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October 16, 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:

The government raises a number of points in its letter to the Court dated October 13, 2017. McKelvy responds to these points.

1. It is true, as the government argues, that the defense has had two years to prepare for trial. It is also true, apparently due to no fault of AUSA Livermore, that the government filed the indictment almost six years after the SEC had conducted an investigation leading to the filing of a complaint and motion for a preliminary injunction, giving rise to counsel's spending months to prepare and file a motion to dismiss based on the statute of limitations.

2. Counsel agree that, ordinarily, two years would be adequate time to prepare for trial. Although AUSA Livermore certainly did not say anything before McKelvy filed his Amended Limitations Motion to suggest that he would work with the defense on an agreed-upon record for the Court to decide the limitations issues, defense counsel assumed that the government would not dispute what we believe is undisputable. We offered to supplement or correct any representations we made about the government's case, taken directly from the grand jury testimony and FBI 302s. Due to the government's general opposition to our quotations from the discovery, we need to take – what we believe

should be unnecessary – time to re-create parts of the government's case for the upcoming trial.

3. While we agree that the public has a right to a speedy trial, we do not agree that just because AUSA Livermore submits that, in his view, counsel are more prepared than in other cases, we should not be heard on our request. One of the reasons for the additional time needed is because we did not anticipate that the government would choose, in its opposition to our limitations motion, to take the position for which they offer no direct support – that mixed factual/legal allegations in the indictment should be considered as factual allegations.

4. We also did not anticipate that, in response to our limitations motion, the government would choose to bypass our argument that both its first and second rationales did not even begin to provide a detailed explanation of the claimed causal connection between the fraud and any loss to a financial institution.

5. While counsel agree that we do not want any government witness to be inconvenienced, we cannot help but observe that AUSA Livermore has taken what appears to be an unusual approach to discovery. It is true that he has stated that he is unlikely to call many of the 70 witnesses on his list. But at the same time, he has not been prepared, at as of our conversation last Thursday, October 12, to definitively say which witnesses he was and was not calling. Although AUSA Livermore asserts that he does not want to conduct a trial by ambush, we contend that this past Thursday was more than enough time for him to have been able to provide us with a 302 for any of the over 25 witnesses for whom there is now no 302. While Mr. Livermore has stated that the government has no duty to provide any such 302s, co-counsel Batty responds that in his 32 years as an AUSA, he never knew of a case where the government had not provided the defense with a 302 (or its equivalent) for each of its witnesses. Also, while Mr. Livermore may not call any of those over 25 witnesses, we do not know that and receiving a summary which he asserts will contain the "substance of their expected testimony" seems to us to be both too little and too late.

6. While we agree that there have been extensive discussions between the parties over the past year and that counsel were

hoping that they would lead to serious plea negotiations, that never happened. Although co-counsel Batty is responsible for not filing the two motions to dismiss more promptly, thereby giving AUSA Livermore more time to analyze these motions, it is clear – as demonstrated by the government's use of adjectives describing defense arguments ("absurd," "farcical") in his responses – which tell us that there is no chance that our position will be given weight by him. Unlike Mr. Livermore, we have not yet given him a deadline by which to accept our offer on a plea.

7. We agree with AUSA Livermore that, as of our conversation on October 10, we expected that the trail would go on as planned on November 13. We also agree that we should have recognized sooner that that date was not a practicable one for us. However, in light of the government's views on our motions, we had started to work with a witness who could address some of the now-necessary details to litigate our two motions to dismiss. Discussions with this witness convinced us that we needed more time.

8. Although we agree that AUSA Livermore has been entirely cooperative with us concerning production of the many thousands of pages of financial and other records, we do not agree that "[d]iscovery was provided … as additional material became available." Mr. Livermore, of course, has had the ability over the past two years and more to request the FBI to conduct an interview, as reflected in a 302. The fact that we are now uncertain as to for whom such 302s will be provided demonstrates that there is a disagreement as to the sufficiency of the discovery produced. Because we have not, as of today, been provided with a firm witness list or with what the government refers to as "the substance of their expected testimony," we, in our view, cannot possibly receive the remainder of the discovery "well in advance of trial."

9. As to the bank account analyst, the government cannot possibly know what our concerns are about that analysis, not provided as of today.

Thank you for your consideration of this matter.

Sincerely,

Walter S. Batty, Jr.

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