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

UNITED STATES OF AMERICA, v. WAYDE MCKELVY, Defendant.	CRIMINAL ACTION NO. 15-398-3

ORDER

AND NOW, this 12th day of January 2018, upon consideration of Defendant's Motion to Reconsider Order Denying His Motion to Dismiss Counts 1-8 of the Indictment Based on the Statute of Limitations (Doc. No. 145) and Government's Response to Defendant's Motion for Reconsideration of the Court's Order Denying the Motion to Dismiss Counts 1-8 (Doc. No. 150), it is **ORDERED** that the Motion for Reconsideration (Doc. No. 145) is **DENIED**.[1]

[1] On June 14, 2017, Defendant Wayde McKelvy filed an Amended Motion to Dismiss Counts 1-8 of the Indictment, Based on the Statute of Limitations. (Doc. No. 105.) On November 17, 2017, the Court issued an Opinion and Order (Doc. Nos. 138, 139) denying Defendant's Motion (Doc. No. 105). In the Opinion, the Court held that sufficient allegations exist for application of the ten-year statute of limitations provided in 18 U.S.C. § 3293(2), and that Counts 1 to 8 of the Indictment would not be dismissed. (Doc. No. 138 at 12, 14.)

Thereafter, Defendant filed a Motion to Reconsider [the] Order Denying His Motion to Dismiss Counts 1-8 of the Indictment Based on the Statute of Limitations. (Doc. No. 145.) The Government filed a Response to Defendant's Motion for Reconsideration. (Doc. No. 150.) For reasons that follow, Defendant's Motion to Reconsider (Doc. No. 145) will be denied.

"The purpose of a motion for reconsideration . . . is to correct manifest errors of law or fact or to present newly discovered evidence." Howard Hess Dental Labs. Inc. v. Dentsply Int'l, Inc., 602 F.3d 237, 251 (3d Cir. 2010) (omission in original) (quoting Max's Seafood Cafe ex rel. Lou-Ann, Inc. v. Quinteros, 176 F.3d 669, 677 (3d Cir. 1999)). Thus, a proper motion for reconsideration "must rely on one of three grounds: (1) an intervening change in controlling law; (2) the availability of new evidence; or (3) the need to correct clear error of law or prevent manifest injustice." Wiest v. Lynch, 710 F.3d 121, 128 (3d Cir. 2013) (quoting

Lazaridis v. Wehmer, 591 F.3d 666, 669 (3d Cir. 2010)). However, "[a] motion for reconsideration 'addresses only factual and legal matters that the Court may have overlooked. It is improper on a motion for reconsideration to ask the Court to rethink what it had already thought through—rightly or wrongly.'" In re Blood Reagents Antitrust Litig., 756 F. Supp. 2d 637, 640 (E.D. Pa. 2010) (quoting Glendon Energy Co. v. Borough of Glendon, 836 F. Supp. 1109, 1122 (E.D. Pa. 1993)). Therefore, "[m]ere dissatisfaction with the Court's ruling . . . is not a proper basis for reconsideration." Progressive Cas. Ins. Co. v. PNC Bank, N.A., 73 F. Supp. 2d 485, 487 (E.D. Pa. 1999). Furthermore, "[b]ecause federal courts have a strong interest in the finality of judgments, motions for reconsideration should be granted sparingly." In re Asbestos Prods. Liab. Litig. (No. VI), 801 F. Supp. 2d 333, 334 (E.D. Pa. 2011) (quoting Cont'l Cas. Co. v. Diversified Indus., Inc., 884 F. Supp. 937, 943 (E.D. Pa. 1995)).

Defendant does not assert that there is an intervening change in controlling law or the availability of new evidence that warrants reconsideration of the Court's denial of his Motion. Instead, he argues that the Court committed error in denying his Motion. As noted, however, "[m]ere dissatisfaction with the Court's ruling . . . is not a proper basis for reconsideration." Progressive Cas. Ins. Co., 73 F. Supp. 2d at 487. Although Defendant reasserts arguments that he has already made and which the Court has already reviewed, the Court still will address each argument in turn.

First, Defendant contends that the Court failed to properly address his argument that "by relying on the government's grand jury testimony . . . —which was undisputed—it was the same as if he were proceeding on a 'stipulated record.'" (Doc. No. 145-1 at 2.) Defendant argues that the Court could have decided his Motion based on undisputed facts. (Id.) As the Court noted in its Opinion, however, "[o]nly where the Government 'has made what can fairly be described as a full proffer of the evidence it intends to present at trial' can the Court address 'the sufficiency of the evidence . . . on a pretrial motion to dismiss an indictment.'" (Doc. No. 138 at 7) (quoting United States v. Gotti, 457 F. Supp. 2d 411, 421 (S.D.N.Y. 2006) (omission in original) (quoting United States v. Alfonso, 143 F.3d 772, 776-77 (2d Cir. 1998)).

In his Motion to Dismiss, Defendant's proffers of evidence consisted of grand jury testimony, deposition testimony from the Securities and Exchange Commission's civil case, statements made to the Federal Bureau of Investigations, the Government's discovery documents, and stipulations between the parties. The Government has not agreed that this evidence constitutes a full proffer of the evidence it intends to present at trial. In addition, Defendant concedes in his Motion to Reconsider that the Government disputes Defendant's proffer of evidence regarding the grand jury testimony of Christopher Flannery, an attorney for Mantria. (Doc. No. 145-1 at 2 n.2.) As such, Defendant's proffers of evidence were neither a full proffer of the Government's evidence nor undisputed, and therefore were not the same as a "stipulated record." Moreover, in making this argument, Defendant merely repeats the same argument he made in his Motion to Dismiss, which the Court reviewed and denied.

Second, Defendant for the first time cites United States v. Mallory, 756 F.3d 373 (3d Cir. 2014), and argues that in moving to dismiss the Indictment, he was not required to accept as true allegations in the Indictment that were based on "mixed questions of law and fact." (Doc. No. 145-2 at 5.) He contends that in Mallory, the Court held that "on appeal . . . 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." (Id. (alteration in original) (quoting Mallory, 765 F.3d at 383).) He argues that, by analogy, Mallory compels the conclusion that "underlying facts are distinguished from the de novo question of applying the law to the facts," and that Defendant therefore is not required to accept as true mixed questions of law and fact in the Indictment. (Id.)

Mallory is inapposite. In Mallory, the Third Circuit reviewed the district court's grant of a motion to suppress. 765 F.3d at 381. In determining the appropriate standard of review, the Court explained:

> Which standard of review is appropriate in a given circumstance depends on which judicial actor—the trial judge or the appellate panel—has a comparative advantage in resolving the issue at hand. In United States v. Brown, we adopted a "functional analysis" for determining the appropriate standard of review for mixed questions of law and fact, an analysis that reflects the relative institutional competencies of district courts and courts of appeals. 631 F.3d 638, 644 (3d Cir. 2011). When there is a need "to control and clarify the development of legal principles" through the "collective judgment" of appellate courts, de novo review is appropriate. Id. at 643 (citing Ornelas v. United States, 517 U.S. 690, 697, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996)). On the other hand, trial judges are better positioned to assess such questions as "witness credibility and juror bias" because these matters turn on "evaluations of demeanor," and therefore we overturn such findings only if they are clearly erroneous. Id.

Id. at 382.

The Court declines to apply here the reasoning of Mallory, a decision which concerns the appropriate standard of review of certain district court findings. It does not specifically cover a district court's review of allegations in an indictment raised in a statute of limitations challenge. The Court already determined that the factual allegations were sufficient for application of the ten-year statute of limitations provided in 18 U.S.C. § 3293(2).

Third, Defendant contends that the Court did not properly address his 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 [18 U.S.C. § 3293(2), 18 U.S.C. § 20(10), and 18 U.S.C. § 27]." (Id. at 3.) Defendant reasserts his argument that based on United States v. Ghavami, No. 10 Cr. 1217, 2012 WL 2878126 (S.D.N.Y. 2012), and United States v. Carollo, No. 10 CR 654, 2011 WL 5023241 (S.D.N.Y. Oct. 20, 2011), the Government was required to offer proof of the evidence it would put forth at trial on this claim and that it has failed to do so.

As such, Defendant argues that the Court erred in failing to adopt the reasoning of Ghavami and Carollo. (Doc. No. 145-1 at 3.)

As an initial matter, Ghavami and Carollo both are decisions from the United States District Court for the Southern District of New York and therefore are not binding on this Court. And again, the Court declines to adopt Defendant's requested standard that "it is the government's burden to make a colorable . . . showing that it could prove at trial, beyond a reasonable doubt, that Mantria Financial was a 'financial institution' within the meaning of [18 U.S.C. § 3293(2), 18 U.S.C. § 20(10), and 18 U.S.C. § 27]." Defendant's argument on this ground is not based on "the need to correct clear error of law or prevent manifest injustice." Wiest, 710 F.3d at 128 (quoting Lazaridis, 591 F.3d at 669). The Government has the right to prove this claim at trial with requisite evidence.

Fourth, Defendant asserts once again his position that the Government has failed to prove that Mantria Financial was a mortgage lending business within the meaning of 18 U.S.C. § 3293 because it operated solely as a fraud. (Doc. No. 145-1.) As noted in the Court's Opinion, the Indictment alleges that Mantria Financial was licensed in Tennessee to finance real estate mortgages and that Defendants used funds raised by Mantria Financial to purchase or finance real estate mortgages. That Defendant merely disagrees with the Court's reading of the Indictment and determination that the Government sufficiently alleged that Mantria Financial was a mortgage lending business is an insufficient reason for reconsideration. As noted, "[i]t is improper on a motion for reconsideration to ask the Court to rethink what it had already thought through—rightly or wrongly.'" In re Blood Reagents Antitrust Litig., 756 F. Supp. 2d at 640 (quoting Glendon Energy Co., 836 F. Supp. at 1122).

Fifth, Defendant argues that the Court did not address his 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 [18 U.S.C. § 3293(2), 18 U.S.C. § 20(10), and 18 U.S.C. § 27]." (Doc. No. 145-1 at 13-14.) The Court declines to adopt Defendant's requested standard and reiterates that the Government has sufficiently alleged that Mantria Financial was exposed to substantial risk of loss and actual loss as a result of the alleged fraud. Here, Defendant again improperly reasserts arguments made in his Motion to Dismiss.

Sixth, Defendant argues that the Government has not made a "colorable" showing that other financial institutions were affected by the alleged fraud. (Id. at 15-16.) Defendant again disagrees with the Court's conclusion that "the Indictment and the discovery materials provided to Defendant sufficiently allege that the fraud affected the financial institutions of the victims." (Doc. No. 138 at 13.) The Indictment alleges that Defendant would advise "prospective investors to liquidate other investments" and "obtain the maximum amount of funds in loans from financial institutions" to "invest the funds in Mantria securities," and that the alleged scheme resulted in a net loss of approximately $37 million. (Doc. No. 1 ¶¶ 2, 12, 15.) In the Opinion, the Court references victims DB and PB from the Government's discovery materials, but as the Government explained in its Response, "there were more than 300 victims of this Ponzi scheme." (Doc. No. 113 at 15.) In fact, the Government alleges

BY THE COURT:

/s/ Joel H. Slomsky
JOEL H. SLOMSKY, J.

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that one victim stated that he was "financially devastated." (Id. at 14.) These allegations are sufficient to show that other financial institutions were affected by the alleged scheme.

Finally, Defendant requests that the Court amend its Order to state that it is "'without prejudice' to the defendant's re-presenting his statute of limitations argument at trial." (Doc. No. 145-1 at 4.) In its Opinion, however, the Court clarified that "whether the wire fraud and conspiracy to commit wire fraud affected a financial institution is a jury question." (Doc. No. 138 at 14.) The Court's Order is without prejudice, and Defendant will be permitted to present his statute of limitations argument at trial. Defendant also will be permitted to test the sufficiency of the Government's evidence at trial through a motion for a judgment of acquittal under Federal Rule of Criminal Procedure 29.

Because Defendant has not demonstrated to the Court "the need to correct clear error of law or prevent manifest injustice," see Wiest, 710 F.3d at 128, the Court will deny Defendant's Motion to Reconsider (Doc. No. 145).