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

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

DEFENDANT'S MEMORANDUM IN REPLY TO 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 "Offense Reply Memo" 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 ("Offense Response," Doc. No. 115). The Court granted leave to file this Reply Memo (Doc. No. 123).

I. INTRODUCTION.

In reply to the government's Offense Response (Doc. No. 115), McKelvy files this Offense Reply Memo, which is consistent with his Motion to Dismiss Counts 1-9 of the Indictment, for Failure to State an Offense and to Strike Parts of Count 10 ("Offense Motion") and supporting Memo ("Offense Memo," Doc. No. 111). This Offense Reply Memo is also consistent with McKelvy's Proposed Findings of Fact and Conclusions of Law (Doc. No. 114), filed in support of the defendant's Offense Memo.

A. Summary of Argument.

McKelvy argues that because there was no "factual orientation" in the charging paragraphs of Counts 1-9, or in the references in Count 10 to "securities fraud," this Court should order, under all the circumstances, that Counts 1-9 be dismissed and that the references in Count 10 to "securities fraud" be stricken.

B. Summary of assertions made by the government as to which McKelvy does not object.

McKelvy does not object to the following parts of the government's Offense Response (Doc. No. 115):

-- The summary of basic principles of litigation of motions to dismiss for failure to state an offense, set out as the Standard of Review in the Offense Response, at 2-3. All of these principles were included in the Offense Memo (Doc. No. 111).

-- The summary of the charges in the indictment set out in the first paragraph of the Indictment section in the Offense Response, at 3, except for the last sentence, starting "One of the key …."

II. PROCEDURAL ASPECTS OF THE OFFENSE MOTION

A. There is no dispute as to the procedural requirements for the Offense Motion.

Although it disagrees with McKelvy's position on whether he has "accepted as true" the factual allegations in the indictment, see below, the government does not disagree with the defendant's summary of the five procedural requirements for filing a motion to dismiss based on an alleged violation of the statute of limitations under section 3293(2). See Offense Memo (Doc. No. 111) at 4-5, Proposed Conclusions (Doc. No. 114) 4-9.

B. McKelvy argues that he has "accepted as true" the underlying factual allegations in the indictment and adopts his earlier argument on this point.

The government argues, as it did in its Amended Limitations Response (Doc. No. 113) at 4, 7, that "the district court must accept as true the factual allegations set forth in the indictment" (citing cases) and, implicitly, that because, in its view, the defendant does accept such allegations, there can be no valid grounds for the Offense Motion. Offense Response (Doc. No. 115), at 3. McKelvy agrees that the "accepted as true" requirement is a proper statement of the law, but argues that this requirement does not apply to any mixed legal/factual allegations, as explained in his Limitations Reply Memo (Doc. No. 121) at 4, 7.

Because the government has not disputed any of McKelvy's proffers 1-17 in his Offense Memo (Doc. No. 111), at 10-15, his (McKelvy's) proffers should be taken as "undisputed," thereby satisfying United States v. DeLaurentis, 230 F.3d 659, 660–61 (3d Cir. 2000), regarding the requirement that there be no "evidentiary questions;" cf. McKelvy's Amended Limitations Memo (Doc. No. 105), at 8-9, 11.

C. McKelvy is not "argu[ing] with the facts as alleged in the indictment …."

In its Offense Reply, the government also represented that

> **[I]n his [Offense Memo], the defendant frequently argued with the facts as alleged in the indictment ….**

Offense Response (Doc. No. 115) at 5. Because the government's assertion did not specify the passages in which McKelvy was allegedly "argu[ing] with the facts as alleged in the indictment," the defendant replies generally that there is nothing in the proffers or in the Proposed Findings of Fact where he is disputing the factual allegations in the indictment. Rather, he has denied, as permitted by the law, the legal or legal/factual allegations in the indictment. See also McKelvy's rebuttal to the government's "accept as true" argument, above.

D. The government's effort to delay consideration of the Offense Motion is without merit.

In his Offense Memo (Doc. No. 111), McKelvy argues that this Court should grant his offense motion because the lack of any "factual orientation" to the language in the charging paragraphs means that the indictment is defective, in that it would be impossible to draft an instruction describing the unitary or overarching scheme to defraud.[1] Id. at 2-4, 20. In its Offense

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[1] **In his Offense Memo, McKelvy argued that in a case where the indictment charges more than one defendant with wire fraud or securities fraud, the Court should instruct the jury that, before returning a guilty verdict, they must agree that each defendant was guilty of participation in the same, common, overall, single, unitary, or overarching scheme, with at least one other defendant. In this Reply Memo, McKelvy will use the phrase "unitary or overarching scheme" to refer to this list.**

Response (Doc. No. 115) at 5, the government contends that McKelvy's argument is premature in that "[t]he issue of which jury instructions might be appropriate is not presently before the Court" (emphasis added).

The first answer to this argument is that McKelvy is not contesting "which jury instructions" the Court should include at trial. Rather, McKelvy argues that, as a matter of law, there is a fundamental pleading defect in the indictment itself, which cannot possibly be remedied by any instruction. See Offense Memo at 2-4, 20. The government's misstatement of this issue is remarkable, given the defendant's concentration on this point in his extensive arguments. Id.

McKelvy's second answer to this contention is that this argument is very similar to its claim as to the Amended Limitations Motion - that the Court should delay until trial consideration of the Offense Motion, which the government believes is premature. McKelvy adopts here his arguments in his Amended Limitations Memo (Doc. No. 105) at 4-10.[2]

E. McKelvy's arguments concerning evidence the government did not have at the time of indictment were offered only for background on the "two layers" issue.

The government makes two arguments regarding the facts as alleged in the indictment. Offense Response at 4-5. First, the government argues that "the Court make findings of fact contrary to the facts alleged in the indictment." Id. at 5. The only such Proposed Findings (Doc. No. 114), including Nos. 8-12, were those which, we contend, were fair ones because the defendant can deny legal allegations or legal/factual allegations, such as whether he acted with a particular kind of intent.

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[2] The government certainly understands that if this Court defers ruling on McKelvy's Offense Motion until trial, the defendant will renew the motion at the close of the government's evidence and will add a related argument, pursuant to United States v. Camiel, 689 F.2d 31, 36-37 (3d Cir. 1982) (the government must allege and prove, in terms that are understandable to a jury, that there was "an agreement among the alleged co-conspirators" as to the same, unitary scheme, rather than two schemes.

The second kind of argument challenged by the government is "what evidence the government had at the time of indictment." Offense Response at 4-5. McKelvy agrees that a defendant filing a motion to dismiss cannot challenge the sufficiency of the evidence presented to the grand jury, as he stated both in the Amended Limitations Memo, at 10, and in his Offense Memo, at 9. The reason that McKelvy included in his Proposed Findings and Conclusions references to the evidence which the government had assembled by the time of the indictment was to give the Court a full picture of his "two layers" argument, not to challenge the sufficiency of the evidence before the grand jury.

III. THE GOVERNMENT CANNOT MAKE UP FOR THE LACK OF "FACTUAL ORIENTATION" IN THE CHARGING PARAGRAPHS IN COUNTS 1-9 BY ARGUING THAT THE COURTS HAVE SET NO SUCH STANDARD.

A. The government did not directly respond to McKelvy's argument that the indictment is defective because there is no "factual orientation" of the scheme in the charging paragraphs.

As McKelvy argued in his Offense Memo, at 3, 16-17, there are three tests under United States v. Huet, 665 F.3d 588, 594-95 (3d Cir. 2012), for determining whether to grant a defendant's motion to dismiss the indictment for failure to state an offense. The first of these tests is whether the indictment fails to "contain[] the elements of the offense intended to be charged." Id. (citations and quotation marks omitted). The second Huet test is whether the indictment "sufficiently apprises the defendant of what he must be prepared to meet." Id.

These two tests are also found in the three other Third Circuit cases cited in McKelvy's Offense Memo at 16-19. As explained in United States v. Stevenson, 832 F.3d 412, 423-24 (3d Cir. 2016), the source of all three of the Huet tests is the Supreme Court's decision in Russell v. United States, 369 U.S. 749, 763-64 (1962). Even though these four Third Circuit cases echo Huet on these first two tests and followed the holding in Russell, the government argued that the statement of the law in Huet was mere dictum[3] and concluded, without any attempted explanation or

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[3] The government argues in its Offense Response (Doc. No. 115), at 5, that Huet is distinguishable because the Third Circuit overturned the district court's granting a motion to dismiss.

analysis, that Counts 1-9 are "more than sufficient" to meet the first two tests in Huet. Offense Response at 4, 5.

In his Offense Memo, at 3, McKelvy argues that Counts 1-9 should be dismissed because the charging paragraphs merely recite the statutory elements for the violations and do not contain any "factual orientation" for these allegations. See United States v. Stock, 728 F.3d 287, 292 (3d Cir. 2013). This "factual orientation" language is also found in Huet, 665 F.3d at 594-95; United States v. Kemp, 500 F.3d 257, 280 (3d Cir. 2007); and United States v. Rankin, 870 F.2d 109, 112 (3d Cir. 1989).

But the government dismisses McKelvy's "factual orientation" argument not only as relying on mere dictum, but also by being at odds with another ruling in Huet, that the "Federal Rules were designed to eliminate technicalities in criminal pleadings and are to be construed to secure simplicity in procedure." 665 F.3d at 594. Cf. United States v. Resendiz-Ponce, 549 U.S. 102, 110 (2007)(same). Remarkably, the passage on "eliminat[ing] technicalities" came in Huet in the paragraph immediately before the sentence on which McKelvy relies, which sentence was not mentioned or discussed by the government:

> **"[N]o greater specificity than the statutory language is required so long as there is sufficient factual orientation" to permit a defendant to prepare his defense and invoke double jeopardy.**

Id. (citations omitted). As such, the Court of Appeals in Huet ruled that indictments could "eliminate technicalities … 'so long as there is sufficient factual orientation' to permit a defendant to prepare his defense." Id. (emphasis added).

As such, the government presented no basis on which to avoid responding to McKelvy's argument that the charging paragraphs contained not a word of the required "factual orientation."

B. Otherwise, the government does not dispute the applicability of the rulings on offense motions cited by McKelvy.

Otherwise, the government does not dispute the legal principles concerning a motion to dismiss for failure to state an offense, as discussed by McKelvy in his Offense Memo at 15-23. Cf. United States v. Yefsky, 994 F.2d 885, 893 (1st Cir. 1993)(slightly

different formulation of the "sufficient factual orientation" requirement); U.S. Attorney's Manual at section 971, "Sufficiency of Indictments" (relying on Yefsky), cited for the proposition that the charging paragraphs in the indictment against McKelvy were "atypical." Offense Memo at 20-22. See also Proposed Conclusions (Doc. No. 114) 10-17 (first Huet test); 18-21 (second Huet test).

C. The government did not even mention the phrase "charging paragraphs" in its Offense Response.

Even though, as stated above, McKelvy's central argument in its Offense Memo was that Counts 1-9 should be dismissed and part of Count 10 should be stricken was that the charging paragraphs for these counts do not contain any factual orientation whatsoever, the government does not refer to the phrase "charging paragraphs" in its Offense Response.

Moreover, in its Response, the government did not mention United States v. Panarella, 277 F.3d 678, 685 (3d Cir. 2002), which McKelvy cited on the issue of incorporating an allegation from the body of the indictment into the charging paragraph(s) of an indictment. See Offense Memo at 23-26. But, as is clear from Panarella, the charging paragraph there had sufficient "factual orientation" from which the court could take into account the relevant "particular facts" in the body of the information. Id.

Likewise, the government did not try to meet McKelvy's challenge in his Offense Memo, at 23:

> **While Panarella is authority for a contention that general but factually oriented language setting out an overarching scheme in a charging paragraph can sometimes be interpreted as incorporating details from the body of the indictment, McKelvy cannot conjure up any rationale for arguing, as the government would seem to have to do here, that language simply tracking statutory terms, but containing no semblance of factual orientation, can be interpreted as incorporating details from other parts of the indictment.**

On a separate but related point, the government argues that "[McKelvy contends] that the government erred in Counts Two

through Nine of the indictment by incorporating the facts alleged in Count One by reference." Offense Response at 7. Although McKelvy cannot be sure of the passage to which the government refers, because there is no page citation, he states that he knows of no such argument and, in any event, agrees that, if he had, he would have been incorrect and the government would be correct when it says that it was proper for it to incorporate allegations from Count 1 into Counts 2-9. Id. See also Proposed Conclusions (Doc. No. 114) 22-28.

D. McKelvy has not "confessed" to any charges in the indictment.

Possibly in an effort to show that there is no actual dispute between the parties as to whether the charging paragraphs in Counts 1-9 have "factually oriented" language, the government argued:

> **[I]n his motion, defendant McKelvy confessed that he made certain false statements to prospective investors, as alleged in the indictment, to induce them into investing in Mantria. Defendant McKelvy further confessed in his motion that he lied to investors and told them that he did not make a "dime" off their investments in Mantria. This is the exact criminal conduct charged in the indictment.**

Offense Response at 4. In the government's analysis of the defendant's Offense Memo, its use of the word "confess" is a misnomer. Certainly, the government understands that McKelvy has made "admissions" that he made false statements, with the intent described in Count 1, ¶ 12, for purposes of this motion only, as set out in Proposed Findings 10-12. And, just as certainly, the government understands that McKelvy has not "confessed" to any crimes – he maintains that there are no properly charged crimes in Counts 1-9 or in the "securities fraud" references in Count 10, and further maintains that he cannot be found guilty at trial of these violations because the government cannot prove a common, unitary scheme.

E. The government does not contest McKelvy's analysis of Dobson, except to say that jury instructions are not at issue.

Except for its arguments that McKelvy's reliance on United States v. Dobson, 419 F.3d 231, 237 (3d Cir. 2005), was misplaced because jury instructions are not now at issue, the government does not dispute the defendant's analysis of that and similar cases in his Offense Memo at 26-33.

F. The government's attempts to overlook the absence of "factually oriented" language in the charging paragraphs are contrary to well-established legal principles.

The government's post-indictment attempt to overlook the gap created by the absence of factually-oriented language in the charging paragraphs, as discussed above and below, is precisely the kind of maneuver which the Supreme Court has prohibited. Without an allegation in the charging paragraphs which provides a description of the unitary or overarching scheme, the government would be free "to roam at large — to shift its theory of criminality so as to take advantage of each passing vicissitude of the trial and appeal." Russell, 369 U.S. at 768. Likewise, neither "the prosecutor [nor] the court [should have] to make a … guess as to what was in the minds of the grand jury at the time they returned the indictment." Id. at 770.

Moreover, as the district court said in United States v. Hillie, 227 F.Supp.3d 57 (D.D.C. 2017),

> **there are certain criminal offenses in which the statutory text is worded so narrowly that a statement of the elements provides the defendant with sufficient notice of the acts that constitute the specific offense charged against him, and in such a case, "an indictment parroting the language of a federal criminal statute is often sufficient[.]"**

Id. at 74, quoting Resendiz-Ponce, 549 U.S. at 109. As the court in Hillie continued,

> **But there are also criminal offenses that are broadly worded, and thus "must be charged with greater specificity" in order to give the defendant sufficient notice of the crime.**

Id. at 74-75, quoting Resendiz-Ponce, 549 U.S. at 109. McKelvy contends that the wire fraud statute is broadly worded and,

as Resendiz–Ponce requires, "must be charged with greater specificity."

IV. CERTAIN OF THE GOVERNMENT'S CHARACTERIZATIONS OF THE ALLEGATIONS IN THE INDICTMENT ARE MISTAKEN.

A. McKelvy disagrees that the "facts of the case, as alleged by the indictment, are quite simple."

McKelvy disagrees with the government, Offense Response (Doc. No. 115) at 3, that the facts, as alleged in the indictment, are "quite simple." McKelvy maintains, as he did in the Amended Limitations Reply (Doc. No. 121) at 4-7, that the apparent reason for the government's mistaken impression is that it assumes that the "accept as true" requirement applies not just to underlying facts, but also to mixed legal/factual allegations, for example, such as whether McKelvy joined Wragg and Knorr in their intent to perpetrate a Ponzi scheme.

B. McKelvy disagrees with the government on its contention about "[o]ne of the key false statements …."

In the "Indictment" section of its Offense Response, the government made the following representation about the factual allegations in the indictment.

> **One of the key false statements … [alleged in the indictment] is the fact that McKelvy told prospective investors that he did not make a "dime" off of their investment[s], when, in truth, Wragg and Knorr were secretly wire transferring [to] McKelvy 10-15% of the new investor funds, totaling $6.2 million. ….**
>
> **This is the exact criminal conduct charged in the indictment.**

Offense Response at 3, 5. There are three defects in this sentence – first, the "not a dime" part is technically flawed; second, the "when in truth" part is a significant miscasting of the indictment; and third, by substituting the above-quoted language for the allegation actually in the indictment at Count 1, ¶ 12, the government unintentionally proves McKelvy's point about the crucial importance of an allegation of the "factual

orientation" of the alleged unitary or overarching fraud in the charging paragraphs of Counts 1-9.

-- "Not a dime" clause. First, the government's assertion that the indictment alleged that McKelvy made a "key" false statement during the May 21, 2009 Speed of Wealth seminar - "that he did not make a 'dime' off of their investments," id. - is inaccurate: there was no such allegation in the indictment.[4]

Instead, the "key" allegation of false statements, which is not only phrased broadly enough to cover his admittedly false "not a dime" statement (and his admittedly false statement that he knew Mantria's books well enough to "know where all the money is going"), but also is phrased narrowly enough to apply to McKelvy's intent, is actually in the indictment, in the Manner and Means section. As alleged in (part of) ¶ 12 of Count 1:

> **During these [Speed of Wealth] seminars, [McKelvy, Wragg, and Knorr] made materially false statements and omitted material facts to mislead prospective investors and induce them to invest in Mantria securities.**

Id. It is this sentence in ¶ 12 of Count 1 which is the only part of the indictment which is a basis for McKelvy's two conditional admissions - as to both the conduct (statements at the Speed of Wealth seminars) and the limited intent - set out in Proposed Findings (Doc. No. 114) 10-12, at 3-5.[5]

As argued below, it is apparent that the government's claim that the "not a dime" statement was a key allegation in the indictment was partly an effort to pair this false statement

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[4] Rather, as can be seen from the Overt Act No. 35, at pages 8-9 of the indictment, McKelvy's "not a dime" statement was not even included with McKelvy's nine other allegedly false statements at that seminar, at subparagraphs (a) to (i).

[5] Unaccountably, the government claims in its Offense Response, at 6, "Notably, in his motion, the defendant admitted that he made numerous false statements to prospective investors to induce them to invest in Mantria." Because the government has not included a page reference to the Offense Memo, McKelvy cannot tell to what the government refers. But he stands by his admission that he made one false statement at the May 7, 2009 seminar and a second one at the May 21, 2009 seminar.

with an alternative intent, not set out in the pairings of false statements and intent in the indictment. See n. 4, infra.

-- Pairing with "when in truth" clause. The second flaw in the above-quoted sentences – which is a fundamental one – is in the linkage between the "not a dime" (conduct) clause and the "when in truth" (intent) clause: "[McKelvy made the 'not a dime' statement] when, in truth, Wragg and Knorr were secretly wire transferring [to] McKelvy 10-15% of the new investor funds, totaling $6.2 million." McKelvy asserts that the clear import of the "when in truth" allegation is that, at the time he made this statement, he knew that his commissions were coming from "new investor funds," that is to say that McKelvy knew that his commissions were derived from a Ponzi scheme.

Put most directly, there is no such pairing alleged in the indictment – instead, this is the government's post-indictment version of the fraud charge, a revisionist cobbling together of language which might have been included in the charging paragraphs of Counts 1-9, but was not. McKelvy knows of no authority for the government's choosing, willy-nilly, to pair the "materially false statements" allegation in ¶ 12 of Count 1 with the "when in truth" allegation of a broader intent concerning knowledge of the Ponzi scheme, drawn together from other parts of the indictment, thereby replacing the more narrowly-defined intent "to mislead prospective investors [at the Speed of Wealth seminars][6] and induce them to invest in Mantria securities," which is the second part of ¶ 12.[7]

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[6] Of the four possibly pertinent paragraphs in the Manner and Means section of the indictment, ¶¶ 9-12, each has a different statement as to the defendants' intent - ¶ 9 (no allegation of intent); ¶ 10 ("false statements … to mislead investors as to the true financial status of Mantria"); ¶ 11 ("knew that Mantria had virtually no earnings, no profits, and was merely using new investor money to repay earlier investors"); and ¶ 12 ("to mislead prospective investors and induce them to invest in Mantria securities"). See Offense Memo at 23-26.

[7] McKelvy has made clear, by way of his limited admissions, that he specifically denies the legal allegations in Count 1, ¶ 11 (Manner and Means), that he was aware, at the time he was making presentations for and collecting commissions from Mantria, that

-- "Two layers." Now that McKelvy has filed his Offense Memo, the government appears to attempt to paper over what he has argued are the "two layers" presented by the case against him – Wragg's and Knorr's carrying out of their Ponzi scheme, as the first layer, and McKelvy's conduct, as the second, where he admits to the narrower intent charged in Count 1, ¶ 12 ("to mislead prospective investors and induce them to invest in Mantria securities"), but not to having had any knowledge of the Ponzi scheme. Since the predominant allegations in Count 1 are that Wragg and Knorr carried out a Ponzi scheme, McKelvy argues that he has a credible defense that he was not intentionally a part of that scheme. See also Proposed Conclusions (Doc. No. 114) 29-42.

-- No allegation of an unitary or overarching scheme. Third, the government's mix–and-match reconstruction of the indictment unintentionally proves McKelvy's point – this is the precise reason why the omission of language from the charging paragraphs of Counts 1-9, providing a description of the unitary or overarching scheme charged, is so crucial. In McKelvy's view, the only apparent reason for the government's assertion of a newly-minted language concerning "[o]ne of the key false statements …" is that it is attempting to sidestep the issue highlighted by the defendant in his Offense Memo – that McKelvy was not involved in the Ponzi scheme, but only involved in his own scheme to mislead potential investors at the Speed of Wealth seminars, "to mislead prospective investors and induce them to invest in Mantria securities." Proposed Findings 10-12.

As such, McKelvy argues that he would be entitled to a "culpable participation" instruction under Dobson, 419 F.3d 239 n.8. As set out in Dobson, such an instruction needs to state that "first, the government must demonstrate that a defendant participated in a fraudulent scheme, and, second, the defendant had "knowledge of the illicit objectives of the fraudulent scheme and willfully intend[ed] that those larger [overarching or overall] objectives be achieved." Offense Memo at 26.

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he was joining Wragg and Knorr in knowing "that Mantria had virtually no earnings, no profits, and was merely using new investor money to repay earlier investors." Proposed Finding 9.

Because there is no "factual orientation" in the charging paragraphs of Counts 1-9, or in the references to "securities fraud" in Count 10, there is no way now for the government to do what it might have done when drafting the indictment – drafting an allegation of a unitary or overarching scheme which would fairly describe what the government believed all three defendants had done, in common. Absent such language in the charging paragraphs, it would be impossible to fairly advise the jury of what it would have to find to return guilty verdicts on these counts.

-- No specific argument on Counts 9 or 10. The government made no specific arguments on Counts 9 or 10.

Respectfully submitted,

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Dated: September 7, 2017

CERTIFICATE OF SERVICE

I hereby certify that I have served by electronic mail a true and correct copy of the foregoing Offense Reply Memo, in Support of his Motion to Dismiss Counts 1-9 of the Indictment and to Strike Parts of Count 10, for Failure to State an Offense, upon Assistant U.S. Attorney Robert J. Livermore:

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Dated: September 7, 2017