisputed," thereby satisfying DeLaurentis.

As stated in his Amended Limitations Memo, there are five 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, United States v. Levin, 973 F.2d 463, 470 (6th Cir. 1992); 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; fourth, the (factual) basis for the within motion to dismiss must be "reasonably available," under Rule 12(b)(3)(A), and there must be no "good cause to defer a ruling," under Rule 12(d); and fifth, 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) (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").

In its Amended Response (Doc. No. 113), the government did not take issue with McKelvy's interpretation of Rule 12 or with his listing of the five requirements for pre-trial determination of a motion to dismiss based on the statute of limitations ("limitations motion").

B. The government's effort to delay consideration of the Amended Limitations Motion is without merit.

In its Amended Response (Doc. No. 113), the government makes two related arguments that the "accept as true" requirement in the cases applying Rule 12, in effect, would bar him from litigating his limitations motion now.

The first version of the government's argument is, in full:

> **In his amended motion, the defendant argues that a pretrial motion to dismiss is appropriate when the facts are not in dispute. The indictment alleges, and the government avers, that the defendant's fraudulent conduct affected a financial institution as defined by 18 U.S.C. § 3293(2). The defendant contests that point. Therefore, there are facts in dispute. The government will not concede any factual basis which falls short of that legal standard.**

Response at 4, n. 1 (emphasis added). By asserting that, because the indictment alleges that the fraud affected a financial institution, McKelvy must accept this allegation as true, the government has argued a proposition for which there is no apparent support in the law as to section 3293(2). McKelvy has acknowledged the requirement that, "'[i]n evaluating a Rule 12 motion to dismiss, a district court must accept as true the factual allegations … in the indictment.'" Amended Limitations Memo (Doc. No. 105), at 10, citing United States v. Stock, 728 F.3d 287, 299 (3d Cir. 2013) (citation and quotation marks omitted). But, for the reasons explained below, there is no support for the government's extension of this requirement.

The second version of the government's argument is:

> **Whether the indictment was filed within the applicable statute of limitations time period is a finding of fact for the jury to decide. See [United States v.]Pelullo, 964 F.2d [193,] 214-16 [(3d Cir. 1992)]; United States v. Bouyea, 152 F.3d 192, 195 (2nd Cir. 1998); United States v. Lowell, 649 F.2d 950 (3rd Cir. 1981).**

Response at 5. Taken literally, this contention would mean the same as the first one – that consideration of the within motion must be delayed until trial. As explained more fully below, the short answer to the first version of the government's argument

is that the "must accept as true" requirement does not apply to mixed questions of law and fact and the short answer to the second version is that the "ultimately" gloss must be added to the government's otherwise uncontestable contention.

-- The "ultimately" gloss. Looking to the second point first, McKelvy contends that without the "ultimately" gloss, the three Third (and Second) Circuit cases cited by the government would be at odds with the cases in this Circuit and elsewhere which are referred to in the Amended Limitations Memo (Doc. No. 105), at 8-13, as well as with Rule 12(b)(3)(A). In summary, the cases cited by McKelvy state that a motion to dismiss can be decided pre-trial, as long as the underlying facts are undisputed and the other requirements of Rule 12 are met. Doc. No. 105 at 8. Specifically, the Rule states that such a motion can be decided pre-trial if it does not involve a trial on "the general matter" or a trial "on the merits," which are generally interpreted to mean a trial to determine the defendant's guilt. Id. at 8.

McKelvy had already explained that he agreed with the government's argument, when phrased another way – that a statute of limitations defense is often decided by a jury at trial. Amended Limitations Memo (Doc. No. 105) at 12. Further, as McKelvy had stated, the district court in Ghavami[2] ruled that the question of "[w]hether an offense affected a financial institution is [ultimately] a question of fact for a jury to decide." 2012 WL 2878126 at *7. Amended Limitations Memo at 13. In the rest of that paragraph in this Memo, we observed that the district court in Ghavami:

> **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).**

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[2] **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.), aff'd sub nom., United States v. Heinz, 790 F.3d 365, 367 (2d Cir. 2015), cert. denied, 136 S.Ct. 801 (2016).**

McKelvy had also argued in his Amended Limitations Memo:

> **As did [United States v. Carollo ("Carollo II"), 2011 WL 5023241 (S.D.N.Y. Oct. 20, 2011)], 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.**

Amended Limitations Memo at 13-14. Accordingly, only by adding the gloss "ultimately" to the government's and the defendant's common statement of appropriate procedure, can the cases and Rule 12 all be harmonized with each other.

-- Mixed questions of law and fact. A second answer to the government's contention that the "accept as true" requirement effectively pre-empts this motion now is provided in the very wording of the government's claim - that "[t]he indictment alleges … that the defendant's fraudulent conduct affected a financial institution as defined by 18 U.S.C. § 3293(2)." As the government has implicitly recognized, its assertion that the issue of whether the fraud "affected a financial institution as defined" by the applicable statutes is partly a matter of law. As the Third Circuit has observed in a different context, "mixed questions of law and fact" require the courts to make rulings on the "application of law to the facts." United States v. Mallory, 765 F.3d 373, 383 (3d Cir. 2014).

Even though, on the one hand, the government implicitly recognizes that the applicability of section 3293(2) is a mixed question of law and fact, it still insists, on the other, that McKelvy is mistaken because he disputes the indictment's allegation that the defendant's fraudulent conduct affected a financial institution. But there is a fundamental difference between what McKelvy has conceded, i.e., that for purposes of this motion, the underlying factual allegations in the indictment are true, and what he has disputed - the mixed legal/factual allegations in the indictment.

If such mixed legal/factual allegations as the ones here cannot be disputed by McKelvy, then no defendant could raise a statute of limitations challenge, in a case where the government relies

on section 3293(2) and where, as here, the indictment alleges, that the fraud affected a financial institution.

-- "[T]he motion can be determined without a trial on the merits." Also by its above-quoted arguments, the government is asking this Court to ignore a provision of Rule 12(b)(3)(A), to which the government had not objected - that a motion to dismiss for a "defect in instituting the prosecution," such as one grounded on the statute of limitations, 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." See Amended Limitations Memo (Doc. No. 105) at 8-11. As McKelvy argued in that Memo, he maintains that the basis for the motion is "reasonably available" and that it can be decided separately from the trial on the merits. Id. Neither of these arguments is contested by the government. McKelvy argues that it is totally proper for this Court to proceed with consideration of this motion – including his concession that he does not dispute the (underlying) facts alleged in the indictment – because his motion can be decided separately from the trial on the merits.

-- S.D.N.Y. support. Support for McKelvy's position on these points is provided in the case law in the Southern District of New York ("S.D.N.Y.") and Second Circuit previously cited by McKelvy and referred to by the government. McKelvy's Amended Limitations Memo (Doc. No.105), at 12-13. The government gives short shrift to McKelvy's arguments in this Memo. As McKelvy argued, the district court in 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), provided a cogent explanation of its reasoning on the issue of whether the motion to dismiss there, on limitations grounds, could be considered and decided pre-trial (a ripeness issue).

In Carollo I, the government had argued, as the government effectively does here, that the defendants' motion to dismiss, based on statute of limitations section 3293(2), was premature. 2011 WL 5023241 at *1. Although the phrasing of the government's argument here is slightly different from the phrasing used by the Court in Carollo I, they are both based on Fed.R.Crim.P. 12(b)(2)(2002 version), that "A party may raise by pretrial motion any defense … that the court can determine

without a trial of the general issue." Carollo I granted the defendants' motion to dismiss Counts 4, 5, and 7, ruling that a motion to dismiss based on section 3293(2) did not run afoul of this provision in Rule 12.

As the district court stated in a later phase of the Carollo case "[t]he general issue in a criminal trial is, of course, whether the defendant is guilty of the offense charged." United States v. Carollo ("Carollo II"), 2011 WL 5023241, *2 (S.D.N.Y. Oct. 20, 2011)(citation omitted), quoting United States v. Doe, 63 F.3d 121, 125 (2d Cir. 1995).

The court in Carollo II also stated, "[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.'" 2011 WL 5023241 at *2 (quoting United States v. Kerik, 615 F.Supp.2d 256, 268 n. 14 (S.D.N.Y.), aff'd, 585 F.3d 726 (2d Cir. 2009)). And, as noted in the Amended Limitations Memo, at 13-14, the district court's ruling in United States v. Ghavami, 2012 WL 2878126, *7 (S.D.N.Y. 2012), was to the same effect. Put differently, if the government were correct here, then the opinions finding that pre-trial limitations motions should be decided pre-trial, as did Carollo, Ghavami, Kerik, and United States v. Ohle, 678 F.Supp.2d 215, 228–29 (S.D.N.Y. 2010), were all wrongly decided.[3]

The government attempts to distinguish the rulings in Carollo and Ghavami on the facts of each of these two cases. Government's Amended Response (Doc. No. 113), at 12 n. 4. As to Carollo, the government argues that the two decisions there "rested on a simple finding that the government could not establish any actual loss and the risk of loss to a financial institution was only de minim[i]s." McKelvy disagrees. The ruling in Carollo II stated, to the contrary, that the issue was not whether the government "could establish" any of the required proofs, but whether the court would re-open the case despite the government's not having submitted a proffer in response to the defendants' motion. On the government's motion for reconsideration of the dismissal, "the outcome [the dismissal of

[3] Cf. Barber v. Thomas, 560 U.S. 474, 488 (2010) (when construing criminal statutes – and presumably criminal rules - the courts can take into account "text, structure, history, and purpose").

Counts 4 and 5] may have been different" had the government "made the proffer of evidence at the motion to dismiss phase that it has made in this motion for reconsideration." Id. at *3.

As to Ghavami, in its Amended Response (Doc. No. 113), at 12 n. 4, the government attempted to distinguish this case on the grounds that the district court denied the defendants' motion to dismiss on the merits, which is true and which McKelvy acknowledged in his Amended Limitations Memo, at 13. The government's argument – that the decision "does not add additional pleading requirements" to other cases, such as McKelvy's - is partly correct, in that that ruling was not binding precedent on this Court.

Although the government's comment that the rulings in Carollo and Ghavami can only be considered as persuasive dicta is technically accurate, the government is clearly incorrect in asserting that the rulings in these two cases are at odds with the Third Circuit rulings in Pelullo, Bouyea, and Lowell that "[w]hether the indictment was filed within the applicable statute of limitations time period is a finding of fact for the jury to decide." Amended Response at 4-5. This is, as we noted in our Amended Limitations Memo (quoted above at 5-6), exactly what the district court stated in Ghavami, which McKelvy reads to include the gloss "ultimately."[4] The government also attempts to distinguish Carollo and Ghavami on the ground that they are in conflict with the Third Circuit decisions in Bergrin, Vitello, Rankin, and Kemp -- but there is no such conflict, as discussed in the next section immediately below.

C. The government mistakenly argues that McKelvy had asserted a failure to state an offense.

In his Amended Limitations Memo, McKelvy argued what he believed was an uncontestable, garden-variety point – that a pre-trial motion to dismiss based on the statute of limitations is authorized under Fed.R.Crim.P.12(b)(3)(A). There is nothing in the Response which counters any aspect of the defendant's

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[4] Without this gloss, the action of the court in Ghavami, where it considered a limitations motion before the case went to the jury, would not be understandable.

position on the procedural posture of this case, but the government instead argues a point of no relevance here.

In its Amended Response at 3-4, the government suggests that McKelvy's motion fails to meet the requirements for a motion to dismiss for failure to state an offense ("offense motion"). McKelvy argued in his Amended Limitations Memo that a motion to dismiss based on the statute of limitations ("limitations motion") is different from a claim of a failure to state an offense ("offense motion"). Id at 6-7, 28. Moreover, as McKelvy also argued, a limitations motion is an affirmative defense, United States v. Karlin, 785 F.2d 90 (3d Cir. 1986), cert. denied, 480 U.S. 907 (1987), while an offense motion concerns the elements of the offense. Limitations Memo at 9. The government did not dispute any of these points.

Instead, the government argues, Amended Response at 3-4, that McKelvy has not met the standard for an offense motion, which is a clear misreading of the Amended Limitations Memo.

In support of its argument, Response at 3-4, the government cites Costello v. United States, 350 U.S. 359 (1956), as well as five other cases, for the following uncontested – and irrelevant - propositions: (1) Rule 7 "requires an indictment to 'be a plain, concise, and definite written statement of the essential facts constituting the offense charged,'" citing United States v. Bergrin, 650 F.3d 257, 264 (3d Cir. 2011); (2) "[a]n indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more," citing Costello; (3) "the Federal Rules were designed to eliminate technicalities in criminal pleadings and are to be construed to secure simplicity in procedure" and while "detailed allegations might well have been required under common-law pleading rules … they surely are not contemplated by Rule 7(c)(1)," citing United States v. Resendiz–Ponce, 549 U.S. 102, 110 (2007) (citation and internal quotations marks omitted); and (4) there are three tests which an indictment must meet to overcome a challenge that the indictment fails to state an offense, citing United States v. Vitillo, 490 F.3d 314, 320 (3d Cir. 2007); United States v. Rankin, 870 F.2d 109, 112 (3d Cir.

1989); and United States v. Kemp, 500 F.3d 257, 280 (3d Cir. 2007). All of these cases correctly state the law as to a defendant's claim that an indictment fails to state an offense.[5]

But McKelvy had explicitly conceded, citing Costello and Kemp, that he had not and could not file an offense motion based on the statute of limitations:

> **McKelvy concedes that it follows, from [United States v. Karlin, 785 F.2d 90 (3d Cir. 1986), cert. denied, 480 U.S. 907 (1987)] and from the Third Circuit and Supreme Court cases cited below [including Costello], 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.**
>
> **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.**

Amended Limitations Memo at 38.

In light of McKelvy's explanation of the nature of a limitations motion under Rule 12, see Amended Limitations Memo at 6-8, and of the concession quoted above, there is no merit to the government's assertion, at Amended Response at 12, that "this Court is bound to follow the precedential Third Circuit opinions [Bergrin, Vitello, Rankin, and Kemp] and not the unpublished district court opinions from New York [Ghavami and Carollo]."

D. Despite its efforts to misplace the burden on the defendant, the government has the burden here.

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[5] The summary paragraph at the end of the section on the allegations in the indictment, Amended Response at 7, states that the government has met the above-described three tests (for failure to state an offense), as set out in the Bergrin, Vitello, Rankin, and Kemp line of cases.

Moreover, the government has also misconstrued McKelvy's argument on the defendant's burden of going forward on the Amended Limitations Motion and the government's burden, in response. The government's analysis on this point is set out in full in the following passage:

> **As noted above, at this stage of the proceeding, the Court must accept the factual allegations set forth in the indictment as true. Bergrin, 650 F.3d at 265; United States v. Besmajian, 910 F.2d 1153, 1154 (3rd Cir.1990). The indictment sets forth precisely how the defendants' alleged conduct affected a financial institution, under two separate and distinct theories, in order to extend the statute of limitations. The indictment also sets forth the losses incurred as a result of the fraud. Whether the government can prove these allegations is a question for the finder of fact at trial. See United States v. Pelullo, 964 F.2d 193, 214-16 (3rd Cir. 1992). Therefore, there is no basis to dismiss the indictment.**

Amended Response at 7-8. As with the proverbial "two ships passing in the night," the government did not mention McKelvy's argument in its Amended Response, Amended Limitations Memo (Doc. No. 105) at 13-14, on the government's burden in an affirmative defense case. In fact, the government does not mention the term "affirmative defense" in its Amended Response (Doc. No. 113).

McKelvy again asserts that, once a defendant makes a colorable challenge to the applicability of a particular statute of limitations, such as section 3293(2), then it is the government's burden to show that it has a colorable case that it will be able to prove at trial, beyond a reasonable doubt, that the requirements of the statute have been met. As the Third Circuit stated in 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)).[6] Now that McKelvy has at

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[6] **Fonseca is not, as noted, directly on point, in that it deals with a defendant's request for jury instructions, rather than a motion to dismiss counts in an indictment.**

least made a colorable case of having affirmatively established that the alleged fraud did not "affect" a "financial institution," the burden is on the government to show, with substantial allegations, proffers, and/or evidence, that it has a "prima facie" or "colorable" case that a "reasonable jury" (Fonseca) or a "reasonable juror" (Kerik) [7] **would have found for the government on this issue - none of which it has even tried to do. Cf. Amended Limitations Motion at 14.**

E. The government does not dispute McKelvy's argument that he has satisfied the procedural steps under Rule 12 for a limitations motion to be heard – and decided – pre-trial.

The government does not otherwise respond to the central focus of McKelvy's argument on the procedural posture of his Limitations Memo – that under certain circumstances, a defendant can file and a district court can – and, under some circumstances, must - rule pre-trial on a motion to dismiss under Fed.R.Crim.P. 12 based on the statute of limitations. Amended Limitations Memo at 8-17 (as summarized at 10-11); see also Proposed Conclusions of Law 21-26, at pages 19-21.

In other words, the government does not oppose McKelvy's assertions as to the conditions under which he can be permitted to use proffers based on the government's case; does not contest his admissions; and does not contest his right to make denials on the legal issues (or mixed legal/factual issues) to present grounds for a pre-trial Order granting his Amended Limitations Motion. Accordingly, McKelvy asks this Court to rule that McKelvy's arguments regarding the procedural requirements under Rule 12 for such an Order are not disputed.

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[7] As an alternative to the "prima facie" or "colorable" standard, McKelvy notes that the court in Kerik, 615 F.Supp.2d at 268 n. 17, in granting pre-trial the defendant's motion to dismiss for a violation of the statute of limitations, employed the analysis of whether "a reasonable juror" would have found, beyond a reasonable doubt, in the government's favor on this issue. Accord, Ghavami, 2012 WL 2878126 at *7 (the standard for deciding a motion to dismiss based on section 3293(2) is whether the government's proffer "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)."

III. THE GOVERNMENT'S ARGUMENTS ON THE MERITS OF ITS FIRST RATIONALE – MANTRIA FINANCIAL WAS NOT A "FINANCIAL INSTITUTION."

Apparently due to the government's mistaken arguments, as rebutted above at 4-10, that the determination of the validity of a statute of limitations affirmative defense must wait until trial, it persists in arguing that McKelvy is "quarreling with the allegations in the indictment." Amended Response at 8. Rather, at this stage, as the district court stated in Ghavami:

> **[T]he Court must determine whether the evidence the Government intends to submit 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).**

2012 WL 2878126 at *7. In this section, mindful that McKelvy knows of no support, in a case involving the interpretation of section 3293(2), that the indictment alone is enough to allow a court to deny consideration now of his proffers, the defendant asks this Court to rule that the government has not presented any detailed allegations and/or a proffer as to how it would show that it has sufficient evidence "to permit a jury to find that the conduct alleged in the Indictment affected a financial institution within the meaning of § 3293(2)."

A. In his proffers in the initial and Amended Limitations Memos, McKelvy did not "ignore" or "discount" testimony.

In its initial Response (Doc. No. 99), the government asserted that "the defendant ignored [in his initial Limitations Memo] the anticipated testimony of one witnesses [sic] who provided very important testimony on this issue, Christopher Flannery." Id. at 8. The government also argued in Doc. No. 99 and argues in its Amended Response (Doc. No. 113) that McKelvy's proffers in his initial and Amended Limitations Memos "ignored or discounted unhelpful" material. Doc. Nos. 99, 113 at 8. McKelvy agrees that he did not mention Flannery in his initial Memo, but otherwise contests the government's assertions.

McKelvy will set out here the government's statement of the information which had allegedly been "ignored or discounted" by the defendant, together with passages from the proffers in both

the initial and Amended Limitations Memos which, of course, were filed before the government submitted its respective Responses:

[USA] "As provided in the discovery materials, Flannery is expected to testify at trial that, when he first became an attorney for Mantria, Mantria was engaged in the sale of real estate in Tennessee." Doc. Nos. 99, 113 at 8.

[McKelvy proffer] 4. "Wragg made (contingent) purchases of land in Tennessee, … as early as 2005, from his sister's father-in-law, Dr. George Dixson.… Wragg paid between $900 and $2,000 an acre…. As S/A Murphy testified, it initially was Wragg's plan to develop and then sell these parcels for a profit.…"

[USA] "As a result of the financial crisis of 2008, Mantria began to experience severe financial problems because banks and other financial institutions had restricted the ability of prospective real estate buyers to secure mortgages to buy Mantria real estate." Doc. Nos. 99, 113 at 8.

[McKelvy proffer] 9. "As S/A [Annette] Murphy … testified, mortgage loans began to dry up in or before January 2008, due to the looming national financial crisis.…"

[USA] "Flannery … advised … Wragg to create his own bank *or other financial institution* in Tennessee to lend money to prospective real estate buyers. With Flannery's legal assistance, Wragg created Mantria Financial, which was a [bank][8] *financial institution licensed to lend money* under Tennessee law."[9] Doc. Nos. 99, 113 at 8 (italicized language added by the government to No. 113).

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[8] **The word "bank" was used in Doc. No. 99, but replaced in the second passage of italicized (new) language in Doc. No. 113, with the phrase "financial institution," for which there is no support in Flannery's grand jury testimony or in his FBI 302.**

[9] **The government's use (twice) of the (new) phrase "financial institution" as coming from Flannery is inaccurate – Flannery did not say this in the grand jury or in his FBI 302. But even if Flannery had used this phrase, any such testimony would not have assisted the government on the limitations issues, because the questions here are matters of law for the Court.**

[McKelvy proffer] 10. As S/A Murphy testified, in approximately January 2008,[10] defendants Wragg and Knorr formed Mantria Financial, which was initially supposed to function as "a bank in Tennessee" to lend "people money to buy th[e] land" in Mantria's developments.

[USA] Mantria Financial subsequently lent money to prospective real estate buyers for the land Mantria was selling in Tennessee.[11] Doc. Nos. 99 at 8, 113 at 8-9.

[McKelvy proffer] 11. Wragg [and McKelvy] solicited investors for Mantria Financial, to whom he (Wragg) had been introduced, sometime after Mantria Financial was formed in October 2007 [according to Mantria Financial Private Placement Memorandum ("PPM")].…

[McKelvy proffer] 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."

Other than the unsupportable language noted in footnotes 7, 8, and 10, there are no appreciable differences between what McKelvy had placed in the proffers in his initial and Amended Limitations Memos and what the government stated were examples of Flannery's statements what McKelvy had "ignored or discounted." The absence of Flannery's name from McKelvy's proffers is of no apparent importance – the source of all but the last of the proffers quoted above was the testimony of the FBI case agent, where the agent summarized the statements of all the witnesses, including Flannery.

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[10] McKelvy noted in Pr1. 10 that based on the discovery, the actual date of Mantria Financial's formation was October 2007.

[11] McKelvy knows of no support for the government's statement that Flannery had said that Mantria Financial "lent money," unless this phrase was preceded by "Wragg told him that …." When asked whether Mantria Financial was "able to loan people the money to buy the lots," Flannery made clear that he could not vouch for the accuracy of what he had been told by Wragg: "Well, that is what I was told was happening." Flannery GJ 7/29/15 at 23.

In his initial Limitations Memo (Doc. No. 97), at 15, McKelvy outlined two aspects of his approach – "submitting … proffers, adopted directly from the government's case, which are, as far as we know, undisputable"[12] and "his representation that he would agree, in good faith, to any relevant stipulation proposed by the government." In response to the government's concerns about Flannery's testimony, McKelvy stated, in his Amended Limitations Memo, at 4, that he had added two proposed proffers, ¶¶ 47-48, as reflected in Amended Proposed Findings (Doc. No. 106), ¶¶ 16-18.

Accordingly, McKelvy asks that this Court rule that the government has made no sustainable objection to any of his proffers.

B. <u>The government has not made a colorable case that it could prove at trial that Mantria Financial issued actual "mortgages</u>."

The government makes several arguments in support of its so-called "first rationale" – that the government had made sufficient allegations in the indictment to support its claim that Mantria Financial was a "financial institution" which had been "affected" by the fraud.[13]

As to Counts 1-8, 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." McKelvy's Amended Limitations Memo at 2. Unless section 3293(2) is applicable, Counts 1-8 must be dismissed. Id. at 3-5. The term "financial institution," as used in section 3293(2), was statutorily

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[12] McKelvy listed, in his Amended Limitations Memo, the sources in the government's discovery for what he believed would be "undisputable" proffers. Id. at 15.

[13] The government continues to argue that McKelvy was required under Rule 12 to accept as true the mixed legal/factual allegations of the indictment, for purposes of litigating the motion to dismiss. Cf. Government's Amended Limitations Response (Doc. No. 113) at 9. McKelvy adopts his rebuttal of this argument at 7-8 above.

amended in 2009, by 18 U.S.C. § 20(10), to include "a "mortgage lending business."

The term "mortgage lending business," in turn, is defined by 18 U.S.C. § 27, which 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." Amended Limitations Memo at 4-7.

Because there are no federal cases which explicate the statutory definition of "mortgage lending business," as used in section 27, McKelvy looked to dictionary definitions, cf. Board of Trustees of Leland Stanford Jr. University v. Roche Molecular Systems, Inc, 563 U.S. 776, 788-89 (2011), of the five terms listed immediately above: "mortgage," "lending," "business," "finances" (verb), and "debt." Based on the five dictionary definitions we quoted, McKelvy contended that Mantria Financial was not "a mortgage lending business." Amended Limitations Memo at 35-36. The government has not objected to these definitions.

McKelvy argued that Mantria Financial was not a "financial institution," within the meaning of the applicable statutes, for several reasons. Amended Limitations Memo at 24-28. He first argued that Mantria Financial was not a "mortgage lending business" because it did not issue actual "mortgages." Amended Proposed Conclusions 27 at page 21. The government responded that the defendant's position was not supported by the discovery "because Mantria Financial kept very detailed mortgage records, … showing which buyers received mortgages on which lots and the terms of those mortgages."[14] Amended Response, Doc. No. 113 at 9.

The government misapprehends McKelvy's argument. The defendant never suggested that there were no documents in the discovery which looked like mortgages. McKelvy does argue, however, that these documents were only sham or phony mortgages. McKelvy

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[14] The government's claim that Mantria Financial was both a financial institution and a mortgage lending business "under the law of the State of Tennessee," Amended Response (Doc. No. 113) at 9, is not supported by a proffer or by any case law.

submitted to this Court Amended Conclusion 27, in which he asked the Court to rule,

> **[B]ased 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 [lots in Mantria's land developments in Tennessee], 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).**

See also, Amended Limitations Memo at 36.

In support of McKelvy's assertion in Proposed Conclusion 27 that no legitimate mortgage lender would have taken the risk of having to foreclose on land worth substantially less than the appraised value – to which the government did not object - there were several Proposed Findings in McKelvy's Amended Proposed Findings of Fact and Conclusions of Law (Doc. No. 106), concerning the problems Wragg was having in selling the lots in Tennessee at the projected asking price of $15,000 to $20,000 per acre. Amended Findings 4, 14, 45. Because Wragg then obtained, during the period August 11, 2007 through June 2008, inflated appraisals of approximately $80,000 per acre, Amended Findings 15, 23, which appraisals were attached to the PPMs, McKelvy requests the Court to enter Amended Conclusion 27, at page 21.

All such "mortgages," which were supported by greatly inflated appraisals, would be sham or phony ones. The sole purpose of such "mortgages" was to assist in Wragg's scheme "to gin up purchases of the land in Tennessee to show the appearance that they had some revenue coming in," according to S/A Murphy's testimony. See Pr2.20, Amended Finding 23 (Doc. No. 106) at pages 7-8. McKelvy argues that sham or phony mortgages are not "mortgages," within the meaning of the statutes cited above.

Alternatively, the government argues, remarkably, that, to constitute a "mortgage," the borrower does not have to have an intent to repay that particular loan:

> **[T]here is no requirement in the law that there must be an intent on either party to repay the loan.… Many lenders intend on reselling the loan before payment is due and many borrowers intend on refinancing the loan before payment is due. These are common and lawful business practices….**

Amended Response (Doc. No. 113) at 11. McKelvy agrees, of course, that reselling or refinancing loans is customary and lawful. But that does not in any way affect the correctness of his assertion that a proper definition of "mortgage," as set out in Proposed Conclusion 27, is a "security for the repayment of money borrowed." It is obvious – as the government certainly understands - that mortgages, regardless of reselling or refinancing, are meant to be repaid.

If this Court enters Proposed Conclusion 27 as a matter of judicial notice, McKelvy argues that the government cannot show that it has made out a colorable case, by sufficiently detailed allegations and/or proffers, that it will be able to overcome this defense at trial, beyond a reasonable doubt. For this reason alone, this Court should dismiss Counts 1-8.

C. <u>The government has not made a colorable case that it could prove at trial that Mantria Financial intended to "lend" on actual mortgages</u>.

McKelvy argued secondly that the statutory definition of a "mortgage lending business" which could be protected under the extended statute could not be satisfied by the government because Mantria Financial was not intended to engage in actual "lending." Amended Limitations Memo at 36, Proposed Conclusion.

In its Amended Response, the government argues that Mantria Financial was licensed by the State of Tennessee to lend money for mortgages. Amended Response at 8-9. McKelvy agrees, as he had previously stated in a proffer that attorney Flannery had "advised Wragg that he should utilize a Tennessee statue that 'allows for special limited lenders … [which are] allowed to make [mortgage] loans.'" Amended Limitations Memo, proffer (Pr2.) 53. McKelvy also proffered that "Mantria Financial … was duly incorporated in Tennessee in October 2007." Id. Cf. Pr2. 54 (language quoted from the Operating Agreement of Mantria Financial, authorizing the company to issue mortgage loans).

But, otherwise, the government does not respond to McKelvy's argument, as reflected in his Proposed Conclusions, where he requested a ruling by the Court that

> **28. From the recitations … of S/A Murphy's testimony [in Pr2. 17-23, in the Amended Limitations Memo at 21-23] concerning the "buyer incentives" offered by Mantria 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." See Amended Limitations Memo at 35-36, Amended Proposed Findings (Doc. No. 106), 21, 22.**

If McKelvy is correct when he argues that it is undisputed that "Mantria Financial operated not to engage in traditional lender/borrower relationships," but that Mantria had fraudulent reasons for giving out "buyer incentives" to the seeming "purchasers," this alone is a reason for the Court to enter Proposed Conclusion 28, which Conclusion would be grounds, in and of itself, for a ruling that Mantria Financial was not a "mortgage lending business," and therefore not a "financial institution," within the meaning of section 3293(2).

D. <u>The government has not made a colorable case that it could prove at trial that Mantria Financial was an actual "business</u>."

McKelvy argued thirdly that the statutory definition of "mortgage lending business" could not be satisfied by the government because Mantria Financial was not a "business," in that it was not designed to make a profit. Amended Limitations Memo at 36. "Business" is defined as an endeavor, "the purpose [of which is to have] a livelihood or [make a] profit," quoting Black's Law Dictionary; see Proposed Conclusions 29-31.

In addition to the support in the discovery noted in Proposed Conclusions 29-31, McKelvy also relies on Pr2. 20, which summarized the testimony of S/A Murphy that, in connection with the purchases of the land in Tennessee during 2008-09 which

involved "mortgages" from Mantria Financial, Mantria (the parent company of Mantria Financial) acted "to gin up [the purchase prices] of the land … to show the appearance that they had some revenue coming in," because Mantria was losing money on each such "purchase."

In support of these Proposed Conclusions, McKelvy also relies on another proffer, which quoted the testimony of SEC accountant Tracy Mongelli, who stated that Mantria and Mantria Financial "realized no cash up front" on the reported "loans" issued by Mantria Financial during 2008-09 and that the only actual sales during this period were three "cash sales" of lots, not involving Mantria Financial. Pr2. 39. See also Pr2. 21 (S/A Murphy said in effect, that "it would be nearly impossible for them to make money with that business plan"). The three proffers mentioned in this and the prior paragraph, when read together, show that, no matter what Wragg's intentions during the years 2005-07, Mantria Financial did not intend to make a profit during the period 2008-09.

The government argues that "[t]here is absolutely no requirement in the law that a business 'make a profit or earn money' in order to qualify as a mortgage lending business under 18 U.S.C. §§ 20 and 27." Amended Response at 10. The government, however, misconstrues McKelvy's argument – he agrees with the government that for an entity to be a "business," it does not have to actually "make a profit or earn money," but maintains that the entity must have "the purpose … [of making a] profit." Under McKelvy's proffers, taken from the government's discovery,[15] it is clear that Mantria Financial did not have such a purpose and, accordingly, was not an actual "business."

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[15] In support of his position that Mantria Financial did not have a purpose of making a profit, McKelvy submits another passage from S/A Murphy's grand jury testimony, in which the agent stated that Mantria Financial was paying "purchasers" fees of about $4,000 per lot and "going to write off [its mortgages] in two years [after they were issued]." Murphy, 9/2/15 GJ at 78. This is additional evidence that the case presented to the grand jury showed that Mantria Financial was not an actual "business," in that the company did not intend to make a profit on the "mortgages," but rather intended to write them off.

On the issue of the necessary purpose of making a profit, the government's statement that Mantria Financial played an important role in Mantria's "buying land in Tennessee for as little as $2,000 an acre and attempting to sell it for more than $100,000 acre," Amended Response (Doc. No. 113) at 10, would be (marginally) relevant[16] if it were accurate. But if the government is using the phrase "attempting to sell" in the sense of arm's length sales – as opposed to the fraudulent, so-called "sales" used to "gin up" the appearance of a strong market for the lots - then McKelvy replies that he knows of no evidence to support the "attempting to sell" part of this claim.

Moreover, in his initial FBI interview, Wragg admitted that his initial plan was to buy land from Dr. Dixson and then to sell the property at $15,000 to $20,000 per acre, Pr2. 45, and McKelvy has no reason to dispute that this was Wragg's initial plan – to sell the lots at $15,000 to $20,000, rather than the (clearly inflated) figure of $100,000.

In addition, the government contended that

> **Mantria was buying land in Tennessee for as little as $2,000 an acre and attempting to sell it for more than $100,000 acre. [w]ithout Mantria Financial, these sales would have never taken place.**

Amended Response (Doc. No. 113) at 10. As written, this claim is directly at odds with the government's presentation in the grand jury about the inflated appraisals, which the combination of S/A Murphy's testimony and the discovery showed was a key part of the fraud, taking place between August 11, 2007 and June 2008. Pr2. 7-8, Amended Finding 15, at page 4-5. Moreover, McKelvy is aware of no evidence which contradicts Ms. Mongelli's testimony, quoted above, that Mantria and Mantria Financial "realized no cash up front" on the "loans" issued by Mantria Financial during 2008-09 and that the only sales during this

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[16] The government's assertion, if accurate, would at best of marginal relevance because the entity which needs to have the "purpose" of making a profit is Mantria Financial, not Mantria.

period were three "cash sales," not involving Mantria Financial. Pr2. 39.[17]

Finally, in a remarkable assertion – again seemingly directly at odds with its case – the government now argues that the Mantria PPMs should be taken as believable reflections of the good faith of Wragg and Knorr.

Specifically, the government argues that the Mantria PPMs spoke of the would-be purchasers as being charged interest rates of between 9% and 12%, necessarily implying that the government's evidence shows that Wragg and Knorr had a good faith plan to collect this interest. See Amended Response (Doc. No. 113) at 11. In its Amended Response, the government also contends that:

> **The Mantria Financial PPM further stated that the mortgages would [be] paid as "balloon" deferred payments for a term of 36 months. Other loans were deferred for 24 months.**

Amended Response (Doc. No. 113) at 11. Once again, the government's claim is seemingly directly at odds with S/A Murphy's testimony, which was that Mantria Financial had no legitimate purpose for these "buyer incentives," but rather only planned to "write off" these "mortgages."

In any event, even if the government's new slant on the case could be melded with the existing grand jury testimony, it would not have any impact on McKelvy's argument that bankruptcy was inevitable before the fraud started. The evidence remains unchanged that Wragg and Knorr resorted to the Ponzi scheme because they could not otherwise successfully operate Mantria.

In summary, this Court should rule that the government has not demonstrated that it can show at trial that Mantria Financial was intended to make a profit. Accordingly, there is no detailed

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[17] While McKelvy certainly agrees that "[t]he whole point of Mantria and Mantria Financial was to make money," there is no evidence that, during 2008-09, this was intended to be a legitimate enterprise. The government's suggestion that Mantria attempted to make legitimate money on $2,000 in fees for each lot is obviously overmatched by the testimony that the "purchaser" would receive $4,000 for each lot "sold."

allegation or proffer of evidence that the government will be able to show that Mantria Financial was a legitimate "business."

E. The government has not made a colorable case that it could prove at trial that Mantria Financial "financed" any actual "debt."

The government did not object in its Amended Response to McKelvy's Proposed Conclusion 32, as set out below:

> **32. As compared with the dictionary definition of "debt" – "something, typically money, that is owed or due," Oxford English Dictionary, definition no. 1, the Court rules that Mantria Financial did not "finance[] or refinance[] any debt," as required by 18 U.S.C. § 27. From the government's evidence, it is clear that the "buyer incentives" did not impose any "debt" on the so-called "purchasers," but rather would result in a "buyer's bonus" of about three percent of the purchase price on the land. Proposed Findings 21, 22. See Amended Limitations Memo at 35-36.**

Accordingly, McKelvy asks this Court to rule that this Conclusion, as well as the similar Proposed Conclusion 33, should be entered. McKelvy further requests that, based on this Conclusion, the Court further rule that Counts 1-8 be dismissed because, as noted above, the statutory definition of a "mortgage lending business" is, in part, "an organization which finances … any debt secured by an interest in real estate."

F. McKelvy adopts his prior arguments on the applicability of the Seventh Circuit's decision in Serpico.

Lastly, as the government correctly notes, Amended Response at 12, McKelvy argued that Mantria Financial was not a financial institution because "there was no difference between the alleged financial institution, on the one hand, and the criminal co-owners and co-operators of the business, on the other." Amended Limitations Memo at 42-43. But the government then contends that McKelvy has, in the same breath, conceded away this argument when he said in his Memo, "the law is clear that even if the financial institution was an 'active participant' in the fraud, it still qualifies as a financial institution under the

statute," citing United States v. Serpico, 320 F.3d 691, 695 (7th Cir. 2003). Amended Response at 12.

While the government's version of McKelvy's argument may seem close to what he said, it is not the same. What McKelvy said was that, as articulated in Ghavami, 2012 WL 2878126 at * 3: (1) a "financial institution [can be] affected within [the] meaning of § 3293 even where it was [an] 'active participant in the fraud,'" quoting from United States v. Ohle, 678 F.Supp.2d 215, 228–29 (S.D.N.Y. 2010); (2) "nothing in [§ 3293(2)]'s language precludes its application to a financial institution that participated in the fraud," quoting from United States v.. Daugerdas, 2011 WL 6020113, at 1 (S.D.N.Y. Apr. 5, 2011); and (3) "the 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)]," quoting from Serpico, 320 F.3d at 695. See Amended Limitations Memo at 41.

From this, McKelvy argued that, although Mantria Financial was an active participant in the fraud,

> **all of the requirements for finding that a "financial institution" was "affected," including the various definitions of "affected" set out [in the Amended Limitations Memo], pages 42-45, are still fully applicable.**

Amended Limitations Memo at 42. McKelvy also argued that,

> **while we agree that just because an institution is an "active 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 – and … have not been met here.**

Id.

Although McKelvy realizes that the above-quoted language is much more complicated than the version of his position set out by the government, he maintains that he said what he meant to in his prior Memo, as quoted above.

The point in the Amended Limitations Memo which may have led to confusion is a separate, but related one. McKelvy argued that distinctly different language in Serpico, which stated that the "whole purpose" of section 3293(2) was to "protect" financial institutions against "would-be criminals." 320 F.3d at 694-95. From this language, separate and apart from the "active participant" analysis, McKelvy argued that there is "no difference between the alleged financial institution, on the one hand, and the criminal co-owners and the co-operators of the business, on the other." Amended Limitations Memo at 42-43. In this situation, "[s]ection 3293(2) should not be read to protect" a purported financial institution "from the total fraud that it was." Id. Other than by saying that, by recognizing that he cannot dispute any of the factual allegations in the indictment, McKelvy had necessarily conceded the "financial institution" issue, the government had no response.

G. In summary, the government has not attempted to meet its burden on the issue of whether Mantria Financial is a "financial institution."

In summary, McKelvy emphasizes that, under Ghavami ("evidence … sufficient to permit a jury to find") and Kerik ("a reasonable juror could find"), it is the government's burden to show, either by detailed allegations in his Amended Response or in a detailed proffer, that it could prove at trial that Mantria Financial was a "financial institution," within the meaning of section 3293(2). Because the government has rested on its assumptions that, as long as the words "financial institution" were alleged in the indictment, that the rulings in Ghavami and Kerik, as well as in Carollo and Ohle could be disregarded, it has not even attempted to provide, in the face of McKelvy's proffers and citations, the detailed allegations necessary to sustain its burden.

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

Assuming that this Court finds that the government has made a colorable case that Mantria Financial was a "financial institution," within the meaning of section 3293(2), McKelvy argues that it (the government) cannot make a colorable case

that Mantria Financial was "affected," within the meaning of the statute.[18]

Even if this Court were to accept the government's argument that, McKelvy's agreeing that he cannot dispute the factual allegations in the indictment means that McKelvy has had to admit that Mantria Financial is a "financial institution," he does not agree that the indictment, by using the phrase "affecting a financial institution," in Count 1 and again in Counts 2-8, would have even begun to have set out the "detailed explanation" of this phrase, as required by the cases McKelvy has cited. Tellingly, the indictment does not even mention that the fraud (allegedly) caused Mantria and Mantria Financial to go into bankruptcy, as the government argues in its Amended Response (Doc. No. 113), at 9 ("the government will prove at trial, as the government alleged in the indictment, that the Mantria Ponzi scheme affected a financial institution, namely, Mantria Financial, by forcing it to go bankrupt and into receivership").

A. In his Amended Limitations Memo, McKelvy made three arguments, none of which has been addressed by the government.

In his Amended Limitations Memo, at 43-50, McKelvy first argued, with supporting references to the case law, that the government had not made a "sufficiently detailed" allegation, whether by way of a memo or by a proffer, to explain how Mantria Financial was "affected" by an alleged "actual" loss or by a "substantial" or "sufficient" risk of loss. See, e.g., Carollo II, at *2-*3.

Second, as McKelvy argued in our Amended Limitations Memo, the government must also demonstrate that the fraud was a "sufficiently direct" cause of such loss or risk of loss. See United States v. Heinz, 790 F.3d 365, 367 (2d Cir. 2015), cert. denied, 136 S.Ct. 801 (2016)(citations omitted); United States v. Bouyea, 152 F.3d 192, 195 (2d Cir. 1998) (per curiam). McKelvy further argued that the government's informal assertion that Mantria Financial had gone into bankruptcy as a result of the fraud was not an "explanation," by way of "detailed" allegations or a proffer, of

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[18] For purposes of this section of his Memo, McKelvy adopts all of S/A Murphy's testimony and the other proffers set out above.

how the fraud "directly" caused the bankruptcy, and also that the government's assertion was not "sufficient to withstand the statute of limitations defense." Cf. Carollo II, at *3. See Amended Limitations Memo at 43-44.

Third, McKelvy argued that the government must specify the amount of any alleged actual loss, or that any risk of loss was "new or increased" and that it was "substantial" or "sufficient." If the government were alleging an actual loss, then it would need to specify the amount of the loss. If the government were, rather, alleging a risk of loss, then it would have to meet the "substantial risk" or "sufficient risk" tests set out in the cases cited in the Amended Limitations Memo at 44-45, and/or the "realistic prospect of loss," the not "too remote," not "too attenuated," or not de minimis tests, also set out in that Memo. Id.

Finally, McKelvy argued that the government had not yet satisfied any of these requirements or tests and, furthermore, it could not do so because of the extensive list of McKelvy's proffered evidence, taken from the discovery, of Wragg's financial distress from early in 2005 until October 2007, when Wragg resorted to making fraudulent securities offerings. Amended Limitations Memo at 45-48. While Mantria was apparently insolvent at the time of the first securities offering in October 2007, it staved off bankruptcy (or another form of formal insolvency)[19] for another two years, until November 16, 2009.

The government did not attempt to provide the necessary allegations and/or proffers as to any of the three central aspects of the case described above, apparently, as also noted above, because it was resting on its assumptions that, as long as the words "financial institution" were alleged in the indictment, it (the government) had no other burden to meet.

McKelvy asserts, as he did previously, that because the discovery showed that there were no sources of funding (other

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[19] McKelvy used the phrase "bankruptcy or another form of insolvency" in his prior Memo and uses it here because "insolvency" is the broader term, which means only the condition of being "unable to satisfy creditors" (Dictionary.com).

than the less than $300,000 in "cash sales" of lots during 2008-09) with which Mantria could pay its millions of dollars of expenses during those two years, the apparent explanation as to why Mantria and Mantria Financial were able to avoid collapse during that time was by the proceeds of the fraudulent investments. Id.

B. <u>The government has not attempted to make a colorable claim that it could prove at trial that Mantria Financial was "affected</u>."

Other than to criticize McKelvy's arguments on the "affected" issue, as being "entirely speculative and irrelevant," Amended Response (Doc. 113) at 11, the only allegations made by the government are set out here, in full – a total of 75 words:

> **The indictment also sets forth the losses incurred as a result of the fraud….**
>
> **As the defendant described in his motion, Mantria had been suffering from financial problems for several years at the time of Mantria's collapse. However, despite these financial problems, Mantria Financial continued to survive and Mantria continued perpetuate the fraud. What finally stopped the Mantria fraud was the SEC action. The defendants' fraudulent conduct was the proximate cause of Mantria Financial's collapse.**

Id. at 8, 11. In these 75 words, the government's first assertion is flat-out wrong – the actual and/or risk of loss are not those suffered by the individual investors; the $54 million figure is an important part of the fraud case, but is, by definition, not part of the statute of limitations issue, which concerns whether a "financial institution" had been "affected." The government's misunderstanding on this point is possibly another reason why the government felt it did not have to deal with the arguments and supporting cases in McKelvy's Amended Limitations Memo.

In these 75 words, the heart of the government's second argument is its contention that "despite these financial problems, Mantria Financial continued to survive [legitimately]," as if by some unidentified force. There are literally no facts, much

less a detailed explanation, in this argument which would even begin to fulfill the requirements stated by the courts in the section immediately above.

-- Certainly, the government must agree that for-profit companies, such as Mantria Financial, survive only if they have money to pay their expenses. Based on S/A Murphy's testimony, Mantria Financial was losing money on each "sale" of a lot in Tennessee and "it would be nearly impossible for them to make money with [Wragg's] business plan." McKelvy argues that companies do not automatically "continue to survive."

-- Among the proffers in support of McKelvy's argument that the government has not and cannot show that the fraud directly caused any losses to Mantria Financial, including bankruptcy or another form of insolvency, was the proffer that, based on the testimony of SEC accountant Tracy Mongelli, Mantria's only recorded income was from three "cash sales" at the Tennessee land developments, for a total of $138,647 in 2008 and of $55,999 in 2009. Pr2. 39. The cash disbursements spreadsheets, provided by Wragg and/or Knorr, which had been examined by Ms. Mongelli showed that Mantria Financial had total operating expenses of $3,296,643.87 in 2008 and $916,281 in 2009. Pr2. 38. Absent a source of a legitimate (not fraudulent) capital investment or of a legitimate (not fraudulent) loan, Mantria Financial was insolvent as of the end of 2008, if not sooner.

-- Other than its contention that the loss to Mantria Financial was an actual one, measured by the loss to the investors, McKelvy reads the emphasis in the Amended Response (Doc. No. 113) on cases which concern risks of loss, to mean that the government implied that there was a "new or increased" risk of loss, but the government never so stated and, in any event, the government never articulated the nature of such a risk of loss. Cf. Amended Response (Doc. No. 113) at 6.

-- As the government knows, McKelvy's proffers showed that Wragg issued the "Trust Deed Group 1," a/k/a "Mantria 50" public debt offering in September or October 2007 was issued to pay off a $3.2 million construction loan from Baringer Capital, for the construction work at the Mantria properties in Tennessee. Wragg has admitted that Mantria did not then have the money to pay off this $3.2 million construction loan. Pr2. 46-47, Amended

Limitations Memo at 28. Accordingly, the most direct evidence of the starting date of the investor fraud charged in the indictment would be when Trust Deed Group 1 was being formed in or before September or October 2007.[20]

Contrary to the government's argument, McKelvy's proffers are not "speculation," but are taken directly from the government's case. The only instance where the government took up McKelvy on his pledge to agree to any reasonable stipulation proposed by the government, if he had omitted something which the government wanted included in the proffers, concerned attorney Flannery, as discussed above. As such, there were no remaining objections to McKelvy's proffers.

As noted above, McKelvy relies on Carollo, Ghavami/Heinz, Kerik, and Ohle, 678 F.Supp.2d at 228–29, which are the most relevant cases he can find on a statute of limitations claim under sections 3293(2) or 3282(the general five-year statute). All of these cases mentioned the importance of sufficient proffers by the government to show that the fraud had directly caused an actual loss or risk of loss. The government, however, has not submitted a detailed explanation, based on the evidence in the discovery or based on witnesses it planned to call, as to how it would show that it had a colorable case that it could prove at trial that a "financial institution" was "affected," beyond a reasonable doubt, but only a single page of extremely generalized bullet points. Amended Response at 14. Cf. Ghavami, where the government "provided a [five-page summary of its] proffer of evidence of actual loss, … infra," which in turn refers to six exhibits concerning complex financial evidence of "nexus" between the fraud and the losses Dkt. #484, 10-CR-1217 (S.D.N.Y), at 9-14.

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[20] If the government is going to persist in its claim that "[t]he whole point of Mantria and Mantria Financial was to make money [legitimately]," by Mantria's selling land at a profit and by Mantria Financial's charging fees, Amended Response at 10, it (the government) would seemingly have to move amend the date in the indictment on which the conspiracy allegedly began, "on or about March 1, 2005," to something like October 1, 2007, when the first offering of a Mantria security took place. Otherwise, the government's recent claim of an additional legitimate intent by Wragg cannot be reconciled with the date of March 1, 2005.

C. If the government had attempted to make a colorable showing of the "affected" aspect of section 3293(2), it would have had to supply specific information showing "direct cause" of loss.

For the government to be able to carry its burden of making a colorable showing that the fraud was the "direct cause" of any actual loss or substantial risk of loss it would, at minimum, need to provide detailed allegations and/or proffers of how it would show that, "but for" the fraud, Mantria and Mantria Financial would not have gone into bankruptcy, or another form of insolvency, at least until sometime after November 16, 2009, as it happened.

To overcome McKelvy's argument that the government has not demonstrated that the fraud was the direct cause of the alleged loss, in a manner which would be potentially able to overcome the defense that, at least as of the end of 2008, there was a high likelihood of insolvency or bankruptcy – the government would need to have presented detailed allegations and/or proffers, including the identities of the qualified witness or witnesses to present evidence[21] which would show:

(a) What the amount was of any actual loss, and how this figure was computed.

(b) What the amount was of any risk of loss, and how this figure was computed.

(c) Whether, contrary to S/A Murphy's testimony, Wragg and/or Knorr had a good faith, workable plan to develop the land in Tennessee that would have had a reasonable chance of succeeding to generate funds from lot sales so as to cover more or all of Mantria's expenses (including payments on the $3.2 million construction loan from Baringer Capital), independent of the proceeds received from the Ponzi scheme, to avoid becoming insolvent and/or bankrupt.

(d) Whether, contrary to S/A Murphy's testimony, the significant problems faced by Mantria in developing the land in Tennessee were not as serious as the agent had stated and would not have

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[21] The only government witnesses who would seemingly be qualified to present such evidence would be S/A Murphy and former CFO Rink, both of whom are accountants.

been an impediment to successful sales there, to the point that there was a reasonable opportunity to avoid becoming insolvent and/or bankrupt, independent of the proceeds received from the Ponzi scheme.

(e) Whether, contrary to S/A Murphy's testimony, the financial problems faced by Mantria and Mantria Financial due to the downturn in the economy were not as serious as the agent had stated, to the point that there was a reasonable opportunity to avoid becoming insolvent and/or bankrupt, independent of the proceeds received from the Ponzi scheme.

(f) Whether, contrary to S/A Murphy's testimony, the financial condition of Mantria and Mantria Financial was markedly better than what former CFO Rink, SEC accountant Mongelli, and S/A Murphy had described in their testimony, to the point that there was a reasonable opportunity to avoid becoming insolvent and/or bankrupt, independent of the proceeds received from the Ponzi scheme.

(g) Whether, contrary to the testimony of Ms. Mongelli and contrary to the spreadsheets submitted by Wragg and/or Knorr to the SEC, the seemingly extremely – if not extraordinarily - high expenses paid by Mantria and by Mantria Financial were not so high as to prevent their being balanced out by arguably reasonable and good faith business plans for Mantria and Mantria Financial, to the point that there was a reasonable opportunity to avoid becoming insolvent and/or bankrupt, independent of the proceeds received from the Ponzi scheme.

(h) Whether, contrary to the testimony of Cary Widener and John Seaner, the green energy plans developed by Wragg and/or Knorr were commercially viable, to the point where there was a realistic prospect that Mantria, the parent of Mantria Financial, would have business success so as to permit Mantria Financial to have the funds to continue its operations, to the point that there was a reasonable opportunity to avoid becoming insolvent and/or bankrupt, independent of the proceeds received from the Ponzi scheme.

(i) The amount, date, and source of any capital contributions to Mantria Financial which, as mandated by the Mantria Financial Operating Agreement, at 1, § 3 (Capital Contributions), had to

be (at least) $25,000, for McKelvy to know whether there were any alleged losses suffered by innocent parties, that is, individuals or parties other than Wragg and/or Knorr.

Without having made allegations and/or proffers as to any of the details which would necessarily be a part of the government's explanation of how the fraud "affected" Mantria Financial, the assertions by the government in its Amended Response cannot and do not meet the standards set by the cases discussed in McKelvy's Amended Limitations Memo or in this Reply.

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

A. <u>The government incorrectly states what is in the indictment regarding the "second rationale</u>."

In McKelvy's Amended Limitations Memo, he analyzed the government's informal "second rationale" to support its reliance on section 3293(2). The government has now set out, in its Amended Response (Doc. No. 113) at 6, its formal version of this rationale. In that description, the government first provided a seeming summary of the relevant part of the indictment:

> **As a second and independent basis for extending the statute of limitations, the indictment alleged in Count One, paragraph 2 that the conspiracy to commit wire fraud and the wire fraud scheme affected financial institutions because 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 Mantria3 and its related entities."**

The government's statement in its Amended Response, as quoted above, that "the indictment alleged in Count One, paragraph 2 that the conspiracy to commit wire fraud and the wire fraud scheme affected financial institutions because defendant McKelvy 'advised prospective investors …,'" in effect, amended the indictment, without filing a superseding indictment. There is simply no language in Count 1, ¶ 2, which says that the wire

fraud crimes alleged in the indictment "affected financial institutions because" of McKelvy's advice to investors.[22]

In its formal presentation of its second rationale, the government next stated:

> **In order to extend the statute of limitations under 18 U.S.C. § 3293(2) for fraud affecting a financial institution, the term "affects" includes a new or increased risk of loss to financial institutions even if the financial institution does not suffer a loss [citing cases]. Thus, as alleged by the indictment, defendant McKelvy's fraud affected the financial institutions from whom the victims of the fraud secured credit and funds to invest in Mantria.**

Amended Response at 6.[23] This second part of the government's analysis is just as inaccurate as the first part, analyzed above, in that there is no such language "alleged by the indictment."

B. <u>The district court's opinion in the civil case brought by the SEC in Colorado has no bearing on the issues here</u>.

The government quotes a passage from the district court's opinion in the case of <u>SEC v. Mantria Corporation, et al</u>., Case No. 09-cv-02676 (D. Colo.). The quoted passage, Amended Response at 2, appears to relate to the government's second rationale. As the government knows, McKelvy did not oppose the SEC's motion for injunctive and other civil relief in that case.

Just because McKelvy does not dispute any aspect of that civil litigation, however, does not mean that he believes that there is any relevance of a ruling in that case to the issues here.

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[22] It should be noted that the government is not obligated to place allegations concerning an affirmative defense in the indictment. Cf. <u>Smith v. United States</u>, ––– U.S. ––––, 133 S.Ct. 714, 720 (2013). As McKelvy has stated, such allegations can be made in a responsive memo or in one or more proffers.

[23] McKelvy agrees with the statement of the law in the first sentence of this excerpt from the Amended Response, which matches a summary in his Amended Limitations Memo, at 40, 44-45.

To the contrary, he maintains that the passage in that ruling quoted by the government, id., is beside the point.

In the last sentence of the quoted excerpt, the district court stated that its conclusion was that "given … the degree of scienter required … a permanent injunction is warranted." Certainly, the government does not pretend that language in a civil case is persuasive, much less binding, authority for this Court in the criminal case where, of course, the government's burden is much greater.

Moreover, the language in the opinion emphasized by the government – that the defendants acted "to induce unsuspecting and unwitting victim investors to liquidate the equity in their homes and take out bank loans to invest in Defendants' scheme – has nothing to do with any of the statute of limitations issues here, factual or legal. While it is true that individual "victim investors" are central to the underlying fraud, it is also true that losses to individuals have nothing to do with section 3293(2), which concerns whether there was an actual loss or risk of loss to a "financial institution."

C. The government's contention that its summary of the discovery provides sufficient evidence is about merit; this issue is a more complex issue than stated by the government.

In support of McKelvy's argument concerning his not being able to find any support in the discovery for the government's second rationale, he put forward a proffer to which the government responded, in its Amended Response at 13. McKelvy's proffer, Pr2. 66, is set out here:

> **66. There is no allegation by the government as to the identity of any putative financial institution as to which the second rationale might apply and no reference in the discovery documents as to such a financial institution, as to the "financial institution" element of section 3293(2). Moreover, there is no known documentary support for the government's second rationale.**

Amended Limitations Memo (Doc. No. 105) at 41-42, Proposed Conclusion 44 (Doc. No. 106). The government responded to this proffer in two ways. First, the government responded that:

> **Obviously, when the Mantria Ponzi scheme collapsed, the ability of the victims to repay these loans was significantly jeopardized. Nothing more than that allegation is required under the law.**

Amended Response at 13 (emphasis added). Otherwise, there was no specific response to McKelvy's arguments in his Amended Limitations Memo, at 9-14, 31-38, 38-54, as to the many requirements for responsive allegations by the government.

The government's second response was that "the discovery materials contain many examples of support [for its position]." Amended Response at 13. "[T]humbing through the files" in the discovery, the government discusses four "examples of support" from the victim witnesses. Id. at 13-14.

The four "examples of support" put forward by the government demonstrate that the government and McKelvy have very different ideas as to the necessary level of "support." While it may well be that these four examples involve "victims [who] lost all or most of their investments in Mantria," Amended Response at 14-15, and while McKelvy recognizes that this allegation is central to the fraud charges in the indictment against all three defendants, he argues that, on the limitations issues here, this contention is not determinative, but only preliminary, at best.

-- The basic details. In response to McKelvy's Amended Limitations Memo, the government provided no answers and/or supporting documentation, to the details McKelvy argued would be necessary. Id. at 53-54, items (a) through (f), which McKelvy still maintains are necessary. As to our requests,[24] McKelvy repeats these requests and sets out the government's responses:

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

Response: No response.

(b) State the dollar amount of any alleged loss to the "financial institution(s)."

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[24] McKelvy has studied all of the relevant discovery materials, including the SEC victim questionnaires on discovery disk #4 and the FBI 302s, and has found none of the requested information.

Response: No response.

(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 ….

Response: Other than to say that "[o]nce Mantria collapsed, the victims' ability to repay these loans to the financial institutions was seriously jeopardized," Amended Response at 15, there was no response pertaining to any individuals, designated by initials or otherwise.

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

Response: No response.

(e) Explain and document how the loss to a financial institution was a "direct" effect of the fraud, ….

Response: Other than to say that "[t]he financial institutions who had lent money to the Mantria victims who used that money to invest in Mantria were also <u>obviously</u> affected by Mantria's collapse and the inability of the victims to repay those loans," Amended Response at 15 (emphasis added), there was no response pertaining to any individuals.

(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 <u>de minimis</u>.

Response: No response.

-- <u>Narrative – accounting of (net) loss in Mantria investments, defaults on loans</u>. Both the SEC investor victim questionnaires and the FBI 302s were focused on the fraud scheme – at the time these documents were created, section 3293(2) and a statute of limitations defense were not at issue. But they are now and this is an extremely complicated case. As far as McKelvy knows,

the investors have not been re-interviewed to provide information on this new issue.

If the investors had been re-interviewed, they could and should have been asked to provide the necessary "detailed explanation" of any "substantial" actual loss or risk of loss, by way of a narrative which would cover, in addition to the basics previously requested in the Amended Limitations Memo, at 53-54, items (a) to (f), a narrative which would explain the history of the investor's experience with Mantria and with loans from financial institutions.

Such a narrative might be relatively straightforward or might involve an informal accounting, with documentation, to set out the different investments made (including any "roll-overs"); the distributions made by Mantria to a particular investor; how the calculation of any losses was made; what, if any, defaults had occurred in the investor's credit cards and/or lines of credit with "financial institutions," allegedly as a result of what they had lost on the Mantria investments; the role of any other possible causes of such defaults, such as the economic downturn of 2008-09, business mistakes, and non-Mantria investments.

Without such details, it is impossible to know whether any "financial institutions" were "affected."

Respectfully submitted,

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Dated: August 28, 2017

CERTIFICATE OF SERVICE

I hereby certify that I have served by electronic mail a true and correct copy of the foregoing Reply 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: August 28, 2017

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August 28, 2017

Hon. Joel H. Slomsky
Judge, U.S. District Court
5614 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106

Re: United States v. McKelvy, 15-cr-398-3

Dear Judge Slomsky:

Co-counsel William J. Murray, Jr., and I have today filed McKelvy's Reply Memorandum, in reply to the Government's Response to Defendant Wayde McKelvy's Amended Motion to Dismiss Counts One through Eight of the Indictment Based on the Statute of Limitations ("Amended Response," Doc. No. 113). As the Court knows, leave was granted (Doc. No. 103) to file this Reply Memo.

Co-counsel Murray and I are currently working on McKelvy's Memorandum in Reply to the Government's Response (Doc. No. 115) to McKelvy's Motion to Dismiss Counts 1-9 of the Indictment, and to Strike Part of Count 10, for a Failure to State an Offense, Memorandum (Doc. No. 111). By this letter, we are asking for leave to file that Reply Memo. The government's attorney, Robert Livermore, has advised that the government does not object to this request.

Sincerely,

Walter S. Batty, Jr.

cc: William J. Murray, Jr., Esq.
Robert Livermore

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 request in a letter dated August 28, 2017 from Walter S. Batty Jr., Esquire, and William J. Murray, Jr., Esquire, counsel for Defendant Wayde McKelvy (Doc. No.), it is ORDERED that counsels' uncontested request for leave to file a Reply Memorandum, in reply to the Government's Response to Defendant Wayde Mckelvy's Motion to Dismiss Counts One Through Nine and to Strike Count Ten of the Indictment (Doc. No. 115), is GRANTED.

BY THE COURT:

_____

JOEL H. SLOMSKY, J.