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 FOR JUDGMENT OF ACQUITTAL PURSUANT TO FED.R.CRIM.P. 29

Defendant Wayde McKelvy, by his attorneys, Walter S. Batty, Jr. and William J. Murray, Jr., submits this Motion for Judgment of Acquittal Pursuant to Fed.R.Crim.P. 29, and states as follows:

1. The indictment in this case, charging defendant McKelvy in ten different counts, was returned on September 2, 2015. As the Court knows, the defendant filed an Amended Limitations Memorandum ("Amended Limitations") in Support of his Amended Motion to Dismiss Counts 1-8 of the Indictment, Based on the Statute of Limitations ("Amended Limitations Motion"), at Doc. No. 105, and a Reply Limitations Memo, at Doc. No. 121. McKelvy has advised the government that he intended to re-assert this defense at trial.

2. For most federal crimes, the applicable statute of limitations, as stated in 18 U.S.C. § 3282, is five years. See, United States v. Leadbeater, 2015 WL 567025 (D.N.J. 2015). McKelvy argues that Count 1, the wire fraud conspiracy count,[1]

[1] **Count 1, ¶ 8, charges McKelvy and co-defendants Troy Wragg and Amanda Knorr with conspiring to commit wire fraud "affecting a financial institution," in violation of 18 U.S.C. § 1343 and 18 U.S.C. § 371. Unless the government has established, beyond a reasonable doubt, that the ten-year extended statute of limitations under 18 U.S.C. § 3293(2) applies here, the statute of limitations on Count 1 would have run five years after November 20, 2009, the date of the last overt act (no. 55) alleged in Count 1; under this scenario, the statute would have run on November 20, 2014.**

and Counts 2-8, the wire fraud substantive counts,[2] should be dismissed for violating the pertinent five-year statute of limitations.

3. As the Court also knows, the defendant filed a Memorandum ("Offense 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 ("Offense Motion"), at Doc. No. 111, and a Reply Offense Memorandum ("Reply Offense Memo"), at Doc. No. 126. McKelvy has advised the government that he intended to re-assert this defense at trial.

4. In his Offense Memos, McKelvy argued that the government could not prove that he had been part of an overall conspiracy and/or an overall fraud scheme, pursuant to the reasoning in the Third Circuit's decision in United States v. Dobson, 419 F.3d 231, 237 (3d Cir. 2005) applies here, because there are "two layers" to the frauds charged by the government.

5. Following presentation of its case in chief, the government rested on October 10, 2018.

6. Shortly after the government rested, McKelvy filed this Motion for Judgment of Acquittal Pursuant to Fed.R.Crim.P. 29.

7. Attached to this motion is a Memorandum in Support of this Motion.

[2] Counts 2-8, ¶ 2, charge McKelvy and his two co-defendants with committing wire fraud, "in circumstances affecting a financial institution," in violation of 18 U.S.C. §§ 1343, 2. Unless the government has established, beyond a reasonable doubt, that the ten-year extended statute of limitations under section 3293(2) applies here, the statute of limitations on Counts 2-8 would have run five years after the various dates alleged in those seven counts (ranging from June 11, 2009, to September 18, 2009), which would mean that the five-year statute on these counts would have run on dates ranging from June 11, 2014, to September 18, 2014.

WHEREFORE, McKelvy requests this Court to grant the defendant's Motion for Judgment of Acquittal Pursuant to Fed.R.Crim.P. 29.

Respectfully submitted,

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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	:	

MEMORANDUM IN SUPPORT OF
DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL
PURSUANT TO FED.R.CRIM.P. 29(a)

Defendant Wayde McKelvy, by his attorneys, Walter S. Batty, Jr. and William J. Murray, Jr., submits this Memorandum in Support of Defendant's Motion for Judgment of Acquittal Pursuant to Fed.R.Crim.P. 29(a).

I. Legal standards. The legal standards for a motion under Rule 29(a) ("Before Submission to the Jury"), are set out in United States v. Pasley, 2013 WL 5761224 (E.D.Pa. 2013):

> **Rule 29(a) provides that a court "must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." A claim of insufficient evidence places an extremely heavy burden on the defendant. United States v. Dent, 149 F.3d 180, 187 (3d Cir. 1998). The evidence at trial is insufficient to sustain a conviction only if no rational trier of fact could have found proof of guilt beyond a reasonable doubt. United States v. Brodie, 403 F.3d 123, 133 (3d Cir. 2005). In reviewing the sufficiency of evidence, a court must review the evidence "in the light most favorable to the Government, and credit all reasonable inferences that support the verdict." United States v. Perez, 280 F.3d 318, 342 (3d Cir. 2002). A court must not "usurp the role of the jury by weighing credibility and assigning weight to the evidence, or by substituting its judgment for that of the jury," and should find insufficient evidence only "where the prosecution's failure [to prove its case] is clear." Id.**

II. Government's "first rationale" under section 3293(2). McKelvy argues that the traditional five-year statute of limitations is applicable in this case and that, accordingly, Counts 1-8 should be dismissed. The government's position, throughout this litigation, is that the applicable statute of limitations is 18 U.S.C. § 3293(2).

Section 3293(2) provides a ten-year statute of limitations for the crimes charged in Count 1, the wire fraud conspiracy count, and Counts 2-8, the wire fraud substantive counts, "if [each] offense affects a financial institution." Cf. United States v. Anthony Allen, 160 F.Supp.3d 698, 705 (S.D.N.Y. 2016).

As used in section 3293(2), the term "financial institution" is defined in 18 U.S.C. § 20(10)[1] as follows:

> As used in this title, the term "financial institution" means --
>
> (1) an insured depository institution (as defined in section 3(c)(2) of the Federal Deposit Insurance Act);
>
> … or
>
> (10) a mortgage lending business (as defined in section 27 of this title) ….

As stated in United States v. Cardillo, 2015 WL 3409324 (D.N.J. 2015), "In 2009, Congress amended the definition of 'financial institution,'" as set out above in section 20(10), to include "a mortgage lending business (as defined in section 27)." Section 27, in turn, states, "In this title, the term 'mortgage lending business' means an organization which finances or refinances any debt secured by an interest in real estate, including private mortgage companies …, and whose activities affect interstate or foreign commerce."

The government has offered a first and second rationale as to why section 3293(2) is applicable here.

The government's first rationale. The first rationale is that Mantria Financial, which was initially set up to issue mortgages

[1] Section 20(10) was added, by an amendment to section 20, on May 20, 2009.

on land sold by Mantria in Tennessee, see Count 1, ¶ 5, later went bankrupt as a result of the fraud scheme. Doc. No. 113 at 9. The indictment alleges that "Mantria Financial was a financial institution and mortgage lending business which engaged in interstate commerce." Id. McKelvy responds that the government has not established, beyond a reasonable doubt, that Mantria Financial qualifies as such.[2]

The only evidence which the government has submitted in support of the allegation in the indictment that Mantria Financial was a "financial institution" is the testimony of Carl Scott, the Director of Licensing for the Tennessee Department of Financial Institutions ("TDFI"). Scott testified that the paper records of the two applications by Mantria Financial to be licensed by the TDFI had been destroyed in accordance with the agency's document management policies.

Scott testified that, according to a "screenshot" of prior transactions, CS-2, Mantria Financial's first application for a license as a financial institution was submitted on 11/13/07 and that this application was granted, with the issuance of such a license on 2/5/08 and that this license expired on 6/30/08. Scott further testified that the initial license was renewed, for the period 7/1/08 through 6/30/09. There were no details in the screenshot as to the contents of these two applications.

On what appears to have been the third application[3] - for which there was a digital copy, AK-16 - Scott said that there is a line on this form which directs the applicant to "identify all parties owning over 5 percent interest in the application." He further testified that that space shows (in hand-printing), "Amanda Knorr 51 percent, Troy Wragg 49 percent."

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[2] McKelvy expects to argue, in a Rule 29 motion after submission of all of the evidence, that, even if the government had shown that Mantria Financial were a "financial institution," it was not "affected" – as that term is used in the case law – by the alleged fraud.

[3] This third application, submitted on 5/19/09, is sometimes referred to on cross as the second application.

With reference to the AK-16, which is apparently Mantria Financial's third application, Scott stated as follows, in response to defense questions on cross:

> **Q Okay. If on an application, initial application or a renewal application false information is provided about the ownership of the entity seeking licensing or registration, would that impact the -- granting the license?**
>
> **A Yes, sir.**
>
> **Q And in what respect?**
>
> **A We would deny it.**
>
> **Q And if you learned after the fact that false information had been submitted in an application, you would deny that.**
>
> **A Yes, sir.**
>
> **Q That, in your view, your agency's view, the ownership interest is important material information.**
>
> **A Yes, sir.**
>
> **Q You want to know who you're doing business with --**
>
> **A Right.**

McKelvy submits that the evidence is clear that Mantria Financial was 100% owned by Mantria Corp. and that the entry concerning the 51%/49% ownership split between Knorr and Wragg was entirely false and that had TDFI known the truth, Mantria Financial's applications would have been denied.

As to the question of whether the TDFI license application form in effect for the initial application were in effect at time of that application in November 2007, the following exchange took place between defense counsel and Scott:

> **Q The ownership interest in entities that are being licensed and certified, is that the type of information that would be recorded anywhere else in your agency's records?**

> **A Should have been on the original application, sir, but since I don't have that.**
>
> **Q The original application, does the original application request information similar to this --**
>
> **A Yes, sir.**

Accordingly, from this testimony, it is apparent that Mantria Financial would have been disqualified as the mortgage lender if the TDFI, if the agency had known the truth at the time that the AK-16 application was filed. It is also apparent that the initial application, apparently submitted on November 13, 2007, contained a request for ownership information.

The only remaining issue as to the initial application is whether the government has proved, beyond a reasonable doubt, that the representations made on the initial application form told the truth – that Mantria Corp. was the 100% owner of Mantria Financial. But neither Knorr nor any other government witness said that the initial form contained accurate information on the ownership issue. Instead, Knorr, on cross, seemed to say that she thought she was the 51% owner of Mantria Financial.

As such, the government has failed to carry its burden of establishing that, had the TDFI known the true facts, it still would have issued the license to Mantria Financial as a mortgage lender.

<u>The government's second rationale</u>. As to the government's second rationale for invoking section 3293(2), there are only three government witnesses who made reference to their having had a financial relationship with a federally insured bank: Dee Holl, Charles Carty, and Phil Wahl. McKelvy argues that, as a matter of law, the government has not proved any of the necessary elements of satisfying the case law on a financial institution being adversely "affected" because it had suffered an actual loss or a substantial risk of loss.

Of these three witnesses, only Holl testified to a federally insured bank having any actual loss. She stated that she had defaulted on approximately $23,000 of credit card debt. But, as set out in our Amended Limitations Memo, Doc. No. 105, under

section 3293(2), the government must produce sufficiently detailed evidence to provide facts which are sufficient to withstand the statute of limitations defense. See United States v. Carollo ("Carollo II"), 2011 WL 5023241, *3 (S.D.N.Y. Oct. 20, 2011). Section 3293(2) "broadly applies to any act of wire fraud which affects a financial institution," provided the effect of the fraud is "sufficiently direct." United States v. Heinz, 790 F.3d 365, 367 (2d Cir. 2015), cert. denied, 136 S.Ct. 801 (2016) (citing United States v. Bouyea, 152 F.3d 192, 195 (2d Cir. 1998) (per curiam) (quotation marks omitted).

Here, the government has not proved a "direct" actual loss because Holl testified that the reason for the $23,000 loss was because she had lost her job for two years and was not able to keep up with the payments on the credit card.

Similarly, as to Carty and Wahl, the government has not shown that any risk of loss was "new or increased" and that it was "substantial." See United States v. Ghavami, 2012 WL 2878126, *5 (S.D.N.Y. 2012), citing United States v. Mullins, 613 F.3d 1273, 1278 (10th Cir. 2010); United States v. Rubin/Chambers, Dunhill Ins. Services (CDR), 831 F.Supp.2d 779, 783-84 (S.D.N.Y. 2011). Neither Carty nor Wahl testified that he was at risk of defaulting on any of his credit cards; it follows from this that there could not have been any risk of loss to a federally insured bank, other than the same risk which is a part of every issuance of every credit card.

Accordingly, the government's second rationale for invoking section 3293(2) is likewise without substance.

III. The government has offered no evidence from which the jury could infer that there was a conspiracy, a wire fraud scheme, and/or a securities fraud scheme involving McKelvy and/or Knorr. As McKelvy argued in his Motion to Dismiss for Failure to State an Offense, and supporting Memo, Doc. No. 111, where there are demonstrably "two layers" of the fraud, the government has to allege and prove an "overall" conspiracy or an "overall" fraud scheme. United States v. Dobson, 419 F.3d 231, 237 (3d Cir. 2005). Here, several of the government's witnesses, including Dan Rink, Knorr, Chris Flannery, and Cary Widener, testified that Wragg repeatedly lied to them about the successes of Mantria. Moreover, there has been substantial evidence that

McKelvy had been told by Wragg of the multiple sales of its land by Mantria in Tennessee, had been told by Wragg about the supposedly independent appraisals showing that the land was worth millions of dollars, and had been told by Wragg about the repeated successes of obtaining letters of intent, worth millions of dollars, for green energy products.

The government, however, has offered no evidence that McKelvy was involved in an "overall" conspiracy or "overall" scheme as those terms are used in Dobson and in Third Circuit Model Jury Instructions.

IV. Conclusion. Accordingly, McKelvy argues that, as a matter of law, judgements of acquittal should be granted on Counts 1-8 for violations of the statute of limitations. Moreover, McKelvy argues that judgements of acquittal should be granted on Counts 1-9 and on the fraud allegations in Count 10.

Respectfully submitted,

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Dated: October 9, 2018

CERTIFICATE OF SERVICE

I hereby certify that I have served by electronic mail a true and correct copy of the foregoing Defendant's Motion for Judgement of Acquittal and supporting Memorandum, upon Assistant U.S. Attorneys Robert J. Livermore and Sarah Wolfe:

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Dated: October 9, 2018