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

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

DEFENDANT'S MOTION TO RECONSIDER ORDER DENYING HIS MOTION TO DISMISS COUNTS 1-8 OF THE INDICTMENT, BASED ON THE STATUTE OF LIMITATIONS

Defendant Wayde McKelvy, by his attorneys, Walter S. Batty, Jr. and William J. Murray, Jr., submits his Motion to Reconsider the Order, Doc. No. 139, Denying his Motion to Dismiss Counts 1-8 of the Indictment, Based on the Statute of Limitations:

1. For the reasons stated in his attached Supporting Memorandum, McKelvy moves this Court to reconsider its Order, Doc. No. 139, denying his motion to dismiss Counts 1-8 of the indictment, based on the statute of limitations.

WHEREFORE, McKelvy moves this Court to reconsider its Order denying his motion to dismiss Counts 1-8 of the indictment, based on the statute of limitations.

Respectfully submitted,

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December 15, 2017

CERTIFICATE OF SERVICE

I hereby certify that I have served by electronic mail a true and correct copy of the foregoing Motion to Reconsider the Order, Doc. No. 139, Denying his Motion to Dismiss Counts 1-8 of the Indictment, Based on the Statute of Limitations, and two proposed Orders, on Assistant U.S. Attorney Robert J. Livermore:

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

Dated: December 15, 2017

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

Defendant Wayde McKelvy, by his attorneys, Walter S. Batty, Jr. and William J. Murray, Jr., submits this Memo in Support of Motion for Reconsideration of this Court's Order (Doc. No. 139) denying his Amended Motion to Dismiss Counts 1-8 of the Indictment, based on the Statute of Limitations.

I. INTRODUCTION.

A. Rule 12. This Court correctly noted in Doc. No. 138 ("Op.") at 6, that McKelvy cited the Third Circuit's ruling in United States v. DeLaurentis, 230 F.3d 659, 660–61 (3d Cir. 2000), that a district court could grant a motion to dismiss, under Rule 12, on "a stipulated record." Id. As this Court knows, there are five kinds of motions to dismiss pursuant to Rule 12(b)(3)(A), for "a defect in instituting the prosecution" (such as a limitations motion) and five kinds of motions to dismiss under Rule 12(b)(3)(B), for "a defect in the indictment" (such as a motion for failure to state an offense). As McKelvy has conceded, "he cannot argue that the indictment is defective due to the insufficiency of the factual allegations there as to how the fraud affected … Mantria Financial." Doc. No. 105, at 37-38.

B. This Court has conflated a motion to dismiss based on the alleged insufficiency of the evidence with McKelvy's Amended Limitations Motion, which relied on undisputed evidence. In its Opinion, after distinguishing DeLaurentis, the Court never returned to considering McKelvy's argument that, by relying on

the government's grand jury testimony, etc. – which was undisputed – it was the same as if he were proceeding on a "stipulated record." [1] McKelvy also relied on United States v. Levin, 973 F.2d 463, 470 (6th Cir. 1992), and United States v. Weaver, 659 F.3d 353, 355 n. (4th Cir. 2011)(citing DeLaurentis and eight other circuit court opinions), as stating that a defendant's Rule 12 motion could be based on "pertinent facts" which were not disputed.[2] Weaver, 659 F.3d at 355 n.

This Court, in its citation of United States v. Messina, 2012 WL 463973, at *4 (E.D.N.Y. 2012), for the proposition that "Where an indictment is 'valid on its face,' it 'may not be dismissed on the ground that it is based on inadequate or insufficient evidence,'" Op. at 7, makes the same error it did in construing DeLaurentis. Messina did not concern a statute of limitations defense under section 3293(2), but rather a claim that a count failed to charge an offense.

C. An indictment need not include allegations concerning an affirmative defense, but the government must make sufficient allegations, in a memo or a proffer, to overcome such a defense. The Court has adopted a line of reasoning which is, McKelvy asserts, clearly beside the point and which he has already addressed at some length. In footnote 5, the Court states, "An Indictment, however, need not anticipate affirmative defenses,

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[1] This Court's distinction of DeLaurentis and its general ruling applicable to the ten kinds of dismissal motions under Rule 12 was misdirected. This Court, just as the government did in its Doc. No. 113 at 3-4, focused on a part of McKelvy's Doc. No. 105 dealing with a clearly different issue – whether the indictment should be dismissed due to the alleged insufficiency of the evidence of guilt. 230 F.3d at 661. Referring to a phrase in Rule 12, McKelvy conceded that he was not attacking the sufficiency of the government's evidence "on the merits," Doc. No. 105 at 38, but rather argued that a dismissal is appropriate where the government did not proffer sufficient evidence "to overcome a statute of limitations defense." Id. at 13.

[2] The only specific complaint by the government as to McKelvy's otherwise undisputed proffers concerned the grand jury testimony of attorney Christopher Flannery. McKelvy challenged the government's factual basis for its claim. Doc. No. 121 at 15-18.

such as the statute of limitations defense," citing Smith v. United States, 568 U.S. 106, 111-12 (2013). But McKelvy had already conceded this point, citing Smith in his Doc. No. 121 at 37 n. 22.

While the indictment does not need to contain allegations which refute an affirmative defense, such as the statute of limitations, the government does need, in a case involving section 3293(2), to do more than merely allege that a "financial institution" has been "affected."[3] See, e.g., United States v. Ghavami, 2012 WL 2878126, *7-*10 (S.D.N.Y. 2012)("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)"), aff'd sub nom., United States v. Heinz, 790 F.3d 365 (2d Cir. 2015), cert. denied, 136 S.Ct. 801 (2016); Carollo II, 2011 WL 5023241, *3 (dismissal appropriate where the government did not allege in a memo or proffer sufficient evidence "to overcome a statute of limitations defense"). This Court erred in mis-construing DeLaurentis, Messina, and Smith and by not adopting the reasoning in Carollo and Ghavami. See Doc. No. 129 at 2-10.

Put differently, this Court did not address McKelvy's argument that, at this stage, it is the government's burden to make a colorable (or prima facie) showing that it could prove at trial, beyond a reasonable doubt, that Mantria Financial was a "financial institution" within the meaning of sections 3293(2), 20(10), and 27. See Ghavami, 2012 WL 2878126, at *7; see also Doc. No. 105 at 14.[4]

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[3] As recognized in Ghavami and in United States v. Carollo ("Carollo II"), 2011 WL 5023241, *3 (S.D.N.Y. Oct. 20, 2011), these allegations can be made in a memo or in a proffer.

[4] The existence of "financial institutions" in Ghavami and Carollo was not at issue. In any event, the reasoning of these two cases fully applies to both the "financial institution" and the "affected" elements.

D. Final rulings? Instead of analyzing this issue in terms of whether the government had made sufficient preliminary allegations, in a memo or proffer, to overcome McKelvy's statute of limitations defense, the Court instead made rulings which appear to be framed as final rulings on this issue. For example, the Court ruled that a "financial institution used for fraudulent purposes, however, is still a financial institution under § 27," Op. at 8; "Mantria Financial, therefore, falls within the § 27 definition of mortgage lending business," Op. at 9. For this reason, McKelvy requests that this Court, at the very least, amend its Order (Doc. No. 139), to state that it is being entered "without prejudice" to the defendant's re-presenting his statute of limitations arguments at trial.

E. It is not premature to rule on McKelvy's limitations motion because here, unlike Carnesi, there is no dispute on the underlying facts. McKelvy is familiar with cases such as United States v. Carnesi, 461 F. Supp. 2d 97, 99 (E.D.N.Y. 2006), cited by the Court. Op. at 7 n. 5. Carnesi was indicted on May 9, 2006 for conspiracy to launder money. Id. at 98. The indictment alleged that the conspiracy took place within the five-year statute of limitations. Id.

This Court's summary of the ruling in Carnesi is accurate – that the court had denied Carnesi's motion to dismiss, based on the five-year statute of limitations, where the motion was based on an argument that no reasonable juror would reject the defense that the defendant had withdrawn from the alleged conspiracy. The Opinion noted that in Carnesi, where the government disputed the withdrawal claim and where the circumstances of the alleged withdrawal were "issues of fact for the jury to decide, "The court in Carnesi ruled that "at this stage of the litigation the motion is premature." Id. at *99. McKelvy does not quarrel with the Carnesi opinion, but rather with this Court's ruling that it is applicable here.

There are two reasons why this Court erred in relying on Carnesi. First, the ruling there that the motion to dismiss was premature is distinguishable because it was grounded on the existence of a factual dispute between the government and the defendant. As the Court knows, McKelvy accepted as true all of

the underlying factual allegations in the indictment, as required by United States v. Stock, 728 F.3d 287, 299 (3d Cir. 2013); see Doc. No. 105 at 10-11, 17-18. Rather, McKelvy only disputed that this acceptance applied to mixed legal/factual allegations, such as those where the indictment alleged that Mantria Financial was a "financial institution" which had been "affected" or that it was a "mortgage lending business."

Although McKelvy argued that the most logical interpretation of the case law requires that the "accept as true" principle not be applied to mixed legal/factual allegations in an indictment and although the courts in the four cases discussed in his Doc. No. 129 (Carollo, at 2-3, Ghavami, 3-5, United States v. Ohle, 678 F.Supp.2d 215, 228–29 (S.D.N.Y. 2010)(5-7), and United States v. Kerik, 615 F.Supp.2d 256, 268 (S.D.N.Y. 2009)(7-8)), support McKelvy's interpretation, he had not previously found a Third Circuit case which directly so states.

However, McKelvy has now found a case, United States v. Mallory, 765 F.3d 373, 383 (3d Cir. 2014), which, by analogy, is clear authority for his position on the applicability of mixed legal/factual allegations in the indictment. As stated in Mallory, the Third Circuit has consistently ruled, for example, that "on appeal from a decision involving the presence or absence of exigent circumstances justifying a warrantless search or seizure, this Court will review the district court's [underlying] findings of fact for clear error, but will review its conclusion that those facts establish a legal exigency de novo" (i.e., applying the law to the facts). As Mallory further stated, "This decision is consistent with the law in every other circuit, and it is consistent with our own decisions regarding mixed questions of law and fact." Id. (citation omitted). From this, it must be concluded that, in our Circuit and "in every other circuit," underlying facts are distinguished from the de novo question of applying the law to the facts. Accordingly, Mallory supports McKelvy's position that the "accept as true" cases apply only to the underlying facts, rather than to "decisions regarding mixed questions of law and fact."

There is a second reason why Carnesi is inapplicable here - all the cases with which McKelvy is familiar which involve the specific statute of limitations at issue here, section 3293(2), have rejected the government's argument that a defendant's motion to dismiss was "premature." See, Doc. No. 105 at 13 (twice), 14-15; Doc. No. 129 at 2-10. One obvious explanation for the different results between Carnesi and the 3293(2) cases is that the issue in Carnesi was "on the merits" - whether the defendant continued to be a member of the charged conspiracy. The issues under section 3293(2), by contrast, concern a collateral issue – how to apply the separate requirements for an extended limitations period.

II. THE GOVERNMENT HAS NOT MADE A COLORABLE SHOWING THAT MANTRIA FINANCIAL IS A "FINANCIAL INSTITUTION."

A. While a "financial institution used for fraudulent purposes" is not automatically disqualified from being considered a "financial institution under § 27," Mantria Financial was never operated as a "financial institution." Assuming that this Court was correct in deciding that it did not need to follow the procedure of insisting that the government offer proof of what evidence it would put on at trial, as that procedure was used in Ghavami, Carollo, and the two other S.D.N.Y. cases which McKelvy discussed in his Doc. No. 129, this Court's construction of United States v. Serpico, 320 F.3d 691, 694 (7th Cir. 2003), was clearly mistaken, as was its reading of the indictment.

In its Opinion, at 8, the Court ruled that "[t]he real crux of Defendant's argument here is that since Mantria Financial operated for fraudulent reasons, it was not in the mortgage lending business, as defined in § 27." McKelvy would agree with this characterization of his position only if the Court had added the word "solely" in the "since" clause, so that this clause would instead read "since Mantria Financial operated solely for fraudulent reasons,…." McKelvy devoted substantial parts of his limitations memos and purposed findings/conclusions to demonstrate that, according to the evidence the government presented in the grand jury, etc., Mantria Financial was never operated as a "financial institution" but only as a fraud.

This Court stated that "A financial institution used for fraudulent purposes, however, is still a financial institution under § 27," Op. at 7, citing Serpico. While McKelvy agrees that this is sometimes true, he does not agree that the Seventh Circuit's analysis in Serpico supports this Court's conclusion that Mantria Financial was a "financial institution." Most fundamentally, the issue considered by the Serpico court was not whether the banks at issue were "financial institutions," but rather whether they were "affected." 320 F.3d at 694. Second, regarding the proper interpretation of Serpico, the focus must be the language used by the court regarding the two banks' being "willing participants" in a fraud.

> **Essentially, Serpico claims that the banks in both schemes were [not affected by the fraud because they were] willing participants who would not have chosen to participate unless it was in their best interests (that is, … they expected to make money on the deals). But 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," as shown clearly by the various banks' dealings with Serpico.**

Id. at 695 (emphasis added). (Parsing this language is challenging, partly because the quoted sentence includes a disfavored double negative.) Rather, the court determined only that banks which were "willing participants" in a fraud scheme were "not necessarily" disqualified from being found to have been "affected" by the fraud.

As McKelvy stated in his Doc. No. 105,

> **[W]hile we agree that just because an institution [such as Mantria Financial] 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. at 42. McKelvy stands by his reading of Serpico.

To properly apply Serpico's analysis, there are two key points: (1) The Seventh Circuit's ruling that the defendant's contention that the banks were "willing participants" in the scheme, id., concerned only - to repeat – whether the banks were "affected." (2) Serpico's emphasis on its finding that "the whole purpose of [section] 3293(2)" - "protect[ing]" financial institutions against "would-be criminals," 320 F.3d at 694-95 – supports McKelvy's reading of the case. There is no dispute that Wragg (51%) and Knorr (49%) were the co-owners of Mantria, and Mantria was the 100% owner of Mantria Financial. See Proposed Findings of Fact 3, 4. Moreover, Wragg was the founder, CEO, and Chairman of Mantria Financial; Knorr was the President and Chief Operating Officer. Put succinctly, following Serpico, Mantria Financial does not deserve protection against being "affected" by the criminal actions of its two co-owners/co-executives.

B. If the Court is correct that it need only look to the indictment to support the conclusion that Mantria Financial was a "financial institution," then the indictment should have been "read as a whole." In its analysis of the issue of whether the government had established, for purposes of the motion, that Mantria Financial was a "financial institution," Op. at 8-9, the Court relied on its paraphrased version of the following three sentences in Count 1, ¶ 5:

> **[1] Mantria Financial was a financial institution and mortgage lending business …. [2] Mantria Financial was licensed in Tennessee to finance real estate mortgages.**
> **…**
> **[3] Defendants … then used the proceeds from the land "sales" for other Mantria-related business and for their own personal enrichment.**

Id. (quotation marks for the word "sales" in the original). As noted above, McKelvy accepts as true the underlying facts, such as those set out in the second and third sentences above, but disputes the mixed legal/factual allegation that "Mantria Financial was a financial institution …."

This Court ruled, based on the allegations contained in these three sentences in the indictment and on the statutory definition of "mortgage lending business" in 18 U.S.C. §§ 20(10) and 27, that "Mantria Financial … falls within the § 27 definition of mortgage lending business." Op. at 8-9.

But the Court's analysis suffers from an important gap. When marshalling its support for its ruling on the "financial institution" issue, the Court did not differentiate between the first two sentences quoted above, which arguably support the Court's ruling, and the third sentence – using "the proceeds from the land 'sales' for other Mantria-related business …" – which does not support the Court's reasoning.

When considering a motion to dismiss, the indictment is "read as a whole." Cf. United States v. Reed, 77 F.3d 139, 140 n. 1 (6th Cir. 1996) (en banc), United States v. Barker Steel Co., Inc., 985 F.2d 1123, 1125 (1st Cir. 1993). Read in that manner, it is apparent that while, as alleged in the second quoted sentence - "Mantria Financial was licensed in Tennessee to finance real estate mortgages" – this company, as described in the third such sentence and in the other four allegations set out below, financed real estate "sales"[5] and mortgages in name only:

-- "Inflate[d] value[s]," "paper profits." "Defendants … used the funds raised by Mantria Financial to … finance mortgages for undeveloped real estate in Tennessee owned by the Mantria or its subsidiaries in order to generate paper profits for Mantria and inflate the value of the undeveloped land. Count 1, ¶ 5.[6]

-- "Appearance of development." "Mantria … made small improvements to the real estate to 'give the appearance of development to investors.'" Count 1, ¶ 6.

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[5] "[C]onstru[ing] those allegations in a practical sense with all of the necessary implications," cf. Reed, Barker Steel, it is apparent that the indictment used quotation marks for "sales" to indicate that they were not ordinary transactions.

[6] Earlier in its Opinion, the Court referred to this allegation, as well as to the other three allegations quoted below, when describing the indictment in general. Op. 2-4.

-- "No [actual] profits." The defendants … "claimed that Mantria made millions … selling real estate …, they knew that Mantria had virtually no earnings, no profits, and was merely using new investor money to repay earlier investors." Count 1, ¶ 11.

-- "Secured by real estate." The defendants … "made the following materially false statements to prospective investors: … That Mantria investments were secured by real estate … which was worth twice as much as the investments, …. Count 1, ¶ 13(b).

In the five sentences quoted above – the sentence about the "proceeds from the land 'sales,'" and the four additional allegations which were not discussed as a part of the Court's analysis – encapsulated the essence of McKelvy's lengthy proffers. In these five sentences, the government has explained why the defendant is correct in arguing that Mantria Financial was not, as a matter of law, a "mortgage lending business" – because the "mortgages" mentioned in the first two sentences of Count 1, ¶ 5, are implicitly described as so-called "mortgages," just as were the so-called "sales" referred to in the quoted sentence on "the proceeds from the land 'sales.'"

C. Proposed Supplemental Conclusions of Law. When McKelvy submitted Amended Proposed Findings of Fact and Conclusions of Law (Doc. No. 106), in support of his Doc. No. 105, he relied on what he argued were undisputed allegations made by the government in the grand jury testimony, etc. Since the Court has, in essence, rejected the defendant's approach, he now argues that the Proposed Conclusions of Law can be based on the above-quoted allegations in the indictment. Accordingly, McKelvy submits his Supplemental Proposed Conclusions of Law, relying on the five passages in the indictment which are quoted above.

1. The "mortgages" referred to in the indictment were not legitimate – inadequate security. Based on the allegations quoted above from Count 1, ¶ 5, that Mantria "inflate[d] the value of the undeveloped land," which was, as alleged in Count 1, ¶ 13(b) to function as security for the "mortgages," but which the defendants "knew … was [worth] substantially less"

than claimed, this Court should take judicial notice, as McKelvy asserted in his Proposed Conclusion of Law ("CoL") 27 (page 21), that no legitimate "mortgage" lending business would have issued mortgage loans on the properties described in the indictment, because no legitimate mortgage lender would have taken the risk of having to foreclose on land worth substantially less than the claimed value, in which case an interest in property would not be a mortgage, one of the definitions of which is "security for the repayment of money borrowed" (Dictionary.com).

2. The "mortgages" referred to in the indictment were not legitimate – no actual land "sales." Based on the recitations above of allegations in the indictment of the defendants' "us[ing] the proceeds from the land 'sales' for other Mantria-related business and for their own personal enrichment" (internal quotation marks for the word "sales" in the original), and where these "sales" only "generate[d] paper profits," this Court should take judicial notice that Mantria Financial did not actually engage in "mortgage lending." No legitimate mortgage lender could afford to participate in transactions where money was not "lent" to actual "purchasers" for actual land "sales," or which only "generate[d] paper profits," or where "sales" proceeds were used for "personal enrichment," as alleged in the indictment. Under the scenario alleged in the above-quoted passages in the indictment, Mantria Financial was not actually lending or having a customer "borrow" money or "pay [it] back with interest" (Cambridge English Dictionary). Cf. SoL 28, at page 21 of Doc. No. 106.

3. Mantria Financial was not a "business," part (a). For the same reasons as set out in paragraph 2 above, based on the dictionary definition of "business," Mantria Financial was not a "business," in that it was not designed to make a profit (Black's Law Dictionary). It should be noted that a definition of "profit" is "the excess of returns over expenditure in a transaction or series of transactions" (Merriam-Webster, definition no. 2). Cf. SoL 29, at pages 21-22 of Doc. No. 106.

4. Mantria Financial was not a "business," part (b). The funds raised from the investors, rather than funds from the so-called "purchasers," were used to give the appearance of "financing"

mortgages; and the monies generated by this approach were only "paper profits," rather than the business income which a legitimate "mortgage lending business" would need to earn. Cf. SoL 30, at page 22 of Doc. No. 106.

5. Mantria Financial was not a "business," part (c). The funds raised from the investors, rather than funds from the so-called "purchasers," were used to give the appearance of "financing" mortgages; and the monies generated by this approach were only "paper profits," rather than the business income which a legitimate "mortgage lending business" would seek to earn. Cf. SoL 30, at page 22 of Doc. No. 106.

6. Mantria Financial did not "finance or refinance any debt." For the same reasons as set out in paragraph 2 above, based on the dictionary definition of "debt" – "something, typically money, that is owed or due," Oxford English Dictionary, definition no. 1 – the Court should rule that Mantria Financial did not "finance[] or refinance[] any debt," as required by 18 U.S.C. § 27, because there no actual "sales" of real estate on which there could be any debt. Cf. SoL 32, at page 22 of Doc. No. 106.

7. In summary. For the same reasons as set out in paragraphs 1-6 above, McKelvy argues that, as a matter of law, although the indictment alleged that Mantria Financial "was licensed in Tennessee to finance real estate mortgages," it was not, in operation, a "financial institution" under the relevant statutes, for the reasons stated above. Accordingly, the government cannot and will not be able to make a colorable case at trial that Mantria Financial was a "financial institution" and will not be able to invoke section 3293(2), whereby the statute of limitations could be extended to ten years.

III. THE GOVERNMENT HAS NOT MADE A COLORABLE SHOWING THAT MANTRIA FINANCIAL WAS "AFFECTED" BY THE FRAUD.

A. The government's burden. As in its discussion of the "financial institution" issue, the Court did not address McKelvy's argument that, at this stage, it is the government's burden to make a colorable (or prima facie) showing that it

could prove at trial that Mantria Financial was "affected" within the meaning of sections 3293(2), 20(10), and 27. Doc. No. 105 at 11, 13-15. As argued above in the section on the financial institution element, the Court has phrased its ruling on the "affected" element as if it were deciding the issue at trial ("Therefore, the fraud directly affected Mantria Financial, and the ten-year statute of limitations applies.") Op. at 11.

B. McKelvy agrees, as he had argued in his memos, that one of the tests for whether a financial institution has been "affected," under section 3293(2), is whether the institution experienced a "new or increased" risk of loss. In its Opinion, the Court stated that one of the tests for determining whether an institution has been "affected" is whether it had experienced a "new or increased" risk of loss. Id. at 9-10. McKelvy provided authority for this rule in his Doc. No. 105, at 40, 45-47, 50-51.

C. The Court erred in its distinctions of Carollo and Ghavami. The Court's distinction of United States v. Carollo ("Carollo I"), 2011 WL 3875322 (S.D.N.Y. Aug. 25, 2011), and Carollo II, supra, in which the defendants' motion to dismiss three counts on limitations grounds was granted pre-trial, was not a substantial one. While this Court correctly observed that the court there ruled that any risk of loss was "at most … de minimis," Carollo I, at *2, this Court ruled that the case against McKelvy was different because (1) the indictment alleged that "the fraud resulted in a net loss of $37 million" and (2) the government had proffered "that Mantria Financial went into bankruptcy as a result of the conspirators' fraudulent conduct." Op. at 11-12.

These two attempted distinctions of Carollo are remarkable ones. First, as McKelvy has emphasized, the $37 million net loss figure alleged a loss to the investors, which is not a relevant consideration under section 3293(2). The government had taken a similar position in its Doc. No. 113 at 2, which McKelvy had rebutted in his Doc. No. 121 at 37-38. McKelvy argues that this misapplication of the loss figure is a fundamental one, which may color the analysis in the Opinion as a whole.

Second, the government's contention on bankruptcy consists of 20 words: "[w]hen the Mantria Ponzi scheme collapsed in November 2009, Mantria Financial and the remainder of the Mantria entities went bankrupt." Doc. No. 113 at 9. (There is no such allegation in the indictment.) The government does not even attempt to allege the extent of any actual loss or risk of loss to Mantria Financial. Moreover, the logical fallacy, "post hoc ergo propter hoc" ("because an event occurred first, it must have caused this later event," Merriam-Webster.com), applies here – as emphasized by McKelvy, there is no semblance of a "detailed explanation" of why the fraud was a "direct cause" of any loss. Cf. Doc. No. 105 at 45-46; Doc. No. 121 at 34-36.

Moreover, this Court's attempted distinction of Ghavami is without merit. This Court stated:

> **[A]s in Ghavami, the Indictment and the evidence the Government intends to offer at trial sufficiently alleges facts that illustrate that Mantria Financial experienced both a risk of loss and actual loss, and therefore that the fraud affected Mantria Financial, a financial institution, for purposes of § 3293(2).**

This reading of the indictment is incorrect. Other than placing the word "affecting" before the words "financial institution" in the charging paragraphs of Counts 1-8, there was no allegation in the indictment concerning loss to Mantria Financial. As for its proffer of evidence, the government has provided nothing beyond the above-quoted 20 words.

D. The Court appears to have pre-determined that Mantria Financial experienced "a risk of loss [which] was not de minimis." Without a "detailed explanation" of any "direct cause" of any actual or risk of loss on these points, as required by the cases cited by McKelvy, this Court should have granted the defendant's limitations motion. Instead, the government has argued that the adverse effect on Mantria Financial was an obvious one – "The government cannot conceive of an affect greater than bankruptcy and receivership for a financial institution." Doc. No. 113 at 9.

The Court has apparently accepted the government's approach on this point, finding that, "Based on the description of the alleged fraud in the Indictment and the Government's proffers, the risk of loss was not de minimis." Op. at 12. McKelvy disagrees – the indictment details the fraud against and losses by the investors, but there is not a word there as to the nature of any actual loss or risk of loss to Mantria Financial. Likewise, the government's only proffer on this issue was that attorney Flannery would testify that Mantria Financial went bankrupt after the SEC began its investigation in November 2009, Doc. 113 at 9, which has never been in dispute.

E. The Court did not address McKelvy's argument that the government was required to overcome the defense that Mantria Financial was headed into insolvency in the fall of 2007. Moreover, this Court never discussed any of McKelvy's several references, in his Doc. No. 212 at 22-26, 29, to S/A Annette Murphy's grand jury testimony to the effect that Mantria (including Mantria Financial) was headed into insolvency in late 2007 and was bailed out only by defendant Troy Wragg's successfully raising investor funds for Mantria and Mantria Financial. If anything, the Court's observation that the government "submits that it will offer the testimony of [attorney Flannery], who will explain that when the Ponzi scheme collapsed in November 2009, Mantria Financial became bankrupt," Op. at 4, makes McKelvy's point – that there is ample testimony to the effect that Mantria and Mantria Financial needed to be – and were – temporarily bailed out to avoid insolvency.

Moreover, neither the government nor the Court could rely on McKelvy's having to accept as true the allegations in the indictment on this point, because the indictment does not mention that the fraud (allegedly) caused Mantria and Mantria Financial to go into bankruptcy.

IV. THE GOVERNMENT HAS NOT MADE A COLORABLE SHOWING THAT ANY UNIDENTIFIED INSTITUTION WAS "AFFECTED" BY THE FRAUD.

A. Neither the indictment nor the government's allegations are sufficient to show that any unidentified financial institution

was "affected" under the government's second rationale. As to what McKelvy referred to as the government's "second rationale" for its contention that a financial institution was "affected," within the meaning of section 3293(2), the Court states that the government has provided sufficient allegations of this impact on "the financial institutions of the victims" by means of the indictment and "the discovery materials." Op. at 13.

-- The indictment. As to the allegations in the indictment, this Court stated that the government "submits … that the Indictment sufficiently alleges that the offenses affected investors' financial institutions." Op. at 13, referring to Doc. No. 113 at 13. Looking to the government's assertion in Doc. No. 113 at 13, it is that, "as alleged by the indictment, … McKelvy's fraud affected the financial institutions from whom the victims of the fraud secured credit and funds to invest in Mantria." But there is no such allegation in the indictment.

The closest the indictment comes is in one of the Background paragraphs, Count 1, ¶ 2, which concerns what McKelvy told "prospective investors [about] liquidat[ing] other investments" to fund their investments in "Mantria and its related entities." There is simply no allegation in this sentence – or anywhere else in the indictment – that any of the investors, as a result of their following McKelvy's advice, defaulted on any of the loans described here and no allegation that a named financial institution was subjected to a new or increased risk of loss as a result of the investors' following such advice.

-- Discovery materials, as described in Doc. No. 113. The Court also relied on the government's allegations in Doc. No. 113 at 13, that "the discovery materials … include ample evidentiary support" for the government's second rationale, using as an example this proffer: "[B]ased on [McKelvy's] advice, investors DB and PB withdrew money from a credit card and took out a home equity line of credit to invest in Mantria." Op. at 13, citing Doc. No. 113. As such, this allegation provides no information about any impact on any financial institution.

B. There is no known authority for failing to identify financial institutions. The government has not identified any

financial institution which it alleges was "affected" under the second rationale. Instead, the Court accepts the government's representation that "the discovery materials … include ample evidentiary support," Op. at 13, for the government's allegations, which allegations, as argued above and below, are irredeemably vague. While McKelvy has found in the discovery the names of several financial institutions with which the investors dealt, it is not in our ken to make suitable allegations for the government, connecting "affecting" with "financial institutions." Moreover, there is no known case which supports the implicit argument that the government need not identify the financial institution(s) purportedly affected.[7]

C. <u>There is no known authority for failing to identify the amount of any actual loss or risk of loss</u>. The government's filings do not specify the amount of any actual or potential loss. McKelvy knows of no case concerning section 3293(2) which fails to include any such figures.

D. <u>The government does not make any of the three necessary allegations on the "affected" element</u>. Moreover, the government, has not made any of the three necessary allegations, as set out in his Doc. No. 105 at 53-54 and Doc. No. 121 at 39-41: the government must provide (1) a "detailed explanation," as to any investors, including DB and PB, for having defaulted on any loan held by an identified financial institution, as a result of McKelvy's advice;[8] (2) an allegation that a financial institution suffered an actual loss or "substantial" "new or increased" risk of loss, in a specified amount, as a result of any such default; and/or (3) an allegation that McKelvy's

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[7] Some of the cases interpreting section 3293(2), such as <u>Ghavami</u>, use pseudonyms (e.g., "Financial Institution A"), in those instances the government has identified the particular institution under seal. 2012 WL 2878126, *7-*10.

[8] McKelvy argued in Doc. No. 105 that the government needed to provide six kinds of basic information to provide a "detailed explanation," and argued in Doc. No. 121 that the government also needed to provide a narrative of the investors' investments in Mantria as well as the alleged impact on financial institutions.

advice, which must be part of the alleged fraud,[9] "directly" caused the actual loss or risk of loss.

E. There is no known authority for the government's and the Court's apparent assumption that any commericial lending relationship carries an automatic risk of loss. Rather, the government's implicit position - seemingly accepted by the Court – is that anytime a borrower merely entered into any kind of loan, the lender was automatically placed at a risk of loss. Nothing else can explain the total absence of any details from the government. Such a standard would mean, inter alia, that the various tests fashioned by the courts for determining whether a risk of loss is a "substantial" one, as set out in Doc. No. 105, at 46-47 – "sufficient risk;" "[not] too remote;" not "too attenuated;" "[a] realistic prospect of loss;" the financial institution has been "prejudiced" by the fraud charged; and the impact of the fraud has been "more than de minimis," id. (citations omitted), would be rendered moot.

F. Neither Serpico nor Allen advances the government's position. Although it is undoubtedly true, as this Court stated, Op. at 13, quoting Serpico, that "the verb 'to affect' expresses a broad and open-ended range of influences," 320 F.3d at 694, McKelvy reads this literally – that "the range" of fraudulent influences which could "affect" a financial institution is "open-ended" – but does not agree that that means that an institution is automatically affected, no matter what the facts are.

Moreover, McKelvy also agrees this Court's pointing out, Op. at 13, that United States v. Anthony Allen, 160 F. Supp. 3d 698, 706 (S.D.N.Y. 2016) (quoting Heinz, 790 F.3d at 367), explained that "if a juror conclude[ed] that a bank would have made different investment decisions if it had known of the fraud,

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[9] As the Court knows, McKelvy has filed a motion to dismiss for failure to state an offense, Doc. No. 111, in which he asserts that, under United States v. Dobson, 419 F.3d 231, 237 (3d Cir. 2005), there is no allegation in the charging paragraph of the indictment of an overarching Ponzi scheme which includes McKelvy's conduct.

then a juror could legitimately conclude that a bank was 'affected.'" But, again, this proves McKelvy's point – under Serpico, as discussed above at 6-8, it is impossible to argue that Mantria Financial would have made "different … decisions if it had known of the fraud," because its two co-owners/co-executives master-minded the fraud scheme. By definition, Mantria Financial "had known of the fraud."[10]

Respectfully submitted,

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Dated: December 15, 2017

[10] **Under all the cases cited by McKelvy, the government is required to make the necessary allegations, whether in the indictment, or by way of proffer or memo. McKelvy knows of no authority for the government to leave it to the defense to put together the government's case.**

CERTIFICATE OF SERVICE

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

Robert J. Livermore, Esq.
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Philadelphia, Pa 19106
215-861-8505
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/s/ Walter S. Batty, Jr.
Walter S. Batty, Jr.

Dated: December 15, 2017

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

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

ORDER

AND NOW, this day of , 201_, after consideration of McKelvy's Motion to Reconsider the Order, Doc. No. 139, Denying his Motion to Dismiss Counts 1-8 of the Indictment, Based on the Statute of Limitations, together with the Supporting Memorandum, and of any Response by the government, enters the following Order:

It is ORDERED that McKelvy's Motion to Reconsider the Order, Doc. No. 139, Denying his Motion to Dismiss Counts 1-8 of the Indictment, Based on the Statute of Limitations, be and hereby is GRANTED, in full, and it is hereby further ORDERED that Counts 1-8 of the indictment are hereby DISMISSED, with prejudice.

BY THE COURT:

_____

JOEL H. SLOMSKY, J.

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 , 201_, after consideration of McKelvy's Motion to Reconsider the Order, Doc. No. 139, Denying his Motion to Dismiss Counts 1-8 of the Indictment, Based on the Statute of Limitations, together with the Supporting Memorandum, and of any Response by the government, enters the following Order:

It is ORDERED that McKelvy's Motion to Reconsider the Order, Doc. No. 139, Denying his Motion to Dismiss Counts 1-8 of the Indictment, Based on the Statute of Limitations, be and hereby is GRANTED, in part, and it is hereby further ORDERED that Doc. No. 139 is clarified to read that it was entered without prejudice to the defendant's re-presenting any or all of his statute of limitations arguments at trial..

BY THE COURT:

_____

JOEL H. SLOMSKY, J.

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 , 201_, after consideration of McKelvy's letter request to permit him to file out of time his Motion to Reconsider the Order, Doc. No. 139, Denying his Motion to Dismiss Counts 1-8 of the Indictment, Based on the Statute of Limitations, and of any Response by the government, enters the following Order:

It is ORDERED that McKelvy's letter request to permit him to file out of time his Motion to Reconsider the Order, Doc. No. 139, Denying his Motion to Dismiss Counts 1-8 of the Indictment, Based on the Statute of Limitations, be and hereby is GRANTED.

BY THE COURT:

_____

JOEL H. SLOMSKY, J.