No. ________

In The
Supreme Court of the United States

GARY HEINZ, MICHAEL WELTY
and PETER GHAVAMI,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether 18 U.S.C. §3293(2), which extends the statute of limitations for mail or wire fraud from five to ten years if the fraud "affects a financial institution," applies where the defendant is a bank employee, the bank is a culpable actor, and the alleged effect is that the bank made payments to settle, or incurred legal fees to defend, certain civil, regulatory and criminal actions. In other words, does the statute apply where the bank "affects itself"?

LIST OF PARTIES

The caption of the case lists all parties to the proceeding in the court whose judgment is to be reviewed.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Peter Ghavami, Gary Heinz and Michael Welty, respectfully petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The decisions of the United States Court of Appeals for the Second Circuit (Pet. App. ("App.") 1-5, 6-10) affirming the convictions and sentence are available at 760 F.3d 365 (2d Cir. 2015), and 607 Fed. Appx. 52 (2d Cir. 2015) (summary order). The decisions of the United States District Court for the Southern District of New York addressing the issue presented (App. 11-64, 65-109) are available at 23 F. Supp. 3d 148 (S.D.N.Y. 2014) (post-trial opinion), and 2012 WL 2878126 (S.D.N.Y. July 13, 2012) (pretrial opinion).

JURISDICTION

The final judgment of the United States Court of Appeals for the Second Circuit was entered on June 4, 2015. On July 30, 2015, Justice Ruth Bader Ginsburg extended the time within which to file a petition for a writ of certiorari to and including October 2, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

RELEVANT STATUTORY PROVISIONS

18 U.S.C. §3282(a), the general limitations statute, states:

> Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

18 U.S.C. §3293 provides:

> No person shall be prosecuted, tried or punished for a violation of, or a conspiracy to violate –
>
> (1) section 215, 656, 657, 1005, 1006, 1007, 1014, 1033, or 1344;
>
> (2) section 1341 or 1343, if the offense affects a financial institution; or
>
> (3) section 1963, to the extent that the racketeering activity involves a violation of 1344;
>
> unless the indictment is returned or the information is filed within 10 years after the commission of the offense.

STATEMENT OF THE CASE

1. This petition squarely presents a recurring issue in criminal and civil law that has manifested itself in a number of significant, high-profile cases

and has generated several different interpretive approaches by the courts of appeals. Various provisions of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), Pub. L. No. 101-73, §961, 103 Stat. 183 (1989), a legislative response to the 1980s savings and loan crisis, attach great significance to whether a fraud "affects a financial institution." The issue here is the interpretation of that phrase.

In this criminal case, the Second Circuit's conclusion that the fraud affected a financial institution rendered an otherwise stale prosecution timely under the statute's ten-year limitations period. That decision turned the meaning of the word "affect" on its head. The offense here was committed *by* financial institution employees who, the jury found, were acting on behalf of, and conspiring with, their employers and other financial institutions to defraud municipalities in connection with bond transactions. The institutions profited greatly from the fraud, a circumstance that hardly implicates the bank-protective policy underlying FIRREA. Nevertheless, the courts below reasoned that the banks were affected because they entered into civil monetary settlements with the SEC, the IRS and other state and federal regulators, and incurred attorneys' fees in reaching non-prosecution agreements with the Department of Justice Antitrust Division. This counter-intuitive "self-affecting" theory of liability, which has begun to take hold among certain lower courts, perilously dilutes the requirement for a sufficient nexus between

the unlawful conduct and the attendant consequence on the financial institution. Taken to its logical conclusion, this overly-broad reading of "affect" would apply to virtually *any* fraud committed by a financial institution employee. The plain language and legislative history of the statute make clear that Congress did not intend to cause such a dramatic change in the law when it passed the bank-protective FIRREA statute.

This Court should grant this petition to interpret FIRREA's "affects a financial institution" language. The issue was clearly presented in the district court and the court of appeals and this case is a straightforward vehicle for the Court to define that term.

2. On December 9, 2010, a grand jury sitting in the Southern District of New York returned an Indictment charging Peter Ghavami, Gary Heinz and Michael Welty with fraud and related charges stemming from allegations that, while working at the New York office of the international bank UBS, they rigged bids for municipal bond reinvestment agreements and other municipal finance contracts. On September 15, 2011, the grand jury returned a six-count superseding Indictment ("the Indictment") alleging that the schemes had "affected a financial institution" such that the charges, otherwise stale, were timely filed pursuant to the ten-year statute of limitations set forth in 18 U.S.C. §3293(2).

On August 31, 2012, following a four-week jury trial, Ghavami was convicted on all three counts in which he was charged (Counts 1-3). On July 24, 2013,

the district court sentenced Ghavami to 18 months' incarceration and imposed a $1 million fine. He has served his sentence. Welty and Heinz were also convicted and sentenced by the district court. On June 4, 2015, the United States Court of Appeals for the Second Circuit affirmed the convictions.

3. A brief background of the municipal reinvestment business is helpful to understanding the issue here. From time to time, municipalities (or other public entities) raise money by issuing bonds. Trial transcript ("Tr.") 2703. In doing so, they have an advantage over private issuers: if certain conditions are met, the interest paid to bondholders is exempt from federal taxation. Tr. 2702.

Often, the proceeds from the sale of bonds are not needed immediately, for example if they are to be used for a capital project that will take years to complete. If so, the municipality may invest unused funds in various reinvestment products offered by financial institutions ("providers"). These reinvestment contracts are typically awarded to providers through a competitive bidding process run by "brokers." Tr. 2708-09; Superseding Indictment ("Ind.") ¶18. Some firms specialize in brokering these transactions, while others, like UBS, do so as an ancillary service to the firm's municipal clients. Tr. 2758-59, 3863. In addition to UBS, certain of the transactions here included JPMorgan Chase ("JPMorgan") and Bank of America ("BOA"), both of which were providers of reinvestment agreements and other municipal

finance contracts, Ind. ¶¶8, 9, 40, as well as a brokerage house known as CDR. Ind. ¶¶27-36.[1]

4. The gravamen of the government's case was that Defendants (at UBS) and individuals at other providers (*e.g.*, JPMorgan, BOA) conspired with one another, the financial institutions and certain brokers to rig the bids for municipal investment agreements. According to the government, the conspirators sought to accomplish this goal in several ways: (i) by agreeing which provider would win a particular transaction; (ii) by soliciting intentionally losing or "courtesy" bids to meet IRS requirements for non-taxability and give the illusion of a competitive bidding process; (iii) by giving "last looks" (*i.e.*, sharing information with one bidder about other providers' bids to allow the bidder to submit a winning bid); and (iv) by falsely certifying to bond counsel that they had complied with the relevant regulations. Tr. 383-87; Ind. ¶25.

5. The core legal issue involved the statute of limitations. Peter Ghavami was convicted of Counts 1 through 3 of the Indictment. Count 1 alleged a §371 conspiracy from "as early as August 2001 until at least July 2002," Ind. ¶23; Count 2 alleged a wire fraud conspiracy from "as early as March 2001 until at least November 2004," Ind. ¶33; and Count 3 alleged a substantive wire fraud from "as early as

[1] UBS, JPMorgan and BOA were all unindicted co-conspirators.

October 18, 2001 until at least February 15, 2002," Ind. ¶42. Thus, the original 2010 Indictment was returned well after the expiration of the usual five-year statute of limitations for wire fraud and conspiracy. 18 U.S.C. §3282.

Accordingly, Defendants moved pre-trial to dismiss these counts as untimely. In response, the government relied primarily on the ten-year limitations period set forth in Section 3293(2) for frauds (and related conspiracies) that "affect[ ] a financial institution." It claimed that the scheme "exposed [UBS, JPMorgan and BOA] to considerable risk of loss and actually resulted in loss, including financial settlements that included fines and penalties." Gov't Mem. Opp. Mot. to Dismiss at 6. The "loss" consisted of civil monetary settlements with the SEC, the IRS and other state and federal regulators, as well as attorneys' fees incurred in reaching non-prosecution agreements with the Department of Justice Antitrust Division. The government sought to introduce the agreements into evidence, along with testimony from bank employees that the settlements resulted in part from the charged conduct.[2]

[2] The government largely abandoned its alternative "economic benefit theory" applicable to transactions that involved a stream of payments to the municipalities at artificially suppressed rates. Under that theory, the schemes did not end (and the limitations periods did not begin to run) until the final payment was made, even if that was to occur decades later. The government successfully pressed the economic benefit theory in a parallel prosecution before another judge in the Southern

(Continued on following page)

For example, the government sought to introduce evidence that, on May 4, 2011, UBS entered into a non-prosecution agreement with the Antitrust Division in which it "admit[ted], acknowledg[ed] and accept[ed] responsibility" for illegal conduct in its company. Ex. A to Gov't Mem. Opp. Mot. to Dismiss ¶5. Specifically, that "from 2001 through 2006, certain then-employees of UBS at its municipal reinvestment and derivatives desk . . . entered into unlawful agreements to manipulate the bidding process and rig bids on certain municipal contracts, and made payments and engaged in other activities in connection with those agreements, in violation of Section 1 of the Sherman Act, 15 U.S.C. §1, and certain sections of Title 18 of the United States Code." *Id.* At the same time, UBS also settled with the SEC, the IRS and 25 state attorneys general, agreeing to pay $160 million to the IRS and municipalities harmed by its conduct.[3]

District, but the Second Circuit rejected the argument and reversed the convictions. *United States v. Grimm*, 738 F.3d 498 (2d Cir. 2013) (holding that ministerial interest payments were not overt acts in furtherance of conspiracy).

[3] The government also offered the settlements of JPMorgan ($228 million), BOA ($137.2 million), and the broker CDR ($70 million).

6. The district court denied Defendants' motion to dismiss in a written opinion dated July 13, 2012. It defined the issue as follows:

> [Whether] the charged conduct affected certain financial institutions within the meaning of § 3293(2) by exposing them to the risk of loss and causing them to experience actual financial loss, in the form of civil monetary settlements with the Securities & Exchange Commission ("SEC") and other regulators, as well as attorneys' costs and fees associated with reaching resolutions of non-prosecution agreements with the Department of Justice Antitrust Division ("DOJ").

App. 76 (quotations and alterations omitted).

The court first held that the statute "is not limited to circumstances in which a financial institution is the object or victim of a scheme to defraud." App. 77. Next, it held that a "new or increased risk of loss is plainly a material, detrimental effect on a financial institution, and falls squarely within the proper scope of the statute." App. 78 (quoting *United States v. Mullins*, 613 F.3d 1273, 1278-79 (10th Cir. 2010)).

The trial court further held that the settlement and deferred prosecution agreements, and related testimony, were admissible to establish the required effect:

> The Settlement Agreements and Non-Prosecution Agreements illustrate that the

> alleged conduct created an increased risk of loss . . . in the form of exposure to restitution payments, civil penalties and criminal prosecution, a risk that was ultimately realized – in the form of restitution payments and civil penalties – when [the three banks and CDR] entered into the Settlement Agreements and Non-Prosecution Agreements. . . .

App. 88. The court, however, severely limited Defendants' ability to challenge that evidence, explaining:

> Because the documentary evidence and testimony would be sufficient to establish that alleged conduct caused the exposure to, and realization of, the risk of loss, Defendants need not inquire into other potential reasons that may have motivated the Financial Institutions' decision to enter into those agreements, thereby eliminating the need for supplemental discovery and cross-examination of the representatives into such collateral issues as to how financial institutions interact with regulators and arrive at settlement decisions, which could potentially confuse the jury.

App. 88-89.

Finally, the court addressed the prejudice that would result from the banks' admissions that its employees committed crimes. The court stated: (i) that "[t]he Agreements do not mention any particular employee by name or description, and there is no acknowledgement that the Defendants in this case engaged in the conduct that led (at least in part) to

the Agreements"; (ii) that the evidence would "be limited to what is necessary to establish that financial institutions were exposed to the risk of loss as a result of the conduct alleged in the Indictment"; and (iii) that the court would instruct the jury "that the evidence is to be used for that purpose only, and not as evidence of Defendants' guilt." App. 89-90.

The court nevertheless invited the parties "to stipulate that the alleged conduct affected a financial institution." App. 90 n.9. The parties subsequently reached such an agreement, with Defendants explicitly preserving their right to appeal the trial court's legal determination of what constitutes "affects" under Section 3293(2). Stipulation 4; Tr. 2597-99, 3826.

7. The Second Circuit affirmed. It first held that Defendants had properly preserved their right to appeal the legal argument relating to the statute of limitations, and thus it reached the merits of the issue. App. 4. As to the merits, the entirety of the court's analysis was as follows:

> "[T]he verb 'to affect' expresses a broad and open-ended range of influences." *United States v. SKW Metals & Alloys, Inc.*, 195 F.3d 83, 90 (2d Cir. 1999). The plain language of § 3293(2) makes clear that "Congress chose to extend the statute of limitations to a broader class of crimes" than those in which "the financial institution is the object of fraud." *United States v. Bouyea*, 152 F.3d 192, 195 (2d Cir. 1998) (quotation marks

> omitted). And so § 3293(2) "broadly applies to any act of wire fraud that affects a financial institution," provided the effect of the fraud is "sufficiently direct." Id. (quotation marks omitted). We conclude that the Defendants' wire fraud offenses "affected" the three banks in this case within the meaning of § 3293(2). It is undisputed that the banks executed the Bank Agreements prompted in part by the fraudulent conduct of the Defendants and their coconspirators. As a result, the banks incurred significant payments and related fees, which were foreseeable to the Defendants at the time of their fraudulent activity. The role of the banks as coconspirators in the criminal conduct does not break the necessary link between the underlying fraud and the financial loss suffered.

App. 4-5.

REASONS FOR GRANTING THE PETITION

The plain language, legislative history and clear purpose of Section 3293(2) establish that settlement agreements reached by a culpable bank are not the type of harm contemplated by the statute. To conclude otherwise, as the lower courts did here, turns on its head a statute aimed at *protecting* banks from fraud. This interpretation is as incongruous as charging a person with attempted murder for trying to commit suicide. Nonetheless, this "self-affecting" theory has

been applied in important civil and criminal cases to reach incorrect results. Although other federal courts have employed different interpretations of "affect," the dominant approach is broad enough to encompass the "self-affecting" theory that threatens to become the law of the land. This Court should grant certiorari to clarify this important and recurring question of statutory interpretation.

I. Statutory Background

18 U.S.C. §3293 provides:

> No person shall be prosecuted, tried or punished for a violation of, or a conspiracy to violate –
>
> > (1) section 215, 656, 657, 1005, 1006, 1007, 1014, 1033, or 1344;
> >
> > (2) section 1341 or 1343, if the offense affects a financial institution; or
> >
> > (3) section 1963, to the extent that the racketeering activity involves a violation of 1344;
>
> unless the indictment is returned or the information is filed within 10 years after the commission of the offense.

The statute was enacted as part of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), Pub. L. No. 101-73, §961, 103 Stat. 183 (1989), a legislative response to the 1980s savings and loan crisis. *See* H.R. Rep. No. 101-54, at

464 (1989), as *reprinted in* 1989 U.S.C.C.A.N. 86, 260 ("[M]isconduct, fraud, and abuse have significantly contributed to or caused hundreds of bank and thrift failures and the consequent multi-billion dollar losses facing the U.S. Government."). At the time, Congress perceived a "tremendous backlog in pending criminal investigations," warranting the extension of the limitations period to ten years for certain conduct affecting a financial institution. *Id.* at 464, 1989 U.S.C.C.A.N. at 260. *See also id.* at 472, 1989 U.S.C.C.A.N. at 268 ("The longer period of limitations is necessary because of the enormous backlog of thousands of currently pending investigations and prosecutions and the complexity of many of the cases.").

In addition to extending the limitations period, FIRREA also attached other civil and criminal consequences to frauds that "affect[ ] a financial institution." For example, the mail and wire fraud statutes increase the statutory maximums from 20 to 30 years if the fraud "affects a financial institution." 18 U.S.C. §§1341, 1343 (Pub. L. No. 101-73, §961(i, j), 103 Stat. 183 (1989)). Moreover, FIRREA's civil penalties require proof that a defendant's fraud "affect[ed] a federally insured financial institution." 12 U.S.C. §1833a(c)(2). And though subsequently amended, the federal sentencing guidelines also embodied materially-identical language prescribed by FIRREA. *See* U.S.S.G. §2F1.1(b)(8)(b) (2000) (four-level enhancement if offense "affected a financial institution and the defendant

derived more than $1,000,000 in gross receipts from the offense").[4]

II. The Lower Courts' Different Approaches

The Second Circuit here, following its earlier decision in *United States v. Bouyea*, 152 F.3d 192, 195 (2d Cir. 1998), applied a quasi-proximate cause standard that looks to whether the offense and the effect on the financial institution are "sufficiently direct." Lower courts in the Second Circuit have followed that approach to hold that an institution can be affected by its own wrongful conduct. *See, e.g.*, *United States v. Wells Fargo Bank, N.A.*, 972 F. Supp. 2d 593 (S.D.N.Y. 2013) (civil case); *United States v. Countrywide Financial Corp.*, 961 F. Supp. 2d 598 (S.D.N.Y. 2013) (civil case); *United States v. Bank of*

[4] This guideline was amended in 2001 and now provides for a two-level enhancement if "the defendant derived more than $1,000,000 in gross receipts from one or more financial institutions as a result of the offense." U.S.S.G. §2B1.1(b)(16)(A) (2014). The amendment was meant "to address issues about what it means to 'affect' a financial institution . . . [and thus] the revised provision focuses on whether the defendant derived more than $1,000,000 in gross receipts *from* one or more financial institutions as a result of the offense." U.S.S.G. Amend. 617 (effective November 1, 2001) (emphasis added). In other words, the guidelines now make explicit that the enhancement applies where the defendant victimized the financial institution, and not merely where the defendant profited and the institution was "affected" in some indirect manner. This underscores our point that FIRREA's enhanced punishment provisions were not intended to give added protection to banks acting as wrongdoers.

New York Mellon, 941 F. Supp. 2d 438 (S.D.N.Y. 2013) (civil case); *United States v. Rubin/Chambers, Dunhill Ins. Servs.*, 831 F. Supp. 2d 779 (S.D.N.Y. 2011) (criminal case); *United States v. Daugerdas*, No. 09-Cr-581, 2011 WL 6020113 (S.D.N.Y. April 5, 2011) (criminal case); *United States v. Ohle*, 678 F. Supp. 2d 215 (S.D.N.Y. 2010) (criminal case), *aff'd on other grounds*, 441 Fed. Appx. 798, 800 (2d Cir. 2011).[5]

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[5] The *Countrywide* case, in which the district court imposed monetary penalties of more than $1.2 billion against several bank defendants based on the "self-affecting" theory, is now on appeal to the Second Circuit and raises the same principal issue that is presented here. *See* Brief of Defendants-Appellants Bank of America, N.A.; Countrywide Bank, FSB; and Countrywide Home Loans, Inc., *United States v. Bank of America, et al.*, Nos. 15-496-cv, 15-499-cv, at 29 (2d Cir. filed April 22, 2015), available at 2015 WL 1910180, at *28 (arguing that "[f]ederally insured financial institutions cannot be liable under Section 1833a(c)(2) on the theory that they engaged in conduct 'affecting' themselves").

However, absent a grant of certiorari, the Circuit panel that will hear the *Countrywide* appeal will likely be required to apply the rule articulated in our case. *See Johnson v. United States*, 779 F.3d 125, 128 (2d Cir. 2015) ("a panel of this Court is "bound by the decisions of prior panels until such time as they are overruled either by an en banc panel of our Court or by the Supreme Court") (internal quotations omitted). In a criminal case also on appeal to the Second Circuit the defendant likewise argues that "the language of 'affect[ing] a financial institution', for purposes of both the statutory language at 18 U.S.C. §§1341 and 3293, only applies to cases where a financial institution is an alleged victim of the charged scheme and not an alleged participant." Brief for Defendant-Appellant Paul M. Daugerdas, *United States v. Mayer, et al.*, No. 14-2437-cr (2d Cir. filed January 30, 2015), available at 2015 WL 493772, at 62 n.19.

(Continued on following page)

Other circuits, however, have adopted varying standards to assess the required nexus between the offense and the effect on the financial institution. For example, the Tenth Circuit in *United States v. Mullins*, 613 F.3d 1273, 1278 (10th Cir. 2010), held that "there may be some point where the 'influence' a defendant's wire fraud has on a financial institution becomes so attenuated, so remote, so indirect that it cannot trigger the ten-year limitations period because it does not in any meaningful sense 'affect' the institution") (citations omitted). The Third Circuit, in *United States v. Pelullo*, 924 F.2d 193, 216 (3d Cir. 1992), remarked that the link between conduct and loss cannot be "unreasonably remote." *See also United States v. Murillo*, 443 Fed. Appx. 472, 474-75 (11th Cir. 2011) (conduct affected financial institution where defendant caused subsidiary to purchase fraudulent loan); *United States v. Serpico*, 320 F.3d 691, 694 (7th Cir. 2003) (scheme that exposes bank to increase risk of loss affects institution); *United States v. Agne*, 214 F.3d 47 (1st Cir. 2000) (potential consequences to bank were too remote to satisfy §3293(2)). The Fourth Circuit, in *United States v. Ubakanma*, 215 F.3d 421, 426 (4th Cir. 2000), applied the tightest nexus

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And, earlier this year, Reuters reported that Bank of New York Mellon, following an adverse decision on the affects issue, settled its FIRREA case with the government for $714 million. *See* Frankel, *BofA 'Hustle' appeal tests Justice's novel use of old S&L statute*, available at *http://blogs.reuters.com/alison-frankel/2015/04/23/bofa-hustle-appeal-tests-justices-novel-use-of-old-sl-statute/*.

requirement, looking to whether the "financial institutions themselves were harmed or victimized in any way, or that they were intended to be so harmed or victimized by the fraud scheme," and concluding that a fraud "affected a financial institution only if the institution itself were victimized by the fraud."

Critically, none of these cases holds that misconduct by the bank or its employees is sufficient to trigger §3293(2)'s extended statute of limitations, creating a conflict with the Second Circuit's decision in our case. At the very least, the circuits' varying definitions of "affect" underscore the need for nationwide clarity on this important and recurring issue.

III. The Plain Language

The Second Circuit's government-friendly high-water mark for what satisfies an effect on a financial institution is unmoored from the terms of §3293(2). Of course, an interpretation of a statute must begin with its plain language. *See Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009). As the district court observed, the primary "meaning of the verb 'affect' is 'to produce an effect upon.'" App. 79 (citing Webster's Third New International Dictionary 35 (1976)). The same dictionary defines "effect" as "something that is produced by an agent or cause; *something that follows immediately from an antecedent*; a resultant condition." (Webster's at 724) (emphasis added). This definition embodies the familiar legal concept of

causation: the result must follow directly and proximately from the antecedent cause.

Where the bank is a culpable member of the conspiracy, however, its fraudulent conduct is not a proximate cause of any settlement it may later reach. Simply put, where the bank *participates in* the offense and targets others, that effect is far too attenuated. The crime must be successful, it must be detected, regulators or law enforcement (or civil plaintiffs) must bring or threaten litigation, potential liability against the institution must be feared, and the bank must agree to settle. Even then, the bank may have come out ahead. The causal chain is too *Palsgraf*-ian to satisfy whatever connective standard may be applied.

The proposition becomes even more dubious when one recognizes that large, publicly-traded and highly-regulated financial institutions settle for numerous reasons that may have nothing to do with whether they committed fraud. A bank may settle to avoid serious collateral consequences or adverse publicity, or because it is cheaper than to litigate. Surely payments that depend on complex layers of corporate decision-making about whether to enter a settlement are not a "sufficiently direct" product of the fraud. *See* Stanley S. Arkin, *Excluding the Corporate Guilty Plea*, 224 N.Y. Law J. 32 (2000) (noting mid-trial ruling in *United States v. Andreas*, 23 F. Supp. 2d 835 (N.D. Ill. 1998), *aff'd*, 216 F.3d 645 (7th Cir. 2000), excluding evidence of corporate guilty plea and non-prosecution commitment in trial of

executives: "Any probative value to the plea, the court found, was diluted by the many factors that cause corporations to plead guilty.").

The structure of Section 3293 confirms that "affect" does not apply where the bank is a perpetrator. The other crimes for which the statute provides a ten-year limitations period (found in subsection (1)) are, at their core, crimes *against* institutions or the FDIC: §215 ("Receipt of commissions or gifts for procuring loans"); §656 ("Theft, embezzlement, or misapplication by bank officer or employee"); §657 (misapplication of bank funds); §1005 (making false entries in bank records); §1014 (false statements on loan or credit applications); and §1344 (bank fraud). *See* John K. Villa, *Banking Crimes: Fraud, Money Laundering, and Embezzlement*, §7:3 (1989) ("In essence, FIRREA treats any mail and wire fraud offense that 'affects a financial institution' in a similar fashion as bank fraud – 18 U.S.C.A. §1344 – while leaving the mail and wire fraud statutes untouched for other offenses."). Unlike what was charged here, when a defendant commits these crimes, the bank stands to lose money as a *direct* result of the fraudulent conduct. This makes sense, since "the whole purpose of [the 'affects' language] is to protect financial institutions." *United States v. Serpico*, 320 F.3d 691, 694 (7th Cir. 2003).

Perhaps most fundamentally, the Second Circuit's approach yields a linguistically strange, counterintuitive result in which a bank affects itself negatively by conduct that defrauds others because

there is a chance that the bank could be caught. One does not typically think of an action against another as producing an effect upon oneself. In this case, the statutory purpose is to protect banks from bad actors, not from the banks themselves. *See* Filmon M. Sexton IV, *The Financial Institutions Reform, Recovery and Enforcement Act of 1989: The Effect of the "Self-Affecting" Theory on Financial Institutions*, 19 N.C. Banking Inst. 263, 265 (2015) (describing lower courts' "self-affecting" theory as "absurd" and reflective of "an impermissible reading" of FIRREA's meaning and intent).

If this court does not recalibrate the meaning of "affects," the potential consequences could be breathtaking. Simply put, a bank would be subject to FIRREA's increased civil penalties whenever its employee commits a wire or mail fraud (because there is always a chance of an investigation, a regulatory action, a lawsuit or a prosecution). Likewise, the employee would be exposed to an increased sentence, and an extended limitations period, even though he was seeking to benefit the institution. As one commentator has aptly noted:

> Taken to its boundary, this broad self-affecting construction . . . makes FIRREA civil penalties applicable to conduct far afield from conduct that threatens the financial integrity of the financial institution. It may surprise the drafters of FIRREA to learn that it could be used to penalize a financial institution for fraud against a non-financial

> institution counter-party. . . . A corporate accounting scandal that leads to a substantial drop in the stock price of the corporation might well "affect" the financial institution where the corporation holds accounts, but is it the kind of threat to the integrity of the financial institution that FIRREA was designed to combat? Pinpointing the outer boundary is a question sure to present itself to appellate courts in the coming years.

U.S. Chamber Institute for Legal Reform, *The FIRREA Revival: Dredging up Solutions to the Financial Crisis* at 6-7 (October 2014). Moreover, the Second Circuit's dilution of the causation requirement will likely yield other unintended consequences. For example, virtually any misconduct involving a publicly-traded company could be the basis for an "affects" finding so long as some bank owns shares of the stock, since the bank could potentially lose money when the share price drops. Even the fact that the government or a private party brings a lawsuit against an institution for an employee's acts would meet the Second Circuit's near-limitless definition, regardless of whether the suit has merit, since the institution would incur legal fees in defending the action. Surely the plain meaning of "affects" cannot be stretched so far so as to capture these scenarios, but that is precisely where the law is headed absent the Court's intervention.

IV. Legislative History

The legislative history of FIRREA shows that Congress was concerned with banks being harmed *by* fraud – whether committed by insiders or outsiders – and not by their own wrongful conduct. The House Report stated that FIRREA's criminal provisions were intended "to provide for improved supervision and enhanced enforcement powers and increase criminal and civil money penalties for crimes of fraud *against* financial institutions and depositors." H.R. Rep. No. 101-54, at 322 (1989), as *reprinted in* 1989 U.S.C.C.A.N. 86, 118 (emphasis added). Through FIRREA, Congress "authorized [the Department of Justice] to spend an additional seventy-five million dollars for the purpose of pursuing the prosecution of individuals who have acted illegally *against* financial institutions." *Id.* at 311, 1989 U.S.C.C.A.N. at 107 (emphasis added). *See also* H.R. Rep. No. 100-1088, at 33 (1988) ("[n]ew opportunities have been provided to both insiders and outsiders who are predisposed to enrich themselves *at the expense of the institutions and the Federal deposit insurance funds*") (emphasis added). The Senate Report stated that, "[a]ccording to the Department of Justice, the most prevalent forms of fraud and insider abuse included nominee loans, double pledging of collateral, reciprocal loan arrangements, land flips, embezzlement, and check kiting." S. Rep. No. 101-19, at 9 (1989). *See also Prosecuting Fraud in the Thrift Industry: Hearing Before the Subcommittee on Criminal Justice: Hearing on H.R. 1278 Before the Committee on the Judiciary*, 101st

Cong. 228 (1989) (statement of Joe D. Whitley, Acting Assoc. Att'y Gen. of the United States Dep't of Justice) ("[t]hose who have contributed to this crisis are avaricious operators, people who are attracted to the world of finance primarily because of the financial gain they can obtain *from money in the vault* and the opportunity to use that money for their own personal gain") (emphasis added). In short, the Senate, the House, and the Department of Justice all understood that FIRREA sought to curb abuses *against* banks.

The government's (non)use of the statute post-enactment underscores that it was not intended to stretch nearly as far as courts are now defining its reach. For example, although FIRREA was enacted in 1989, until recently it was rarely used to bring otherwise untimely fraud cases. *See* Andrew W. Schilling, *Understanding FIRREA's Reach: When Does Fraud 'Affect' a Financial Institution*, BNA Banking Report, 99 BBR 186 (July 24, 2012) ("the Department of Justice (DOJ) seems to have recently rediscovered the statute."); Peter Lattman & Ben Protess, *From Anonymity to Scourge of Wall Street*, N.Y. Times, October 30, 2013 (noting that government is "dusting off" this "obscure federal law"). And a survey of published cases reveals that for nearly 20 years the statute was rarely if ever invoked where the institution was an active participant in the offense.

Moreover, Congress could not have intended an interpretation of "affects" that would require the admission of evidence as prejudicial as "Non-Prosecution Agreements, Settlement Agreements, and

related testimony." App. 90. A defendant simply cannot win a trial if the government is allowed to show: (i) that his company paid $160 million to the IRS and various municipalities to settle charges with the SEC, the IRS and 25 state attorneys general; (ii) that it entered into a non-prosecution agreement with the Department of Justice acknowledging bid-rigging by "certain then-employees [from 2001-2006] at its municipal reinvestment desk;" and (iii) that the other financial institutions implicated in the fraud reached similar arrangements. App. 89.

A statute should be given "'a sensible construction' that avoids attributing to the legislature either 'an unjust or an absurd conclusion.'" *United States v. Granderson*, 511 U.S. 39, 56 (1994) (quoting *In re Chapman*, 166 U.S. 661, 667 (1897)). *See also Holy Trinity Church v. United States*, 143 U.S. 457, 461 (1892) (court should presume that legislature did not intend statute to lead to "injustice, oppression, or an absurd consequence") (quotations omitted). This Court's decision in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), made the point. That case involved 8 U.S.C. §1326, which makes it a crime punishable by up to two years for a deported alien to return to the United States, and up to 20 years if the deportation was for an aggravated felony. The Court concluded that Congress intended the enhanced penalty provision to be a sentencing factor and not an element of the offense. A "contrary interpretation," the Court held, "risks unfairness" since "the Government would be required to prove to the jury that the

defendant was previously deported 'subsequent to a conviction for commission of an aggravated felony.'" *Id.* at 234-35. This would be true "[e]ven if a defendant's stipulation were to keep the name and details of the previous offense from the jury." *Id.* at 235.[6]

To be sure, the district court noted that "[t]he Agreements do not mention any particular employee by name or description, and there is no acknowledgment that the Defendants in this case engaged in the conduct that led (at least in part) to the agreements." App. 89. And it agreed to instruct the jury that the agreements and related testimony were not "evidence of Defendants' guilt." App. 90. But just as a stipulation could not sanitize the prior crimes evidence in *Almendarez-Torres*, the redactions and instruction proposed here could not ameliorate the obvious harm from the introduction of the settlement evidence. No juror could put aside the powerful implication that UBS settled because it believed that Ghavami, Heinz and Welty were guilty of the charged crimes. *Cf. Gray v. Maryland*, 523 U.S. 185, 196 (1998) (redactions of co-defendant's confession did not solve *Bruton*

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[6] The Court cited with approval several lower court decisions that had reached the same result, including *United States v. Forbes*, 16 F.3d 1294, 1299 (1st Cir. 1994) ("strong policy reasons" counseled in favor of rejecting interpretation that would require introduction of "highly prejudicial" evidence), and *United States v. Jackson*, 824 F.2d 21, 25 (D.C. Cir. 1987) (noting that there was no "convincing evidence . . . that Congress intended to deviate" from "[the] strong policy of avoiding the introduction of this potentially prejudicial evidence in criminal trials").

problem where "[t]he inferences . . . involve statements that, despite redaction, obviously refer directly to someone, often obviously the defendant").[7]

Finally, our interpretation would not leave an unintended statutory lacuna. As noted above, DOJ brought virtually no cases under the theory advanced here during FIRREA's first two decades. Nevertheless, Congress left the "affects" language unchanged despite twice amending the other subsections of Section 3293. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, §320604(b) and (e), 108 Stat. 1796 (1994) (amending paragraph (1)); Crime Control Act of 1990, Pub. L. No. 101-647, §2505, 104 Stat. 4789 (1990) (adding paragraph (3)). A court will "[o]rdinarily [ ] resist reading congressional intent into congressional inaction." *Kimbrough v. United States*, 552 U.S. 85, 106 (2007). But Congress's inaction as to subsection (2) suggests that it, like the government, believed that "affects" did not encompass the conduct and harm alleged here. *See Andrus v. Allard*, 444 U.S. 51, 57 (1979) (finding "particularly relevant" that Congress twice amended statute without rejecting Department of Agriculture's

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[7] *See also Andreas*, 23 F. Supp. 2d at 848-49 (to admit evidence of corporate plea agreement and non-prosecution commitment would "raise serious concerns of unfair prejudice in that the jury may be unable to separate [the corporation] from the individual . . . executives on trial"); Arkin, *supra*, at 32 ("A variety of other reasons exist for excluding a corporate guilty plea apart from the plea's lack of probative value regarding even the corporation's guilt. Obviously, the prejudice to the individual defendants would be extreme.").

view of it); *United Airlines v. Brien*, 588 F.3d 158, 173 (2d Cir. 2009) (Congress's repeated amendment of statutory provisions without disapproval of agency's interpretation "is persuasive evidence that the Agency's interpretation is the one intended by Congress") (quoting *CFTC v. Schor*, 478 U.S. 833, 846 (1986)) (alterations and quotations omitted).

In short, Congress did not intend that FIRREA would apply where the bank was the wrongdoer.

CONCLUSION

For the reasons set forth above, this Court should grant certiorari to address the meaning of the phrase "affects a financial institution" under FIRREA and, specifically, whether a culpable bank actor can "affect" itself.

Dated: New York, New York
October 2, 2015

Respectfully submitted,

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Counsel of Record for all Petitioners

United States Court of Appeals,
Second Circuit.
UNITED STATES of America, Appellee,
v.
Gary HEINZ, Michael Welty, Peter **Ghavami**,
Defendants-Appellants.

Docket Nos. 13-3119-cr(L), 13-3121-cr(CON),
13-3296-cr(CON), 14-1845-cr(CON),
14-1857-cr(CON), 14-1859-cr(CON).
Argued: May 15, 2015.
Decided: June 4, 2015.

Marc L. Mukasey (Philip J. Bezanson, on the brief), Bracewell & Giuliani LLP, New York, N.Y., for Defendant-Appellant Gary Heinz.

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Before: WINTER, LOHIER, and CARNEY, Circuit Judges.

PER CURIAM:

Defendants-appellants Gary Heinz, Michael Welty, and Peter Ghavami appeal from judgments of conviction entered by the United States District Court for the Southern District of New York (Wood, *J.*), following a jury trial where the Defendants were convicted of conspiracy to commit wire fraud in violation of 18 U.S.C. §§ 371 and 1349 and, as to Heinz and Ghavami, wire fraud in violation of 18 U.S.C. § 1343. On appeal, the Defendants argue that the District Court erred by denying their motion to dismiss the superseding indictment as time barred.[1] We AFFIRM.

BACKGROUND

Heinz, Welty, and Ghavami were convicted in connection with schemes to defraud municipalities, the Department of the Treasury, and the Internal Revenue Service by manipulating the bidding process for municipal bond reinvestment agreements and other municipal finance contracts while employed at UBS Financial Services, Inc. ("UBS").

Before trial, the Defendants moved to dismiss the superseding indictment as untimely, arguing that the District Court should apply the five- or six-year statute of limitations for wire fraud and wire fraud

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[1] We address the Defendants' remaining arguments in a separate summary order filed simultaneously with this opinion.

conspiracies, *see* 18 U.S.C. § 3282(a); 26 U.S.C. § 6531(1), and that each fraudulent transaction identified in the indictment was completed more than six years before that indictment was filed. In denying the motion, the District Court concluded that the evidence the Government intended to submit at trial was enough to permit a jury to find that the Defendants' conduct "affect[ed] a financial institution" within the meaning of 18 U.S.C. § 3293(2), and thereby extend the statute of limitations to ten years under § 3293(2). The Government's proffered evidence comprised non-prosecution agreements and settlement agreements (the "Bank Agreements") that UBS and two other co-conspirator banks entered into with the Department of Justice, other federal regulatory agencies, and various state attorneys general; testimony from representatives of these banks that the Bank Agreements resulted from the conduct charged in the superseding indictment; and documents reflecting that some of the Bank Agreements discuss the particular transactions referenced in the indictment. In the Bank Agreements, the three financial institutions admitted wrongdoing, accepted responsibility for the illegal conduct of certain former employees, and agreed to pay more than $500 million in fines and restitution to federal agencies and municipalities. The banks also incurred attorney's fees arising from the investigations that resulted in the Bank Agreements.

Following the District Court's denial of the Defendants' motion to dismiss, the parties stipulated

that "each offense charged in the above-captioned matter, if proven beyond a reasonable doubt to have occurred, affected a financial institution for purposes of 18 U.S.C. § 3293(2) and 18 U.S.C. § 1343." App'x 1911.

The jury convicted Heinz, Welty, and Ghavami of conspiracy to commit wire fraud, and convicted Heinz and Ghavami of substantive wire fraud.

DISCUSSION

The Defendants orally preserved their right to appeal their legal arguments regarding the statute of limitations issue, and the District Court confirmed the Defendants' understanding that they had preserved those arguments. Accordingly, we address the merits.

18 U.S.C. § 3293(2) extends to ten years the statute of limitations for wire fraud offenses (including conspiracy to commit wire fraud) "if the offense affects a financial institution." 18 U.S.C. § 3293(2). "[T]he verb 'to affect' expresses a broad and open-ended range of influences." *United States v. SKW Metals & Alloys, Inc.*, 195 F.3d 83, 90 (2d Cir.1999). The plain language of § 3293(2) makes clear that "Congress chose to extend the statute of limitations to a broader class of crimes" than those in which "the financial institution is the object of fraud." *United States v. Bouyea*, 152 F.3d 192, 195 (2d Cir.1998) (quotation marks omitted). And so § 3293(2) "broadly applies to any act of wire fraud that affects a financial

institution," provided the effect of the fraud is "sufficiently direct." *Id.* (quotation marks omitted).

We conclude that the Defendants' wire fraud offenses "affected" the three banks in this case within the meaning of § 3293(2). It is undisputed that the banks executed the Bank Agreements prompted in part by the fraudulent conduct of the Defendants and their co-conspirators. As a result, the banks incurred significant payments and related fees, which were foreseeable to the Defendants at the time of their fraudulent activity. The role of the banks as co-conspirators in the criminal conduct does not break the necessary link between the underlying fraud and the financial loss suffered.

Since the relevant charges in the superseding indictment were well within the applicable ten-year statute of limitations, the District Court properly denied the motion to dismiss.

CONCLUSION

We have considered the Defendants' remaining arguments and conclude that they are without merit. For the reasons stated herein and in the separate summary order accompanying this opinion, the judgments of the District Court are AFFIRMED.

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

United States Court of Appeals,
Second Circuit.
UNITED STATES of America, Appellee,
v.
Gary HEINZ, Michael Welty, Peter **Ghavami**,
Defendants-Appellants.

Nos. Nos. 13-3119-cr(L), 13-3121-cr(CON),
13-3296-cr(CON), 14-1845-cr(CON),
14-1857-cr(CON), 14-1859-cr(CON.).
June 4, 2015.

Appeal from judgments of the United States District Court for the Southern District of New York (Kimba M. Wood, Judge).

Marc L. Mukasey (Philip J. Bezanson, on the brief), Bracewell & Giuliani LLP, New York, NY, for Gary Heinz, Gregory L. Poe (Preston Burton, Rachel S. LiWai Suen, on the brief), Poe & Burton PLLC, Washington, DC, for Michael Welty, Nathaniel Z.

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Daniel E. Haar, Attorney (Brent Snyder, Deputy Assistant Attorney General, James J. Fredricks, Finnuala K. Tessier, Kalina Tulley, Jennifer Dixton, Attorneys, on the brief), U.S. Department of Justice, Antitrust Division, Washington, DC, for Appellee.

SUMMARY ORDER

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgments of the District Court are AFFIRMED.

Defendants-appellants Gary Heinz, Michael Welty, and Peter Ghavami appeal from judgments of conviction, following a jury trial, for conspiracy to commit wire fraud in violation of 18 U.S.C. §§ 371 and 1349 and, as to Heinz and Ghavami, wire fraud in violation of 18 U.S.C. § 1343. On appeal, the Defendants claim that (1) the Government should be judicially estopped from arguing that their conduct affected financial institutions, (2) the Government failed to disclose evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and (3) the District Court erred by improperly instructing the jury, admitting prior bad acts evidence, and admitting lay

witness testimony.[1] We assume the parties' familiarity with the facts and record of the prior proceedings, to which we refer only as necessary to explain our decision to affirm.

We are not persuaded by the Defendants' argument regarding judicial estoppel. The original indictment and co-conspirators' plea agreements, which do not state whether the fraud "affected a financial institution," are not "clearly inconsistent" with the charges in the superseding indictment that the Defendants' fraud "affected a financial institution." *See New Hampshire v. Maine*, 532 U.S. 742, 750 (2001); *United States v. Christian*, 342 F.3d 744, 748 (7th Cir.2003).

As for the alleged *Brady* violation, we agree with the District Court that the email the Government failed to disclose is neither favorable nor material to the defense. *See United States v. Certified Envtl. Servs., Inc.*, 753 F.3d 72, 91, 93 (2d Cir.2014). Rather, the email supports the Government's theory at trial regarding the meaning of code words used within the conspiracy.

Nor do we identify error in the District Court's jury instruction and evidentiary decisions. Viewed as a whole, the jury instruction did not convey to the jury that a certification was false if it was submitted

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[1] We address the Defendants' argument that the prosecution was time barred in a separate opinion filed simultaneously with this order.

for a business purpose that the jury deemed illegitimate, *see United States v. George*, 779 F.3d 113, 117 (2d Cir.2015), and it was not error to instruct the jury to determine whether the Defendants agreed to defraud municipalities of their property right to control their assets, *see United States v. Carlo*, 507 F.3d 799, 802 (2d Cir.2007). In addition, for substantially the reasons provided by the District Court, it was not error to admit evidence that Ghavami and Heinz manipulated bids on municipal investment contracts during their previous employment at JPMorgan Chase, particularly since the District Court gave an appropriate limiting instruction to the jury. *See United States v. Mercado*, 573 F.3d 138, 141-42 (2d Cir.2009). Finally, the District Court did not err by admitting lay witness Mark Zaino's opinion testimony pursuant to Federal Rule of Evidence 701. The Government laid a sufficient foundation to explain that Zaino derived his opinions as a member of the Defendants' conspiracy, Zaino's testimony helped explain "ambiguous references . . . that [were] clear only to the conversants," and the testimony was not based on specialized knowledge within the scope of Federal Rule of Evidence 702. *United States v. Yannotti*, 541 F.3d 112, 125-26 (2d Cir.2008); *see United States v. Garcia*, 291 F.3d 127, 141 (2d Cir.2002).

We have considered the Defendants' remaining arguments that are not the subject of the opinion we issue simultaneously with this summary order and conclude that they are without merit. For the reasons

stated herein and in the separate opinion accompanying this order, the judgments of the District Court are AFFIRMED.

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23 F.Supp.3d 148

United States District Court,
S.D. New York.
UNITED STATES of America
v.
Peter GHAVAMI, Gary Heinz, and Michael Welty,
Defendants.

No. 10 Cr. 1217(KMW).
Signed May 15, 2014.

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OPINION & ORDER

KIMBA M. WOOD, District Judge:

After a month-long trial, Defendants Peter Ghavami ("Ghavami"), Gary Heinz ("Heinz"), and Michael Welty ("Welty") (collectively, "Defendants")

were convicted of conspiracies to defraud municipal bond issuers, the United States Department of Treasury, and the Internal Revenue Service, by manipulating the bidding process for municipal bond investment products and other municipal finance products, in violation of 18 U.S.C. §§ 371 and 1349. Heinz and Ghavami were also convicted of substantive wire fraud, in violation of 18 U.S.C. § 1343.

Welty now moves for a new trial, pursuant to Federal Rule of Criminal Procedure 33 ("Rule 33"); Ghavami and Heinz join Welty's motion for a new trial. In addition, Heinz and Welty move for release pending appeal, pursuant to 18 U.S.C. § 3143(b). For the following reasons, the Court DENIES both motions.

I. BACKGROUND

Defendants worked for UBS Financial Services, Inc. ("UBS") on its municipal bond reinvestment and derivatives desk, (Tr. 502-03), participating in a market in which financial institutions provide investment products to the issuers of municipal bonds. Municipal bonds are issued by government and quasi-governmental entities to raise money for operations or projects. The money raised is typically spent slowly over time; issuers therefore frequently invest bond proceeds in investment products. These products are often chosen through a competitive bidding process, run by a financial institution hired by the issuer to act as a "broker." The broker solicits bids from

financial institutions for investment products that are customized to the issuer's needs. The investment product offering the highest rate of return generally wins the bidding, and the financial institution that submits the winning bid is chosen as the investment product "provider." UBS functioned as both a broker and a provider for municipal bond investment products during the relevant time period. (Tr. 517, 529-30, 3861); *see generally United States v. Grimm*, 738 F.3d 498, 499-500 (2d Cir.2013) (discussing the investment of municipal bond proceeds); (*see, e.g.*, Tr. 499-590, 2703, 2913-14, 3858-61).

Typically, interest payments on municipal bonds are not subject to federal income tax. *See* I.R.C. § 103(a) (providing that, subject to certain exceptions, "gross income does not include interest on any State or local bond"). As part of the process for maintaining a bond's tax-exempt status when its proceeds are put into an investment product, United States Treasury regulations require issuers to determine the investment product's fair market value, *see Grimm*, 738 F.3d at 500 (citing Treas. Reg. § 1.148-5(d)); under the regulations' "safe harbor" provision, an investment product's purchase price can be "treated as the fair market value of the investment," if certain requirements for a competitive bidding process are satisfied, Treas. Reg. § 1.148-5(d)(6)(iii). The regulations require, among other things, that at least three bids be received, that a potential provider "not consult with any other potential provider about its bid" or be "given the opportunity to review other bids (i.e., a last

look) before providing a bid," that bids be "determined without regard to any other formal or informal agreement that the potential provider has with the issuer or any other person," and that bids not be submitted "solely as a courtesy to the issuer or any other person for purposes of satisfying" the three-bid requirement. *Id.* Brokers and bidders sign "certifications" to the issuer that typically contain representations mirroring the Treasury regulations' requirements, so that the issuer's legal counsel can verify the bond's tax-exempt status. *See generally Grimm*, 738 F.3d at 499-500 (discussing the Treasury regulations); (*see, e.g.*, Tr. 521-94, 1640-47, 1858, 2068, 2473, 2701-10, 2735-46, 2802-09, 2914-16, 3590-91, 3942-56).

The Government charged Defendants with conspiring to manipulate and rig bidding on certain investment products, and then falsely certifying that competitive bidding processes had occurred. The Superseding Indictment contained six counts.

Counts One and Two charged Defendants with conspiracy to commit wire fraud in connection with UBS's role as a potential provider. Count One alleged that Defendants, acting as potential providers, conspired with other potential providers – specifically, individuals at J.P. Morgan Chase ("JPMC") and Bank of America ("BOA") – to reduce competition among the firms by exchanging bid information, such as discussing on which transactions to bid, and submitting intentionally losing bids on each others' behalf, in violation of 18 U.S.C. § 371. Count Two charged that Defendants, acting as potential providers,

conspired with a broker – Chambers, Dunhill, Rubin & Co. ("CDR") – to set up bids for UBS to win, in violation of 18 U.S.C. § 1349. Coconspirators at CDR allegedly provided Defendants with the opportunity to change bids after reviewing the bids of others, kept competitive bidders off bid lists, and solicited intentionally losing bids from other potential providers. In return, UBS gave CDR kickbacks and submitted intentionally losing bids when requested. (*See* Superseding Indictment [Dkt. No. 30]).

The Government also alleged, in Counts Three through Five, that Defendants rigged bidding while acting as a broker. Count Three charged Defendants with substantive wire fraud, for purportedly setting up a transaction for BOA to win in exchange for a kickback, in violation of 18 U.S.C. § 1343. Count Four charged Heinz and Welty with conspiracy to commit wire fraud. Count Four alleged that Heinz and Welty conspired with a potential provider – GE Capital ("GE") – to rig bidding in GE's favor by providing coconspirators at GE with "last looks" and by agreeing to keep competitive bidders off bid lists, in return for kickbacks on other transactions, in violation of 18 U.S.C. § 1349. Count Five charged Heinz with substantive wire fraud for manipulating the bidding process on a transaction to steer it to JPMC, in violation of 18 U.S.C. § 1343. (*See* Superseding Indictment).

Additionally, the Government charged Heinz, in Count Six, with witness tampering, in violation of

18 U.S.C. §§ 1512(b)(1) and (3). (*See* Superseding Indictment).

At trial, the Government presented substantial evidence to support these charges. Among numerous witnesses called by the Government who testified against Defendants were alleged coconspirators at UBS, CDR, BOA, JPMC, and GE. In addition to emails and other documents in furtherance of the conspiracies that were submitted into evidence, the Government played audio recordings of numerous phone calls between Defendants and their alleged coconspirators. The Government also submitted approximately sixty purportedly false certifications signed by Defendants and their alleged coconspirators on over twenty transactions.

The jury found Ghavami guilty on Counts One through Three; Welty guilty on Counts One, Two, and Four; and Heinz guilty on Counts One through Five. (Tr. 4864-65). Welty was found not guilty on Count Three, and Heinz was found not guilty on Count Six. (*Id.*). Ghavami was sentenced to 18 months of imprisonment, and he was fined $1,000,000. [Dkt. No. 389]. Welty was sentenced to 16 months of imprisonment and three years of supervised release, and he was fined $300,000. [Dkt. No. 386]. Heinz was sentenced to 27 months of imprisonment and three years of supervised release, and he was fined $400,000. [Dkt. No. 385].

II. MOTION FOR A NEW TRIAL

Welty's motion for a new trial contends that the Government failed to disclose material evidence favorable to the defense in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). In the course of discovery in this case, the Government produced the equivalent of approximately 19.5 million records, along with over 600,000 audio files of recorded conversations. (*See* Gov't Opp. to Mot. for New Trial 3 [Dkt. No. 461]). After Defendants were convicted, the prosecutors in this case learned that, due to the fault of a vendor, a subset of files from CDR – an alleged coconspirator broker – had not been reviewed by the prosecutors in this case and thus had not been turned over in discovery. (*See* Letters to the Court [Dkt. Nos. 421, 423, 439-48, 450-51, 455]). Those records (which totaled nearly 400,000 documents) were produced to Defendants post-trial, in late 2013. (*See id.* [Dkt. Nos. 423, 439, 455]). Welty asserts that *one* of the newly-produced documents (the "Goldberg Email") could have changed the outcome of the trial and should have been produced pursuant to the Government's *Brady* obligations. The Court disagrees and thus DENIES Welty's motion for a new trial.

A. Legal Standard

Rule 33 provides that a court "may vacate any judgment and grant a new trial if the interest of justice so requires."[1]

Under *Brady*, the Government must "disclose material evidence favorable to a criminal defendant." *United States v. Mahaffy*, 693 F.3d 113, 127 (2d Cir.2012); *see also United States v. Bagley*, 473 U.S. 667, 676, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985) (noting that "[i]mpeachment evidence . . . as well as exculpatory evidence, falls within the *Brady* rule"). Undisclosed evidence is "material" if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Youngblood v. West Virginia*, 547 U.S. 867, 870, 126 S.Ct. 2188, 165 L.Ed.2d 269 (2006) (quotation marks omitted). A showing of materiality, though, "'does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal,'" but rather requires only "'a showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'"

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[1] Although Rule 33 states that, if "an appeal is pending" – as is the case here – a court "may not grant a motion for a new trial until the appellate court remands the case," Fed.R.Crim.P. 33, a district court nonetheless has "jurisdiction to *deny* a Rule 33 motion during the pendency of an appeal," *United States v. Camacho*, 302 F.3d 35, 36 (2d Cir.2002) (emphasis added).

Mahaffy, 693 F.3d at 127 (quoting *Youngblood*, 547 U.S. at 870, 126 S.Ct. 2188).

B. Discussion

The Government acknowledges that it failed to timely disclose the Goldberg Email. (*See* Gov't Opp. to Mot. for New Trial 10). The Government argues, however, and the Court agrees, that this failure did not constitute a *Brady* violation, because the Goldberg Email was not "material" evidence; even if it had been disclosed before trial, there is no reason to believe that it would have had any impact on the verdict.[2]

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[2] Welty argues that a new trial would be warranted even if the Goldberg Email had not been suppressed and were, instead, from a "neutral source." (Welty Mem. of Law in Supp. of Mot. for New Trial 19-21 [Dkt. No. 458]). This point is moot. The Government concedes that it had possession of the Email and failed to timely disclose it. Moreover, having failed to satisfy the *Brady* standard for materiality, the Email would not merit a new trial under the standard for non-suppressed newly discovered evidence, given that the "burden on a defendant in supporting a motion for a new trial based on newly discovered evidence from a neutral source is higher than that for undisclosed *Brady* evidence." *Orena v. United States*, 956 F.Supp. 1071, 1092 (E.D.N.Y.1997). Whereas *Brady* mandates a new trial if suppressed evidence creates "a real enough possibility to undermine confidence in the verdict," *Mahaffy*, 693 F.3d at 134, neutral source evidence merits a new trial only if the "admission of the evidence would probably lead to an acquittal," *United States v. Alessi*, 638 F.2d 466, 479 (2d Cir.1980); *see, e.g.*, *United States v. Basciano*, 03 Cr. 929, 2008 WL 905867, at *2 (E.D.N.Y. Mar. 31, 2008) (explaining that, because the court declined to grant the

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The Goldberg Email is most directly relevant to Count Four. As to Count Four, the Government presented evidence that Heinz and Welty, while serving as brokers for certain investment products, manipulated bidding in order to allow Peter Grimm ("Grimm"), an alleged coconspirator at GE, to win deals at reduced prices. In return, Grimm provided Heinz and Welty with kickbacks on related transactions.

As part of its case on Count Four, the Government submitted audio recordings of phone calls between Welty and Grimm. The Government argued that some of the calls revealed Grimm informing Welty of his intended bid, which Welty then reduced, to allow Grimm to win the bidding at a lower price.

In these phone conversations, however, Welty and Grimm did not explicitly use the word "bid"; rather, they used the word "indication." At trial, the Government acknowledged that "indication" has a meaning in general industry practice that is distinct from "bid." Evidence showed that, in typical practice, brokers and bidders often asked one another for information concerning the levels at which bids would be made in the current (albeit fast moving) market.

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defendant a new trial "under the lower standard applicable to such a motion where the Government has suppressed evidence," the defendant "necessarily cannot establish that he should receive a new trial under the more rigorous standard applicable to a motion based upon newly discovered evidence"), *aff'd*, 384 Fed.Appx. 28 (2d Cir.2010).

These estimated bid levels could change over time, given market fluctuations; the closer to bidding time, the more likely it was that the level given would be the bank's actual bid. In the parlance of the industry, these bid levels were termed "indications."

One of the Government's witnesses, an alleged coconspirator at UBS named Mark Zaino ("Zaino"), testified that although the word "indication" does not usually mean "bid," (*see* Tr. 698, 1099, 1654-56, 1790), he would sometimes use the word "indication" to signify "bid." In particular, Zaino testified that the meaning of his use of "indication" changed closer to bidding time, and he explained that, "[a]s a broker," he would use "indication" to "signal" to the bidder "a bid to submit" and, "as a bidder," he would use it to "signal" to the broker "a bid that I wanted to submit." (Tr. 698-99). Based on his experience in the conspiracies, Zaino testified that, on certain phone calls related to Count Four transactions, Welty and Grimm had similarly used "indication" to signal "bid." (*See, e.g.*, Tr. 1117-19, 1231).

Defendants contended at trial, however, that the word "indication" never meant "bid." Thus, according to Defendants, when the conspirators told one another their "indication," they were speaking about only where they saw the market price and were not signaling what they specifically planned to bid.

Welty claims that the Goldberg Email warrants a new trial because it shows an instance in which the word "indication" was expressly distinguished from

"bid." The Email relates to a transaction that CDR brokered. (*See* Welty Mem. in Supp. of Mot. for New Trial ("Welty New Trial Mem."), Attach. 1, Decl. of Jeffrey L. Ziglar ("Ziglar Decl.") [Dkt. No. 458]). Matt Rothman ("Rothman") at CDR sent the bid specifications for the deal to individuals at various potential providers, including Welty at UBS. (*See id.*, Ex. B). On the day bids were due, Welty emailed Rothman, stating that "we are out our indication is not good it is not a good offer." (*Id.*, Ex. C). Shortly thereafter, Jeffrey Ziglar ("Ziglar"), a former colleague of Defendants' at UBS, (*see* Tr. 3850), sent an email to Rothman and another broker at CDR, Doug Goldberg ("Goldberg"), copying Welty and stating that, "[f]or the record no trade has been done with UBS on this deal," (Ziglar Decl., Ex. D). Four minutes later, in the email that Welty now claims merits a new trial, Goldberg replied that, "[f]or the record until I hear a tape using the words indication we are not through with this conversation!," (*id.*, Ex. E), implying that only if he heard the word "indication" from UBS would he consider UBS's number *not* to be a bid. The following day, Welty wrote to Rothman, stating that the relevant phone calls had not been recorded, so no verbatim record could be provided. (*Id.*, Ex. K). In the same email, Welty explained that UBS "did not realize you were soliciting an actual bid for securities as opposed to seeking some market color." (*Id.*). Ziglar recalls that this "dispute was resolved consistent with [UBS's] position . . . and that UBS did not participate" in the transaction. (Ziglar Decl. ¶ 3).

Welty contends that the Goldberg Email corroborates Defendants' categorical distinction between "indications" and "bids," thereby revealing their lack of criminal intent, undermining Zaino's testimony and credibility, and undermining the Government's reliance on Zaino's testimony in its summation. Because Zaino also testified on matters pertaining to counts other than Count Four, Welty argues that the Government's failure to disclose the Goldberg Email prejudiced the entire trial. The Email is immaterial, however, for three reasons. First, it is consistent with the Government's theory at trial and does not support Defendants' position. Second, to the extent the Email could have been used to impeach Zaino, it would have been cumulative. Third, the substantial evidence presented at trial of Defendants' guilt negates the possibility that the Email could have "put the whole case in such a different light as to undermine confidence in the verdict." *Mahaffy*, 693 F.3d at 127.

1. *The Goldberg Email Is Consistent with the Government's Theory at Trial*

Goldberg's distinction between bids and indications in the Email is reflective of general industry practice and is consistent with the Government's position and the testimony the Government elicited at trial. (*See, e.g.*, Tr. 698, 1790 (Zaino acknowledging that "indication" typically means a "price that would transact given the then current market" and was not normally the same as a bid)). Goldberg was not alleged to be part of the Count Four conspiracy;

Ziglar – the direct recipient at UBS of the Email and the author of the message to which Goldberg replied – was not alleged to be a coconspirator in any of the charged counts; and the transaction discussed in the Goldberg Email was not claimed by the Government to have been rigged. If anything, the Goldberg Email is just one more example of how the term was used *outside* the conspiracy. It does not bolster the defense position that, *within* the conspiracy, "indication" was never used to mean "bid."

2. *Use of the Email to Impeach Zaino Would Have Been Cumulative*

Use of the Email to contradict Zaino's testimony would have added little or nothing to the evidence already in Defendants' hands. "[I]f the information withheld is merely cumulative of equally impeaching evidence introduced at trial, so that it would not have materially increased the jury's likelihood of discrediting the witness, it is not material." *United States v. Spinelli*, 551 F.3d 159, 165 (2d Cir.2008).

Zaino was cross-examined heavily on the meaning of the word "indication" and steadfastly maintained his position that although the word had one general meaning, it could also be used to signal the price at which bids would be submitted. Defendants attempted to impeach Zaino on this point with his prior testimony from a related trial, *United States v. Carollo*, 10 Cr. 654 (S.D.N.Y.). Welty's counsel read from the transcript of that case, in which Zaino

answered affirmatively to the question "[c]an we agree an indication is different from a bid?" (Tr. 1655-57). In response to questioning from Welty's counsel in the instant case, Zaino similarly replied that an indication is "[m]ost times not" an executable price. (*Id.*). But Zaino insisted that the word "indication" did not always have the same meaning in every context. (*See, e.g.*, *id.*).

Zaino's credibility was also attacked by cross-examination about his plea agreement, (Tr. 1295-97, 1328), crimes he had committed outside the scope of his plea agreement, (Tr. 1292-93, 1329, 1706-07), and evidence that he disliked Welty, (Tr. 1570-72; *see also* Tr. 3855). Defendants also called Ziglar, who testified that indications are not bids. (Tr. 3865-66, 3899).

Zaino had therefore been thoroughly attacked by defense counsel, not only on the exact point for which the Goldberg Email could have been used, but also by additional means of impeachment. The Goldberg Email, moreover, would have been a far less persuasive means of impeaching Zaino than the myriad approaches utilized by the defense at trial, because Zaino had no involvement in the Goldberg Email conversation.

3. *The Government Submitted Substantial Evidence, In Addition To Zaino's Testimony*

"Where the evidence against the defendant is ample or overwhelming, the withheld *Brady* material

is less likely to be material than if the evidence of guilt is thin." *United States v. Gil*, 297 F.3d 93, 103 (2d Cir.2002).

The Government's evidence at trial was substantial. It consisted of considerably more than just Zaino's testimony, and the majority of the evidence had nothing to do with the meaning of "indication," which was an issue only as to Count Four. As to Count Four, the Government also introduced, for example, (i) recorded phone calls in which Heinz and Grimm appeared to discuss kickbacks in return for rigged bidding, (*see* Gov't Exs. 605607, 605610 (Heinz remarking to Grimm, "I thought there was some profit sharing, if you will")); (ii) recorded phone calls in which Welty, acting as a broker, seemed to manipulate bidding lists in Grimm's favor, (*see* Gov't Ex. 11906(A) (Welty asking Grimm, "who do you wanna, wanna see in this thing?," and Grimm responding, "[w]ell, who don't I wanna see?"); Gov't Ex. 605507 (Welty asking Grimm, "who you wanna go against?"));[3] and (iii) recorded phone calls in which

[3] Welty argues that the Treasury regulations "do not prohibit the discussion of bid lists between bidding agents and potential providers," citing trial testimony by Ziglar. (Welty Reply Mem. in Supp. of Mot. for New Trial 6 [Dkt. No. 464]). Yet Ziglar testified merely that he would not state with a "blanket no" that a broker should not consult with a potential provider about who should be on a bid list, because it might be proper for a broker and potential provider to discuss which potential providers could be good for a particular transaction, for the purpose of gathering "market information." (Tr. 3951-52). Broker-provider communications about manipulating bid lists in

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Welty and Grimm appeared to discuss sharing profits on rigged transactions, (*see, e.g.*, Gov't Ex. 11954 (Grimm noting to Welty that, "you know, obviously, . . . the better level I can get the other one at, you know, the more, you know, I could give"); Gov't Ex. 11968 (Grimm explaining to Welty that, "the more, you know, I mean, so this way we could take care of the other, you know, better")).

C. The Court Denies Welty's Request for an Evidentiary Hearing

Welty requests an evidentiary hearing on his motion for a new trial. (*See* Welty New Trial Mem. 21). Welty suggests that an evidentiary hearing would permit the Court to hear testimony from two participants in the Goldberg Email. Whether to hold an evidentiary hearing before deciding a motion for a new trial rests within the district court's discretion. *See United States v. Sasso*, 59 F.3d 341, 350 (2d Cir.1995).

The Court finds that an evidentiary hearing is unnecessary and rejects Welty's request. The Court's denial of Welty's motion for a new trial does not rest

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order to make bidding less competitive is entirely distinct from gathering "market information"; as Ziglar acknowledged, issuers asked brokers "to get the most competitive providers on the list," and a broker "would try to foster a competitive bidding process" by getting "the most competitive providers put on the bid list." (Tr. 3952 (questions asked by the Government on cross, to which Ziglar responded affirmatively)).

on choosing between competing interpretations of the Goldberg Email; the Court finds Welty's arguments unavailing, even taking his interpretation of the Email as correct.[4] *Cf. United States v. Helmsley*, 985 F.2d 1202, 1209-10 (2d Cir.1993) (explaining that a hearing on a new trial motion is unwarranted where "'[t]he moving papers themselves disclosed the inadequacies of the defendants' case, and the opportunity to present live witnesses would clearly have been unavailing'" (quoting *United States v. Slutsky*, 514 F.2d 1222, 1226 (2d Cir.1975))).

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[4] Furthermore, it is unlikely that the testimony of Welty's two proposed witnesses would assist the Court's determination of the Goldberg Email's materiality. Welty seeks to examine Goldberg and Rothman; Welty "anticipate[s] that both Mr. Goldberg and Mr. Rothman would support [Defendants'] position that an 'indication' is not a 'bid' and contradict Mr. Zaino's testimony on the subject," (Welty Reply in Supp. of Mot. for New Trial 15). But the Court already heard Rothman address the use of "indication" at trial in this case, and his testimony used the term's general meaning, consistent with Defendants' argument. (*See* Tr. 3479). Defendants had an opportunity to cross-examine Rothman on this testimony at trial. Goldberg, by contrast, did not testify about the meaning of "indication" in this case. Yet he gave substantial testimony in the *Carollo* trial that undermines Defendants' position; Goldberg explained in *Carollo* that he "used guarded language" on recorded phone lines and that he used a different meaning of "indication" in certain contexts to conceal his illegal conduct. Tr. 369-70, *Carollo*, 10 Cr. 654 (S.D.N.Y.2012) (Goldberg stating that he "might use language that if heard outside what the understanding is wouldn't seem like anything," and noting that "a word like indication I would use in a manner opposite of its meaning").

III. MOTION FOR RELEASE PENDING APPEAL

After the Court sentenced Defendants, they each appealed their convictions. Heinz and Welty now move for release pending appeal, [Dkt. Nos. 404, 406]; Ghavami does not. For the following reasons, the Court DENIES Heinz's and Welty's motions for release pending appeal.

A. Legal Standard

Release pending appeal is warranted when (i) the defendant "is not likely to flee or pose a danger to the safety of any other person or the community if released"; (ii) "the appeal is not for the purpose of delay"; and, most importantly for the present motion, (iii) the appeal "raises a substantial question of law or fact likely to result in," among other things, reversal, a new trial, or a materially reduced sentence. 18 U.S.C. § 3143(b).

The Second Circuit defines a "substantial" question as "one of more substance than would be necessary to a finding that it was not frivolous. It is a 'close' question or one that very well could be decided the other way." *United States v. Randell*, 761 F.2d 122, 125 (2d Cir.1985) (internal citations omitted). The defendant has the burden of persuasion on whether the questions raised on appeal are "substantial" and are likely to result in a reversal, new trial, or materially reduced sentence. *Id.*

B. Discussion

Heinz and Welty together raise four issues that they contend constitute substantial questions of law or fact.[5] First, they both contend that the Court incorrectly held that 18 U.S.C. § 3293(2), which extends the limitations period for a wire fraud offense if the offense "affects a financial institution," is applicable if the offense exposes the institution to a new or increased risk of loss. Second, Heinz argues that the Government's contention that Defendants' conduct affected a financial institution under 18 U.S.C. § 3293(2), when it did not make the same assertion in related plea agreements with Defendants' coconspirators, violated due process. Third, Welty asserts that a portion of the Court's jury instructions was erroneous. Fourth, Welty states that Zaino's trial testimony violated Federal Rule of Evidence 701.

The Court concludes that none of these issues presents sufficiently close, substantial questions to permit release pending appeal.

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[5] Although Heinz and Welty do not each brief all four arguments in their respective memoranda, they both expressly join in and adopt one other's arguments. (*See* Heinz Mem. of Law in Supp. of Mot. for Release Pending Appeal 1 n. 2 [Dkt. No. 407]; Welty Mem. of Law in Supp. of Mot. for Release Pending Appeal 2 n. 1 [Dkt. No. 405]).

1. *Statute of Limitations*

Under 18 U.S.C. § 3293(2), the statute of limitations for wire fraud and conspiracies to commit wire fraud, which is typically five years, *see* 18 U.S.C. § 3282(a), is extended to ten years if "the offense affects a financial institution." Before trial, Defendants moved to dismiss Counts One through Five of the Superseding Indictment as untimely. In denying their motion, the Court concluded that a financial institution is "affect[ed]" under 18 U.S.C. § 3293(2) if the offense "exposes such institution to a new or increased risk of loss, even if there is no actual or net loss." *United States v. Ghavami*, 10 Cr. 1217, 2012 WL 2878126, at *6 (S.D.N.Y. July 13, 2012) (Wood, J.). The Court found that the Government had alleged sufficient evidence – in the form of enormous settlement payments made by financial institutions, including UBS,[6] as a result of Defendants' conduct and

[6] UBS's settlement with the SEC included disgorgement of $9,606,543, prejudgment interest of $5,100,637, and a civil penalty in the amount of $32,500,000. (*See* Gov't Mem. of Law in Opp. to Mot. to Dismiss, Ex. B [Dkt. No. 110]). The Government asserts that UBS's settlement agreements with the SEC, IRS, and twenty-five state attorneys general required UBS to pay a total of $160 million. (*See id.* at 11). JPMC's settlement with the SEC similarly included disgorgement of $11,065,969, prejudgment interest of $7,620,380, and a civil penalty in the amount of $32,500,000. (*See id.*, Ex. D). The Government asserts that JPMC's settlements with various federal regulators and state attorney generals totaled $228 million. (*See id.* at 12). BOA's SEC settlement provided for disgorgement of $24,926,375 and prejudgment interest of $11,170,067. (*See id.*, Ex. F). The Government asserts that BOA's settlements with various federal

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in return for non-prosecution agreements – to demonstrate a new or increased risk of loss to financial institutions. *See id.* at *9-10. Heinz and Welty contend, instead, that for an offense to "affect[ ]" a financial institution, the offense must at least cause the institution to suffer an *actual* loss, not just a *risk* of loss. They argue that the Government's evidence does not show actual loss.

Heinz and Welty have little support for their position. The Court's interpretation is consistent with § 3293(2)'s plain meaning and purpose. Moreover, authority from other courts, both within and outside the Second Circuit, is overwhelmingly in accord with the Court's ruling. And even if the Second Circuit were to hold that an actual loss must be shown to satisfy § 3293(2), the Government should nonetheless prevail, because the settlements suffice to demonstrate actual losses. Heinz and Welty's statute of limitations argument is not, therefore, a substantial question likely to result in a reversal, new trial, or materially reduced sentence.[7]

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regulators and state attorney generals totaled $137.3 million. (*See id.* at 13).

[7] Congress amended 18 U.S.C. § 3293, to add the "affects a financial institution" language, in Section 961 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"). *See* P.L. 101-73, 103 Stat. 183 (Aug. 9, 1989). FIRREA simultaneously amended and enacted other sections of the United States Code using almost identical language. *See id.* § 951 (enacting 12 U.S.C. § 1833); *id.* § 961 (amending 18 U.S.C. §§ 1341 and 1343); *id.* § 963 (amending 18 U.S.C. § 982). The

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a. The Court's Prior Interpretation and Application of 18 U.S.C. § 3293(2)

The Court's prior opinion explained that, although the Second Circuit Court of Appeals had not addressed the issue, other courts have concluded that a financial institution is "affected" for purposes of § 3293(2) where it is exposed to a new or increased risk of loss; the Court found this interpretation compelling "in light of the plain meaning and purpose of § 3293(2)." *Ghavami*, 2012 WL 2878126, at *5. The Court noted that "[t]he most common meaning of the verb 'affect' is 'to produce an effect upon,'" *id.* (quoting Webster's Third New International Dictionary 35), and that creating a new or increased risk of loss for a financial institution "'is plainly a material, detrimental effect'" on that institution, *id.* (quoting *United States v. Mullins*, 613 F.3d 1273, 1278-79 (10th Cir.2010)). Moreover, "interpreting § 3293(2) to cover conduct that exposes a financial institution to a new or increased risk of loss is also consistent with

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Government, Heinz, and Welty cite decisions applying these various statutes, as have other courts discussing what conduct affects a financial institution. *See, e.g.*, *United States v. Stargell*, 738 F.3d 1018, 1022-23 (9th Cir.2013) (interpreting the phrase "affected a financial institution" in 18 U.S.C. § 1343, and citing to cases applying 18 U.S.C. § 3293); *United States v. Wells Fargo Bank, N.A.*, 972 F.Supp.2d 593, 629-31 (S.D.N.Y.2013) (Furman, J.) (discussing the phrase "affecting a federally insured financial institution" in 12 U.S.C. § 1833, and citing to cases applying 18 U.S.C. § 3293). This Court will therefore similarly cite to decisions interpreting those portions of FIRREA that use language nearly identical to that in § 3293.

the statute's legislative purpose, which is 'to protect financial institutions, a goal it tries to accomplish in large part by deterring would-be criminals from including financial institutions in their schemes.'" *Id.* at *6 (quoting *United States v. Serpico*, 320 F.3d 691, 694 (7th Cir.2003)); *see also Serpico*, 320 F.3d at 694-95 ("Just as society punishes someone who recklessly fires a gun, whether or not he hits anyone, protection for financial institutions is much more effective if there's a cost to putting those institutions at risk, whether or not there is actual harm."); *Mullins*, 613 F.3d at 1278 (noting that, although "Congress certainly could have extended the limitations period only when wire fraud 'causes a loss' to a financial institution, it chose instead to use the considerably broader term 'affects'").

The Court concluded that the Government had "sufficient evidence to permit a jury to find that Defendants' conduct 'affect[ed] a financial institution' within the meaning of 18 U.S.C. § 3293(2)." *Ghavami*, 2012 WL 2878126, at *10. The Government's evidence included settlement agreements that various financial institutions, including UBS, had entered into with the Securities and Exchange Commission (the "SEC") and other regulators, and non-prosecution agreements that some of those financial institutions, again including UBS, had entered into with the Department of Justice (the "DOJ"), both relating to Defendants' charged conduct. *Id.* at *7-8. The Court found that the settlements, which were for hundreds of millions of dollars, and the non-prosecution

agreements, which admitted responsibility for employees' unlawful conduct, "illustrate[d] that the alleged conduct created an increased risk of loss." *Id.* at *9 (noting that it was "a risk that was ultimately realized").

b. *Other Courts Are in Accord with the Court's Interpretation of 18 U.S.C. § 3293(2)*

i. Second Circuit

Although the Second Circuit Court of Appeals has not addressed whether a financial institution's risk of loss constitutes a sufficient effect under § 3293(2), the decision closest to being on point – *United States v. Bouyea*, 152 F.3d 192 (2d Cir.1998) – is more supportive of the Court's interpretation than Defendants'. Moreover, district courts within this Circuit that have considered the issue have agreed with this Court's interpretation; the one Southern District decision that Heinz and Welty have identified as arguably to the contrary is not to the contrary.

Defendants are unpersuasive in claiming that *Bouyea* supports their argument. In *Bouyea*, the defendants were charged with defrauding an entity that, albeit not a financial institution itself, was a wholly-owned subsidiary of one. *See* 152 F.3d at 195 (noting testimony that the subsidiary had borrowed money from its parent in connection with the fraudulent transaction). *Bouyea* found the connection to a financial institution "sufficiently direct" to support

§ 3293(2)'s application, but it did not suggest that the circumstances in that case were the furthest reach of what might "affect" a financial institution. *See id.* Rather, *Bouyea* endorsed the Third Circuit's statement that the statute "broadly applies" to "any act of wire fraud that affects a financial institution." *Id.* (quoting *United States v. Pelullo*, 964 F.2d 193, 215-16 (3d Cir.1992)) (internal quotation marks omitted); *see also id.* ("easily reject[ing]" the defendant's argument that the statute was inapplicable, and repeating the Third Circuit's explanation that the defendant's position "would have more force if the statute provided for an extended limitations period where the financial institution is the *object* of fraud," and that, "[c]learly, however, Congress chose to extend the statute of limitations to a broader class of crimes" (emphasis added) (quoting *Pelullo*, 964 F.2d at 215-16)).

District courts within this Circuit that have addressed the issue of whether an increased risk of loss can "affect[ ]" a financial institution have explicitly cited and agreed with this Court's holding in *Ghavami. See United States v. Wells Fargo Bank, N.A.*, 972 F.Supp.2d 593, 630 (S.D.N.Y.2013) (Furman, J.) ("Courts have repeatedly held that in order to allege such an effect [on a financial institution], the Government need not allege actual harm, but only facts that would demonstrate that the bank suffered an increased risk of loss due to its conduct." (citing *Ghavami*, 2012 WL 2878126, at *5) (internal citation omitted)); *United States v. Bank of New York Mellon*,

941 F.Supp.2d 438, 458 (S.D.N.Y.2013) (Kaplan, J.) ("Courts regularly have concluded that a fraud affects an institution by embroiling it in costly litigation, whether because the fraud causes actual losses to the institution through settlements and attorney's fees or because it exposes the institution to realistic potential legal liability." (footnotes omitted) (citing *Ghavami*, 2012 WL 2878126 at *9)); *see also United States v. Countrywide Fin. Corp.*, 12 Civ. 1422, 996 F.Supp.2d 247, 249-50, 2014 WL 587364, at *3 (S.D.N.Y. Feb. 17, 2014) (Rakoff, J.) ("[E]ven the threat of criminal liability . . . is bound to affect any federally insured entity in material fashion." (citing *Ghavami*, 2012 WL 2878126 at *5)).

United States v. Carollo is not to the contrary. *See* 10 Cr. 654, 2011 WL 3875322 (S.D.N.Y. Aug. 25, 2011) (Baer, J.). Although in *Carollo* Judge Baer denied the Government's attempt to apply § 3293(2), there the Government had "not alleged that the financial institutions suffered any actual loss or at most the risk of loss is de minimis." *Id.* at *2 (noting that the Government "merely argues that the kickback arrangements exposed [financial institutions] to a risk of loss without providing much explanation as to what that risk is other than the expenses associated with litigation"). Judge Baer's reconsideration opinion emphasized that his holding was prompted by "the absence of any actual loss or a non-de minimis risk of loss by a financial institution." 2011 WL 5023241, at *1, *3 (S.D.N.Y. Oct. 20, 2011) (noting that, "had the Government made the proffer of

evidence at the motion to dismiss phase that it has made in this motion for reconsideration, [that a financial institution had entered into a multi-million dollar settlement for its participation in the alleged offenses,] the outcome may have been different"). Thus, *Carollo* suggests merely that a financial institution is not "affect[ed]" by an increased risk of loss, where no more than a de minimis risk of loss has been shown. In fact, Judge Baer explicitly stated that he was not addressing the statute's applicability to a greater than de minimis risk of loss. *See id.* at *4 ("[B]ased on the record at the time of my decision on the motion to dismiss, and even if on that record it was appropriate to consider whether an increased risk of loss alone was sufficient to trigger § 3293, this case would be the wrong case in which to take such a leap.").[8]

ii. Other Circuits

Opinions from other circuits support the Court's interpretation of § 3293(2). Three Courts of Appeals have held that an increased risk of loss "affects" a

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[8] After rejecting the Government's use of § 3293(2), Judge Baer nonetheless declined to dismiss the conspiracy charges in *Carollo*, holding that the "payment of artificially depressed interest payments constitutes overt acts in furtherance of the conspiracies." 2011 WL 3875322, at *3. The Second Circuit reversed, holding that the interest payments did not constitute overt acts. *See United States v. Grimm*, 738 F.3d 498 (2d Cir.2013). The Second Circuit's decision did not discuss the scope of § 3293(2). *See id.*

financial institution. The Seventh Circuit, in *United States v. Serpico*, upheld a jury instruction stating that, under § 3293(2), the defendants "affected the banks if they 'exposed the financial institution[s] to a new or increased risk of loss,'" and "'[a] financial institution need not have actually suffered a loss in order to have been affected by the scheme.'" 320 F.3d 691, 694 (7th Cir.2003). The Tenth Circuit has similarly concluded that a "'new or increased risk of loss' is plainly a material, detrimental effect on a financial institution, and falls squarely within the proper scope of [§ 3293(2)]." *Mullins*, 613 F.3d at 1278-79 (10th Cir.2010). Recently, the Ninth Circuit "join[ed] [its] sister circuits" in defining "affects" a financial institution "to include new or increased risk of loss to financial institutions." *United States v. Stargell*, 738 F.3d 1018, 1022-23 (9th Cir.2013) (interpreting 18 U.S.C. § 1343, and citing *Serpico* and *Mullins*).

Heinz and Welty cite four decisions from other circuits that, they contend, support their argument on appeal. But these authorities are inapposite. Contrary to Heinz and Welty's assertions, *United States v. Agne*, 214 F.3d 47 (1st Cir.2000), *United States v. Ubakanma*, 215 F.3d 421 (4th Cir.2000), *United States v. Grass*, 274 F.Supp.2d 648 (M.D.Pa.2003), and *United States v. Esterman*, 135 F.Supp.2d 917 (N.D.Ill.2001), do not provide support for their position.

In *Agne*, the First Circuit found that the bank at issue "experienced no realistic prospect of loss," and thus did not reach the question of whether § 3293(2)

requires actual loss. *See* 214 F.3d at 51-53. Similarly, *Ubakanma, Grass*, and *Esterman* involved frauds that merely utilized a financial institution to transfer funds for the scheme; hence, the institutions in those cases never faced a meaningful risk of loss or potential liability such as that created by Defendants' conduct in this case. *See Ubakanma*, 215 F.3d at 426 (noting that "the funds involved in the fraud scheme were transferred into and out of accounts at various financial institutions" but "there are no facts indicating that the financial institutions themselves were harmed or victimized in any way")[9]; *Grass*, 274 F.Supp.2d at 656 (explaining that two financial institutions "were merely used as a conduit to transfer funds procured through a wire fraud," and thus the "losses that these institutions suffered . . . [we]re nothing more than routine transaction fees and lost income" – had the defendants "procured these transactions legally, the listed financial institutions would have lost this same income and incurred these same expenses"); *Esterman*, 135 F.Supp.2d at 920 (stating that the scheme "did not have any cognizable impact" on the financial institution, which "was called upon to

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[9] *Ubakanma's* irrelevance to Heinz and Welty's position is reinforced by *United States v. Murphy*, a decision from a district court within the Fourth Circuit that addressed facts substantially similar to those of *Ghavami. See* 12 Cr. 235, 2013 WL 5636710 (W.D.N.C. Oct. 16, 2013). *Murphy* explicitly distinguished *Ubakanma* in finding § 3293(2) applicable. *See id.* at *1-2; *see also id.* at *2 (noting that "the effect first occurred when the financial institution was exposed to risk of loss").

do nothing more than to honor the authorizations that were wholly regular from the bank's perspective").[10]

c. *Even If the Second Circuit Were To Hold That § 3293(2) Requires Actual Loss, the Government Would Still Prevail*

If Heinz and Welty were able to persuade the Second Circuit Court of Appeals to hold that actual loss is required under § 3293(2), their convictions would still be upheld. The settlement agreements entered into by UBS and other financial institutions with the SEC and other regulators, and the non-prosecution agreements entered into by some of those institutions with the DOJ, were more than sufficient to show that the alleged conduct caused those financial institutions actual losses.

Heinz and Welty argue that corporations enter settlements for any number of reasons and there is no evidence that the settlements and non-prosecution agreements were "anything more than the end product of a business judgment." (Welty Mem. of Law in Supp. of Mot. for Release Pending Appeal ("Welty Release Mem.") 10 [Dkt. No. 405]). Yet, regardless of the precise reasons they were entered into, the

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[10] Even if *Esterman* stood for the position that Heinz and Welty state that it does, the Seventh Circuit's decision in *Serpico* would have abrogated it.

settlement and non-prosecution agreements were direct consequences of Defendants' charged conduct. UBS's non-prosecution agreement, in fact, specifically stated that UBS "admits, acknowledges and accepts responsibility for the conduct of its former employees," who "entered into unlawful agreements to manipulate the bidding process and rig bids on certain relevant municipal contracts." *See Ghavami*, 2012 WL 2878126, at *8 (quoting Gov't Mem. of Law in Opp. to Mot. to Dismiss, Ex. A [Dkt. No. 110]).

Other courts have similarly found that a financial institution's settlement payment constitutes an actual loss. In *United States v. Ohle*, for example, a bank employee was charged with implementing a tax fraud scheme that earned his employer substantial income. *See* 678 F.Supp.2d 215, 218-19 (S.D.N.Y.2010) (Sand, J.). Judge Sand rejected the defendant's argument that the institution was not "affected" under § 3293(2), finding that the bank "was not only exposed to substantial risk but experienced actual losses," because it "paid over $24,000,000 in settlements" and "over $4,200,000 in attorneys' fees." *Id.* at 228-29; *cf. also United States v. Countrywide Fin. Corp.*, 961 F.Supp.2d 598, 605 (S.D.N.Y.2013) (Rakoff, J.) (ruling that the defendant financial institution was affected by the fraud, because the amended complaint "itself alleges" that the financial institution "has paid billions of dollars to settle" claims made as "a result of the fraud here alleged").

Moreover, in this case, the Government intended to have representatives of the financial institutions

"testify that those entities entered into the [a]greements in part because of the conduct alleged in the Indictment." *Ghavami*, 2012 WL 2878126, at *9. The Government did not, however, present this testimony – or any evidence of the settlements or non-prosecution agreements – because Defendants, having argued unsuccessfully pretrial that § 3293(2) could not apply in this case, stipulated that the alleged fraud affected financial institutions and thus satisfied § 3293(2). *See* Stipulation S-4.

2. *Due Process and Judicial Estoppel*

Heinz argues that his due process rights were violated because the Government charged coconspirators who pled guilty with the lesser crime of ordinary wire fraud, which is subject to a twenty-year statutory maximum and a five-year statute of limitations, but alleged that *his* criminal conduct (and that of his codefendants) "affect[ed] a financial institution," which increases the statutory maximum to thirty years and the statute of limitations to ten years. 18 U.S.C. §§ 1343, 3293(2). Heinz contends that the Government should have been "judicially estopped from using an incompatible theory" to charge him under the ten-year statute of limitations. (Heinz Mem. of Law in Supp. of Mot. for Release Pending Appeal 9 [Dkt. No. 407]). The Court previously rejected this argument in a footnote. *See Ghavami*, 2012 WL 2878126, at *10 n. 10. It does not constitute a substantial question.

Those courts that have held that inconsistent prosecutions violated due process have done so where the prosecution pursued, to its advantage, factually *contradictory* theories against different defendants. *See United States v. Urso*, 369 F.Supp.2d 254, 264 (E.D.N.Y.2005) ("[J]udicial estoppel may be applied to prevent a due process violation, if ever, only where there is a clear and categorical repugnance between the government's two theories of the case.").[11] In *Stumpf v. Mitchell*, for example, the prosecution argued, in two different proceedings, that each of two different defendants was "the one to pull the trigger, resulting in the fatal shots" to the same murder victim. 367 F.3d 594, 613 (6th Cir.2004), *judgment rev'd in part on other grounds, Bradshaw v. Stumpf*, 545 U.S. 175, 125 S.Ct. 2398, 162 L.Ed.2d 143 (2005).

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[11] Only a handful of courts have held that due process is violated by inconsistent prosecutions. "There is no clear consensus in the federal courts on whether a prosecutor may be precluded from raising an argument at a criminal trial because the government has asserted a factually incompatible argument in pursuing a conviction against another defendant at another trial." *Urso*, 369 F.Supp.2d at 263 (collecting cases); *see also Bradshaw v. Stumpf*, 545 U.S. 175, 190, 125 S.Ct. 2398, 162 L.Ed.2d 143 (2005) (Thomas, J., concurring) ("This Court has never hinted, much less held, that the Due Process Clause prevents a State from prosecuting defendants based on inconsistent theories."); *United States v. Boyle*, 283 Fed.Appx. 825, 826 (2d Cir.2007), *aff'd*, 556 U.S. 938, 129 S.Ct. 2237, 173 L.Ed.2d 1265 (2009) (noting that "other circuits have found that the use of inherently factually contradictory theories violates the principles of due process," but stating that the case did not "present the opportunity for us to consider the issue" (internal quotation omitted)).

Likewise, in *Smith v. Groose*, the prosecution used two different, conflicting statements to convict separate defendants of murder. 205 F.3d 1045 (8th Cir.2000). The statements were inherently contradictory; each inculpated one of the defendants but exculpated the other. *See id.* at 1050 ("In short, what the State claimed to be true in [one] case it rejected in [the other] case, and vice versa."); *see also Thompson v. Calderon*, 120 F.3d 1045, 1057-59 (9th Cir.1997) (en banc plurality) (holding that a defendant's due process rights were violated where the prosecution argued at his trial that he alone committed a murder, but argued at a subsequent trial that another defendant actually committed the same murder and, in doing so, "discredited the very evidence" it had offered in the first trial), *rev'd on other grounds*, 523 U.S. 538, 118 S.Ct. 1489, 140 L.Ed.2d 728 (1998).

The Government's well-settled discretion to charge lesser crimes against those who plead guilty is entirely distinct from the use of inherently conflicting theories to "pursue as many convictions as possible without regard to fairness and the search for truth." *Groose*, 205 F.3d at 1051-52 (stating that, "[t]o violate due process, an inconsistency must exist at the core of the prosecutor's cases against defendants for the same crime"). Charging coconspirators who plead guilty with lesser crimes than those who go to trial is common, and does not reflect inconsistency. As this Court noted in its prior decision rejecting Heinz's argument, "Federal Rule of Criminal Procedure 11(c)(1)(A) specifically contemplates plea agreements

in which defendants plead guilty to lesser or fewer charges than they might have faced had they proceeded to trial." *Ghavami*, 2012 WL 2878126, at *10 n. 10. Here, the primary difference between the charges against those who pled guilty and the charges in this case is that, in the former cases, the Government did not pursue the enhancement for conduct affecting a financial institution, whereas in this case, the Government did; this was within its discretion to do. Any purported inconsistency was not inherently contradictory and, in contrast to *Stumpf, Groose*, and *Calderon*, was not the result of the Government seeking to "win a case" instead of ensuring that "justice shall be done." *Groose*, 205 F.3d at 1049 (quoting *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935)).[12]

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[12] Heinz also notes that the Superseding Indictment in this case alleged that Defendants' fraud affected a financial institution, whereas the original indictment did not. None of the cases cited by Heinz suggests that this constituted a violation of his due process rights, regardless of whether the Government's purpose for adding that Defendants' fraud affected a financial institution was to enhance available penalties at sentencing or to extend the statute of limitations. *Cf. United States v. Stewart*, 590 F.3d 93, 122 (2d Cir.2009) ("'[A] prosecutor's pretrial charging decision is presumed legitimate.'" (quoting *United States v. Sanders*, 211 F.3d 711, 716 (2d Cir.2000))).

To the extent that Heinz raises a distinct argument under judicial estoppel, it falls flat for the same reasons discussed above. *Cf. United States v. Christian*, 342 F.3d 744, 747-49 (7th Cir.2003) (rejecting the argument that the Government's plea agreements for misdemeanor charges with certain defendants should judicially estop the Government from bringing a felony

(Continued on following page)

3. *Jury Instructions Concerning Intentionally Losing Bids*

Welty asserts that the last paragraph of the Court's jury instruction on the relevant Treasury regulations was erroneous and tainted the jury's deliberations. The Second Circuit "review[s] challenged jury instructions *de novo* but will reverse only if all of the instructions, taken as a whole, caused a defendant prejudice." *United States v. Bok*, 156 F.3d 157, 160 (2d Cir.1998). "A 'jury instruction is erroneous if it misleads the jury as to the correct legal standard or does not adequately inform the jury on the law.'" *United States v. Applins*, 637 F.3d 59, 72 (2d Cir.2011) (quoting *Bok*, 156 F.3d at 160). Where a defendant objected to erroneous instructions, the instructions are reviewed for harmless error and will be upheld if it is "'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" *United States v. Quattrone*, 441 F.3d 153, 179 (2d Cir.2006) (quoting *Neder v. United States*, 527 U.S. 1, 18, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)); *see also United States v. Lung Fong Chen*, 393 F.3d 139, 147 (2d Cir.2004) ("An error is deemed harmless if we are convinced that the error did not influence the jury's verdict." (quoting *United States v. Masotto*, 73 F.3d 1233, 1239 (2d Cir.1996))).

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charge arising out of the same conduct against a different defendant).

To place Welty's argument in context, the Court reproduces relevant portions of the Treasury regulations instruction here. The instruction, of which Welty challenges only the last paragraph, began by explaining that:

> [T]he government has alleged that the defendants falsely certified or caused others to falsely certify that certain bidding procedures in certain transactions satisfied the 'safe harbor' provision in the United States Treasury regulations that govern the municipal bond industry. Certification that a bidding procedure satisfied the safe harbor provision of the treasury regulations is part of the process by which municipalities and other bond issuers can achieve tax-free treatment of the interest paid on those bonds.

(Tr. 4767-68). With respect to potential providers, the instruction stated:

> Under the safe harbor provision, a potential provider submitting a bid is required to represent that (1) it did not consult with any other potential provider about its bid; (2) its bid was determined without regard to any other formal or informal agreement that the potential provider has with the issuer or any other person, whether or not in connection with the bond issue; and (3) its bid is not being submitted solely as a courtesy to the issuer or any other person for purposes of satisfying the safe harbor's "three bid" requirement. To meet the three-bid requirement, an issuer is

> required to receive at least three bids from potential providers who do not have a material financial interest in the bond issue, and at least one of those bids must be from a "reasonably competitive" provider.

(Tr. 4768). With respect to brokers, the instruction stated:

> A broker is required under the safe harbor provision to make a bona fide solicitation on behalf of an issuer for the purchase of the investment at issue. That requires the broker [No. 1] to provide written notification to potential providers of their obligations under the safe harbor provision; No. 2, to provide all potential providers with an equal opportunity to bid (in other words, no potential provider may be given the opportunity to review other bids, i.e., a last look before providing a bid); No. 3, to solicit bids from at least three reasonably competitive providers; and, No. 4, to receive bids from at least three potential providers, one of which must be a reasonably competitive provider.

(Tr. 4769). And the final paragraph of the instruction, which Welty challenges, stated:

> The government contends that many certifications were false because the bids included intentionally losing bids. You may not consider a certification to be false if you find that an intentionally losing bid was submitted only for a legitimate business purpose

> (for example, to keep the potential provider's name visible).

(Tr. 4769).

Welty argues that this last paragraph improperly "gave the force of law to a principle that is not contained in the regulations." (Welty Release Mem. 15). Welty (i) asserts that "an intentionally losing bid doesn't have any meaning within the context of the treasury regulations unless it is submitted solely as a courtesy for purposes of satisfying the three-bid requirement," (Tr. 4113; Welty Reply Mem. in Supp. of Mot. for Release Pending Appeal 11 [Dkt. No. 418]); and (ii) contends that the instruction improperly "permitted the jury to speculate concerning whether a bid," submitted either by Welty or a coconspirator, "had a 'legitimate business purpose,'" (Welty Release Mem. 15-16). Welty has not demonstrated that this argument raises a substantial question likely to result in reversal, a new trial, or a materially reduced sentence, for three reasons.

First, Welty's initial contention, which appears to be that an intentionally losing bid is improper only if submitted as a courtesy to satisfy the three-bid requirement, is unduly narrow. A bidder submitting an intentionally losing bid violates the regulations (and any certification mirroring the regulations) if his or her bid is offered after a consultation with another potential provider about bids, or is determined with regard to a formal or informal agreement with another person, regardless of whether the bid is submitted

solely as a courtesy to satisfy the three-bid requirement. *See* Treas. Reg. § 1.148-5(d)(6)(iii). Because the Government's evidence showed that the purportedly intentionally losing bids in this case were submitted pursuant to conspiratorial agreements with brokers and potential providers,[13] a jury crediting this evidence would have found that the certifications for those intentionally losing bids were false, even if the losing bids were not necessarily submitted to satisfy the three-bid requirement.

Welty cites two transactions in his memorandum that he incorrectly contends support his argument – the Georgia Baptist transaction, and the City of Chicago transaction; instead, these transactions are useful illustrations of why Welty's argument fails. In the Georgia Baptist transaction, the deal's broker, Goldberg, an alleged coconspirator at CDR, testified that he "set [the transaction] up for UBS to win,"

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[13] *See, e.g.*, Tr. 2423-24, 2430-31, 2435 (Campbell testifying that either Welty or Zaino obtained Campbell's agreement to submit an intentionally losing bid on the Anchorage transaction); Tr. 757-60, 764-67 (Zaino testifying about same, and stating that Welty had informed him that the transaction "was being set up for UBS" and that he should tell Campbell to submit an intentionally losing bid); Tr. 1962-66 (Wright testifying that he put in intentionally losing bids on the City of Detroit transaction based on an agreement with Heinz); Tr. 2018-19 (same for the City of Chicago transaction); Tr. 2052-55 (same for the Fresno County transaction); Tr. 2064-67 (same for the City of Anchorage transaction); Tr. 3616-23 (Hertz testifying that he put in a losing bid on the Rhode Island Tobacco transaction based on an agreement with Heinz).

"[b]y getting intentionally losing bids other than UBS's," (Tr. 2973), in return for Welty getting CDR hired as broker, (Tr. 2976-77). Goldberg remarked that Welty's bid certification was false because he and Welty "had an informal agreement that . . . CDR would set up the bid for UBS to win." (Tr. 2977). Hence, if the jury believed Goldberg's testimony, it would have found Welty's and his coconspirators' certifications false because their bids were determined pursuant to an unlawful agreement that the bidders had with CDR. Similarly, on the City of Chicago deal, UBS, BOA, and JPMC were potential providers; Zaino testified that, on the deal, he "knew [he] could call Doug Campbell [at BOA] to solicit an intentionally losing bid," and that Heinz "could solicit an intentionally losing bid from Alex Wright at J.P. Morgan." (Tr. 791-94; *see also* Tr. 2018-19, 2320-21 (Wright testifying that Heinz asked him to put in an intentionally losing bid on the City of Chicago transaction, which he did)). If the jury found that Zaino, Heinz, Campbell, and Wright had consulted each other about their bids or determined their bids based on agreements with each other, that finding would have sufficed to conclude that the related bid certifications were false.

Second, Welty's concern that he was prejudiced because the jury might have speculated about whether a bid had a "legitimate business purpose" is unfounded. The instruction was tailored to allow the jury to accept Defendants' contentions that intentionally losing bids may have been submitted for legitimate

business purposes; the instruction's plain language *restricts* when the jury can find that a certification is false because of an intentionally losing bid. (*See* Tr. 4769 ("You may *not* consider a certification to be false if you find that an intentionally losing bid was submitted only for a legitimate business purpose. . . ." (emphasis added))). Whereas the Government alleged that the conspirators submitted losing bids for obviously illegitimate purposes, such as to satisfy the three-bid requirement or pursuant to agreements with brokers or other potential providers, Defendants maintained that intentionally losing bids were actually submitted for different, legitimate business reasons. (*See, e.g.*, Tr. 4496-98 (Heinz summation) (noting that "[alleged coconspirator] Alex [Wright] said there were tons of reasons to put in a bid even if you weren't so psyched up to win," and arguing that Wright's bids "were put in for other legitimate business reasons"); Tr. 4614 (Welty summation) (stating that "it's clear from the first call that [alleged coconspirator] Mr. Grimm stuck around so that he could learn the bid results," and that Grimm "wanted information and he wanted marketplace visibility," which were "completely legitimate business reasons . . . even under the government's approach to this case, for a provider to put in a number that he doesn't actually want to win at")). The Government did not argue that Defendants' *claimed* alternate reasons for submitting intentionally losing bids were not legitimate; instead, the Government contended that those reasons were not the bidders' *actual* motivations. See, for example, the Government's rebuttal summation:

> [Heinz's counsel] pointed out to you that during his testimony, Alex Wright offered or agreed that there could be a lot of reasons why you might submit a losing bid. *There could be legitimate business reasons for that.* And he told you that sometimes you'd want to get market color back. And sometimes you might want to stay on bid lists. *And those were legitimate reasons to submit a bid that you didn't think that you would win.* But what [Heinz's counsel] didn't remind you is that on redirect examination Mr. Wright told you that *in none of the cases where Gary Heinz asked him to submit a losing bid were those his motivations.* And he told you that on the Detroit transaction, on the Anchorage transaction, on the Chicago water transaction, on the Fresno transaction, in none of those cases was he submitting a bid to try to get color back or to try to stay on a bid list; that, in fact, he was submitting those bids because Mr. Heinz asked him to submit losing bids.

(Tr. 4678-79 (emphasis added)).[14] The jury was thus left to consider simply whether it thought an

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[14] Welty's argument that the instruction prejudiced him on the jury's consideration of the Corona-Norca deal is unpersuasive. On that transaction, the Government introduced two audio recordings of conversations between Welty and Grimm that suggest that Welty and Grimm had agreed that Grimm would submit an intentionally losing bid. On one of the calls, for instance, Welty directed that Grimm's bid should be lowered, because it "might win." (Gov't Ex. 186724; *see also id.* (Grimm asking Welty if his bid is "low enough?" and if a lower bid would

(Continued on following page)

intentionally losing bid was submitted for reason *A* or reason *B*, where reason *A* was legitimate and reason *B* was not.

Third, even if the instruction was erroneous – and although the Court finds that Welty properly objected to the instruction[15] – any error was harmless.

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also "be too high?"); Gov't Ex. 186715 (Grimm asking Welty "Do you want me to throw in a bid? Do you guys need a bid?")). Welty nonetheless contends that there is language on the tapes suggesting that Grimm intended to submit a losing bid without regard to any agreement with Welty. (*See* Welty Release Mem. 17-18 (noting that, on the first of the two calls, Grimm remarked that he "just want[s] to know if [he] should be around for it" (quoting Gov't Ex. 186715))). Welty does not state that the Government argued that "be[ing] around" for the bid would be an illegitimate purpose or make a certification false, and nothing in the jury instructions would have caused the jury to reach that conclusion.

[15] The Government challenges Welty's assertion that he objected to the instruction at trial, (*see* Gov't Resp. to Mot. for Release Pending Appeal 13-14 [Dkt. No. 417]), but the Court finds support in the transcript for Welty's position. Although it appears that Ghavami suggested the language that was ultimately used, (*see* Tr. 4103-04), which Welty remarked "would be a correct statement," (Tr. 4107), Welty also repeatedly argued that an "intentionally losing bid" could violate the regulations only if it were submitted as a courtesy bid to satisfy the three-bidder requirement. *See, e.g.*, Tr. 4099 ("I think my initial, and main concern, your Honor, is de-linking intentionally losing bids from the courtesy bid requirement, the three-bidder requirement."); Tr. 4106 ("[A]n intentionally losing bid doesn't have any meaning within the context of the treasury regulations unless it is submitted solely as a courtesy for purposes of satisfying the three-bid requirement."); Tr. 4113-14 ("[O]ur position is that an intentionally losing bid is inconsistent with the treasury regulations only if it violates the specified language that already exists

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The evidence against Welty and his codefendants was substantial, and much of it had nothing to do with submitting intentionally losing bids. For example, the Government presented evidence that the conspirators (i) discussed on which transactions to bid, to reduce competition and increase profits, (*see, e.g.*, Tr. 2439-45, 2450-51, 2465-72 (Campbell testifying that Welty asked him not to bid on the Rhode Island Tobacco transaction but instead to sell securities to UBS so that both UBS and BOA could profit); Tr. 1922-27 (Wright testifying that Ghavami and Heinz met with members of JPMC to find ways to reduce competition)); (ii) rigged bidding, provided each other with "last looks," and otherwise permitted bids to be lowered but still win the bidding, in exchange for kickbacks, (*see, e.g.*, Tr. 2932, 2963-66, 2973-77 (Goldberg testifying that CDR "set up bids" for Heinz, Welty, and Zaino in exchange for kickbacks); Tr. 863-64, 884-88, 914-19 (Zaino testifying about same); Tr. 3453, 3481-84, 3489-90 (Rothman testifying about same); Tr. 1039-49, 1117-29, 1158-66, 1191-97, 1231-33 (Zaino testifying that, on multiple transactions, Heinz, Welty, and he provided Grimm "last looks" and allowed Grimm to reduce his bid and still win); Tr. 1061-68, 1083-84, 1156-57, 1177-78, (Zaino testifying that, in exchange for UBS's assistance on deals, Grimm provided kickbacks)); and (iii) manipulated

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in the treasury regulations. And I understand the Court's ruled the Court is going to give the instruction, and I just want to make sure that that position on our behalf is clear.").

bid lists in each other's favor, (*see, e.g.*, Gov't Exs. 11906(A), 605507 (phone calls in which Grimm and Welty appear to set up bid lists)).[16]

4. *Zaino's Rule 701 Testimony*

Welty argues that portions of Zaino's testimony at trial impermissibly exceeded the scope of Federal Rule of Evidence 701 ("Rule 701"). Specifically, Welty objects to Zaino's testimony concerning audio recordings of phone calls between Welty and alleged coconspirator Grimm on Count Four transactions.

Rule 701 limits opinion testimony by a lay witness to testimony that is "(a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702 [governing testimony by expert witnesses]." Fed.R.Evid. 701. Welty's contention that Zaino's testimony violated each of these three requirements is unpersuasive and does not raise a substantial question. Additionally, even if portions of Zaino's testimony were improper under Rule 701, the error was harmless.

[16] As explained in Section II, the Goldberg Email, which is the basis for Welty's motion for a new trial, does not undermine the substantial evidence against Defendants.

a. Background

Before trial, Defendants and the Government moved *in limine* for a ruling on whether opinion testimony could be elicited from cooperating witnesses about recorded phone conversations. [Dkt. Nos. 146, 156]. The Court ruled that coconspirator witnesses could provide lay opinion testimony that would "consist of identification of speakers on recordings, provide background and context for ambiguous conversations, identify the subjects discussed, and interpret coded language used by the alleged co-conspirators." [Dkt. No. 218]. At trial, the Court reiterated its pretrial ruling, (Tr. 1098), and sustained many of Defendants' objections during Zaino's testimony, (*see, e.g.*, Tr. 1090, 1112, 1120-21, 1124, 1133, 1193-98, 1213).

b. Zaino's Testimony Was Based on His Personal Perception

Zaino's testimony about audio recordings of phone calls between Welty and Grimm on Count Four transactions was properly based on his personal perceptions. As explained in the Court's prior Order, under Second Circuit precedent, Zaino was permitted to testify about these recordings, even though he did not necessarily participate personally in the communications or the specific transactions they concerned. "[D]irect participation in the . . . activities of the charged enterprise" may sufficiently "afford[ ] [a witness] particular perceptions of its methods of operation [such that he or she] may offer helpful lay

opinion testimony under Rule 701 even as to coconspirators' actions that he did not witness directly." *United States v. Yannotti*, 541 F.3d 112, 125-26 & n. 8 (2d Cir.2008) (finding that a coconspirator's testimony concerning a phone conversation in which he did not participate "easily" satisfied Rule 701(a), and explaining that the testimony was "rationally based on his own perception because it derived from his direct participation in the loansharking activities of the charged enterprise, not on participation in the loansharking activities of some unrelated criminal scheme"). Zaino was able to decode Welty and Grimm's conversations based on his experience in the conspiracies, in which he was an active member, who participated personally in many of the transactions, (*see, e.g.*, Tr. 509-11, 529-33, 537, 543, 573, 775, 805, 983, 990, 1003, 1078-79, 1223), worked in close proximity with his codefendants for many years, (*see, e.g.*, Tr. 502-07, 534-36, 565-66, 1070, 3852-53), and regularly communicated with them and with other alleged coconspirators about their deals, (*see, e.g.*, Tr. 533, 536, 1025, 1036-49, 1080-81, 1223-26).

Hence, Welty's contention that Zaino lacked sufficient personal perception to testify about phone conversations related to the Rhode Island Housing ("RIH") and Catholic Health Initiatives ("CHI") transactions is mistaken. Zaino acknowledged that he did not participate in the calls or deals. (*See* Tr. 1080, 1167-68). Yet, in addition to his general experience in the conspiracies, Zaino affirmed that he knew of the RIH and CHI deals when he worked at UBS, (*see id.*),

stated that he was the primary broker for a transaction that "was tied to the Rhode Island [Housing] transaction via swap," (Tr. 1078-79), testified about a call in which he participated with Welty and Grimm concerning the CHI transaction, (*see* Tr. 1176-78), and explained that he spoke with Heinz and Welty about the transactions when they occurred, (*see* Tr. 1080-83, 1087-88, 1168-69).

c. Zaino's Testimony Was Helpful to the Jury

"[I]ndividuals engaging in illicit activities rarely describe their transactions in an open or transparent manner and the government may call witnesses to provide insight into coded language through lay opinion testimony." *Yannotti*, 541 F.3d at 126. Zaino's decoding testimony was helpful to the jury, who could not have been expected to appreciate the meaning of ambiguous terms and phrases without context. (*See generally* Tr. 1033-1248; *see, e.g.*, Tr. 1118 (Zaino explaining "give me your best indication," in phone call's context); Tr. 1124-25 (same for "confirm these levels," "five beeps in for each one," "note account was a 405," and "[f]loat fund was a 490"); Tr. 1211-12 (same for "baking in," "juicier," and "add in a couple of bips")). In *Yannotti*, the Second Circuit similarly found that a coconspirator's testimony about a "cryptic" recorded conversation was helpful to the jury, "because the 'language on the tape [was] . . . punctuated with ambiguous references to events that are clear only to the conversants.'" 541 F.3d at 126

(quoting *United States v. Aiello*, 864 F.2d 257, 265 (2d Cir.1988)).

d. Zaino's Testimony Was Not Improperly Based on Specialized Knowledge

Zaino's testimony (concerning the complex financial transactions that were the subject of the conspiracies) was proper, in that it was based on his participation in the conspiracies. *See Yannotti*, 541 F.3d at 126 ("[W]here a witness derives his opinion solely from insider perceptions of a conspiracy of which he was a member, he may share his perspective as to aspects of the scheme about which he has gained knowledge as a lay witness subject to Rule 701, not as an expert subject to Rule 702."); *see also United States v. Cuti*, 720 F.3d 453, 460 (2d Cir.2013) (lay opinion testimony was proper, because the "witnesses testified based only on their experiences with matters pertinent to this case, and their reasoning was evident to the jury"); *cf. United States v. Haynes*, 729 F.3d 178, 194-95 (2d Cir.2013) (ruling that an officer's lay testimony that was based on his "experience as a border agent inspecting vehicles" was improper); *United States v. Garcia*, 413 F.3d 201, 210-17 (2d Cir.2005) (holding that an undercover law enforcement agent could not testify that, based on his experience in other drug cases, the defendant was a partner in the alleged drug conspiracy). Indeed, Zaino's testimony was meaningful precisely because it provided an insider's perspective into the conspiracies.

Welty claims that parts of Zaino's testimony were based on specialized knowledge and not on the reasoning process of the average person: "Zaino's (1) characterization of 'indications' as 'bids;' (2) opinions as to what Messrs. Welty and Grimm meant; (3) comparison of transactions based solely on trial preparation; (4) opinion as to the falsity of a bidding agent's certificate; [and] (5) testimony that a municipality was harmed by Mr. Welty's conduct." (Welty Release Mem. at 29).

Welty's argument is unpersuasive. As to the first and second, as noted above, Zaino's decoding of "indication" to mean "bid," and his testimony generally about what Welty and Grimm meant when they used ambiguous phrases, were based on his day-to-day participation in the conspiracies, not on specialized knowledge. Indeed, Zaino's testimony that, in certain instances, "indication" was not used as it typically is in the industry underscores this point. As to the third, it is neither surprising nor improper that Zaino reviewed transaction documents and call transcripts during pretrial preparation; after all, like the witness testifying in *Yannotti*, Zaino had not necessarily participated in each call or deal that he testified about. There was more than sufficient basis to conclude that Zaino's opinions on such documents were based on his experience in the conspiracies, and not on specialized knowledge or "solely" trial preparation. As to the fourth, Zaino concluded that Welty's certification was false based on calls about which Zaino had just testified. (*See* Tr. 1127-29). Zaino stated that

those calls evidenced Welty allowing Grimm to "adjust his bid lower." (*Id.*). Zaino's reasoning for then remarking that the certification was false was evident to the jury. *Cf. Cuti*, 720 F.3d at 460. As to the fifth, Zaino's observation that the municipality was earning a lower interest rate merely showed the difference in the transaction's interest rate with and without the fraud – an observation that involved simply comparing numbers, which was not rooted in specialized knowledge. *See United States v. Rigas*, 490 F.3d 208, 224-25 (2d Cir.2007) (holding that lay opinion testimony by an accountant was permissible when it was offered to show what the amount of the debt would have been had the fraud not occurred); *cf. Cuti*, 720 F.3d at 460 ("When the issue for the fact-finder's determination is reduced to impact – whether a witness would have acted differently if he had been aware of additional information – the witness so testifying is engaged in a process of reasoning familiar in everyday life." (internal quotation omitted)).

e. Even If Admitting the Testimony Was Improper, Any Error Was Harmless

Even if the Court improperly admitted portions of Zaino's testimony, the error was harmless. *See United States v. Dukagjini*, 326 F.3d 45, 61-62 (2d Cir.2003) ("Reversal is necessary only if the error had a 'substantial and injurious effect or influence in determining the jury's verdict.'" (quoting *United States v. Castro*, 813 F.2d 571, 577 (2d Cir.1987))). The Government presented substantial evidence at

trial of Defendants' guilt, and it is highly probable that the jury would have found Defendants guilty had the Court sustained the handful of objections to portions of testimony that Welty contends violated Rule 701. *See, e.g.*, *supra* Sections II.B.3 and III.B.3 (listing examples of evidence presented at trial). The Court is confident that, if any error was made, it "did not influence the jury, or had but very slight effect." *Dukagjini*, 326 F.3d at 62 (citation omitted).

IV. CONCLUSION

For the foregoing reasons, Welty's motion for a new trial and Heinz's and Welty's motions for release pending appeal are DENIED. [Dkt. Nos. 404, 406, 457, 459].

Heinz and Welty shall surrender to the facility[ies] designated for them by the Bureau of Prisons by 10:00 a.m. on July 17, 2014.

SO ORDERED.

2012 WL 2878126 (S.D.N.Y.)

United States District Court,
S.D. New York.
UNITED STATES of America
v.
Peter **GHAVAMI**, Gary Heinz, and Michael Welty,
Defendants.

No. 10 Cr. 1217(KMW).
July 13, 2012.

OPINION & ORDER

KIMBA M. WOOD, District Judge.

Defendants Peter Ghavami ("Ghavami"), Gary Heinz ("Heinz"), and Michael Welty ("Welty") (collectively, "Defendants") are charged in a six-count Superseding Indictment ("Indictment") with engaging in various conspiracies and schemes to defraud municipal bond issuers, the United States Department of the Treasury ("Treasury"), and the Internal Revenue Service ("IRS") by manipulating the bidding process for municipal bond investment agreements and other municipal finance contracts, in violation of 18 U.S.C. §§ 371, 1343, and 1349, Defendants have jointly filed the following motions: (1) Motion for a Bill of Particulars; (2) Motion to Dismiss Counts One Through Five as Untimely; (3) Motion for Relief as to Counts One, Two, and Four as Multiplicitous; and (4) Motion to Dismiss Counts Two and Four Based on the *Ex Post Facto* and Due Process Clauses. (*See* Dkt Nos. 98-101.) Additionally, Welty and Ghavami move to sever

Count Six, which charges only Heinz with witness tampering, in violation of 18 U.S.C, § 1512(b). (*See* Dkt. Nos. 102-103.) For the following reasons, the Court DENIES Defendants' motions.

I. FACTUAL BACKGROUND

Municipal bonds are issued by governmental or quasi-governmental entities to raise money for operating funds or specific projects, or to refinance outstanding municipal debt, (Indictment ¶ 13.) Municipal bond issuers typically invest some or all of the bond proceeds in investment products, which are sold to them by major financial institutions, including banks, investment banks, insurance companies, and financial services companies (collectively, "providers"). (*Id.* ¶¶ 15-16.) The returns on municipal bonds are usually tax-exempt; to maintain tax-exempt status, an issuer will usually select a provider through a *bona fide* competitive bidding procedure that is designed to comply with federal tax law and Treasury regulations. (*Id.* ¶ 17.) An issuer will often hire a third-party broker to conduct the bidding process and ensure compliance with Treasury and IRS regulations. (*Id.* ¶ 18.)

At all times relevant to the Indictment, Defendants were employed at a financial services company ("FSC") that served as both a provider and a broker of

municipal investment products.[1] Ghavami served as a managing director and co-head of FSC's municipal bond reinvestment and derivatives ("MRD") desk, and Heinz and Welty were vice presidents and marketers on the MRD desk.

Counts One and Two charge all three Defendants with conspiracy to commit wire fraud in connection with FSC's role as a provider of investment agreements. Count One alleges that the Defendants conspired to defraud municipal bond issuers, the Treasury, and the IRS by manipulating the bidding process for investment agreements and other municipal finance contracts by horizontally colluding with their counterparts at other providers, in violation of 18 U.S.C. § 371. Count Two alleges that the Defendants conspired to defraud municipal bond issuers, the Treasury, and the IRS by vertically colluding with a third-party broker to manipulate and control the bidding process in exchange for kickback payments to that broker, in violation of 18 U.S.C. § 1349,

Counts Three through Five relate to FSC's role as a broker of investment agreements. Count Three is a substantive wire fraud charge against all three Defendants; it alleges that Defendants committed wire fraud by accepting a kickback, disguised as a

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[1] FSC is an unnamed co-conspirator in the Indictment, as is the financial institution that wholly owns the FSC, referred to in the Indictment as Financial Institution A. All unnamed co-conspirators will be referred to in this Opinion & Order by the pseudonyms assigned to them in the Indictment.

hedge fee, from a certain provider, Financial Institution D, in exchange for steering an investment agreement (hereinafter, the "Mass I Transaction") to Financial Institution D, in violation of 18 U.S.C § 1343. Count Four alleges that Heinz and Welty conspired to commit wire fraud by manipulating the bidding process for multiple investment agreements in favor of a certain provider, Provider B, in exchange for Provider B entering into hedging transactions, known as swaps, with Financial Institution A at inflated rates, in violation of 18 U.S.C. § 1349. Count Five is a substantive wire fraud charge against Heinz only; it alleges that Heinz committed wire fraud by steering an investment agreement to Financial Institution C at an artificially determined price level, in violation of 18 U.S.C. § 1343.

Count Six is a witness tampering charge against Heinz only; it alleges that Heinz willfully obstructed an investigation into the Mass I Transaction – the basis for the charge in Count Three – in violation of 18 U.S.C. § 1512(b)(1) and (3).

II. DEFENDANTS' MOTION FOR A BILL OF PARTICULARS

All three Defendants move the Court to order the Government to identify, with respect to each transaction related to Counts One, Two, and Four that is listed in the preliminary Bill of Particulars already

provided to Defendants by the Government[2] ("Draft BOP"): (1) the parties to the alleged illegal agreements; (2) the substance of the alleged misrepresentation(s) made, including details regarding when they were made and by whom; and (3) the actual harm suffered by the municipal bond issuers, the IRS, and the Treasury. (Mem, in Supp. of Defs.' Mot. for Bill of Particulars ("Dels.' BOP Mem.") at 4-5.)

A. *Applicable Law*

Pursuant to Federal Rule of Criminal Procedure 7(f), a defendant may move for a bill of particulars. A bill of particulars "is appropriate to permit a defendant to identify with sufficient particularity the nature of the charge pending against him, thereby enabling [him] to prepare for trial, to prevent surprise, and to interpose a plea of double jeopardy should he be prosecuted a second time for the same offense." *United States v. Davidoff*, 845 F.2d 1151, 1154 (2d Cir.1988) (internal quotation marks omitted). It is "required only where the charges of the indictment are so general that they do not advise the defendant of the specific acts of which he is accused." *United States v. Chen*, 378 F.3d 151, 163 (2d Cir,

[2] On or about March 8, 2011, the Government produced to Defendants a document entitled "Draft/Preliminary Voluntary Bill of Particulars (as of 3.8.11)," described *infra*. (*See* Decl. of Gregory L. Poe in Supp. of Mot. for Severance, Mot. for Relief as to Multiplicitous Counts, and Mot. for Bill of Particulars (hereinafter "Poe Decl."), Ex. 1.)

2004) (internal quotation marks omitted). The test is whether the information sought is *necessary*, and not merely helpful, to the defense. *See United States v. Mitlof*, 165 F.Supp.2d 558, 569 (S.D.N.Y.2001) (McMahon, J.),

A bill of particulars "is not a discovery tool and is not intended to allow defendants a preview of the evidence or the theory of the government's case." *United States v. Guerrerio*, 670 F.Supp. 1215, 1225 (S.D.N.Y.1987) (Edelstein, J.) (citing *United States v. Andrews*, 381 F.2d 377, 377-78 (2d Cir.1967) (per curiam)). The Government is not obligated to disclose either the manner in which it will attempt to prove the charges or the precise manner in which the defendant committed the crime charged. *See id.* Moreover, a bill of particulars "is not necessary where the government has made sufficient disclosures concerning its evidence and witnesses by other means." *Id.* (internal quotation marks omitted); *see also United States v. Bortnovsky*, 820 F.2d 572, 574 (2d Cir.1987) ("[I]f the information sought by defendant is provided in the indictment or in some acceptable alternate form, no bill of particulars is required."). However, "the Government does not fulfill its obligation merely by providing mountains of documents to defense counsel who [a]re left unguided" as to the nature of the charges. *Bortnovsky*, 820 F.2d at 575.

B. *Analysis*

The Government has already provided a considerable amount of particularized information, including:

(1) A 39-page Indictment that describes, in considerable detail, the nature of the conspiracy and wire fraud charges, including the relevant time periods, the means and methods by which the alleged schemes were carried out, specific overt acts taken in furtherance of those schemes, and the harm allegedly suffered by the issuers, IRS, and Treasury;

(2) A Draft BOP, in the form of a chart listing the 48[3] transactions that are, in aggregate, the subjects of the conspiracy and fraud charges. For each transaction, the chart lists the name and date of the deal, the product being sold, the broker handling the deal, the bidders on the deal, and the count with which the deal is associated;

(3) A "deal bucket" production, which contains audio recordings, draft transcripts, emails, and documents, such as bid specifications and certifications, organized by deal;

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[3] The Government notes that, since producing the Draft BOP to Defendants, it has reduced the number of transactions it intends to present in its case-in-chief to 38 and has advised Defendants of which transactions it has eliminated.

(4) Identifying information for each of the unnamed financial institutions and individual unindicted co-conspirators referred to in the Indictment;

(5) Lists identifying each witness the Government intends to call at trial and every exhibit it intends to offer during its case-in-chief; and

(6) Disclosure of statements of co-conspirators, in the form of interview reports and consensual recordings, in satisfaction of the Government's *Brady* obligations and in early satisfaction of its *Giglio* and Jencks Act obligations.

(Govt.'s Mem. of Law in Opp. to Defs.' Mot. for a Bill of Particulars ("Govt's BOP Mem.") at 3,5.)

Defendants argue that the materials provided by the Government do not adequately apprise them of the charges they face. They contend that the Draft BOP is insufficient in that it lists the allegedly corrupt transactions that form the basis for the Indictment, but does not identify, on a transaction-specific basis, the allegedly illegal agreements, parties to such agreements, or alleged fraudulent misrepresentations made in connection with each transaction. (Defs.' BOP Mem. at 7.) Defendants further argue that the Government has failed to sufficiently notify them as to how each transaction resulted in actual harm to the issuers, the IRS, and Treasury, (*Id.*)

However, the Indictment itself describes, in sufficient detail, the basis for the charges, including the alleged harm suffered by the issuers, IRS, and

Treasury. For example, the Indictment alleges that Defendants' conduct, *inter alia*, caused municipal issuers to award investment agreements that would not otherwise have been awarded; enabled providers to perform certain contracts at artificially determined or suppressed rates, caused issuers to file inaccurate reports with the IRS, thereby jeopardizing the tax exempt status of the bonds; caused issuers to fail to comply with Treasury regulations regarding the bidding process; and caused issuers to fail to give the IRS or Treasury money to which those entities were entitled, (Indictment ¶¶ 24(d)-(f), 35(f)-(i), 43, 52(f)-(j), 60.)

In addition to the Indictment, the Government has provided a significant amount of particularized discovery. Through its Draft BOP and "deal bucket" production, the Government has identified the universe of transactions that form the basis for the charges, and has provided, for each transaction, the relevant audio recordings, draft transcripts, emails, and other documents that it will use in its case-in-chief. It has further supplemented this material with lists of the witnesses it intends to call, the exhibits it intends to use at trial, and *Brady*, *Giglio*, and Jencks Act materials related to co-conspirators, whether or not the Government plans to call them as witnesses. Defendants' request that the Government identify precisely *which* documents or recordings form the basis for the fraudulent transactions, the exact misrepresentations allegedly made therein, when and by whom they were made, and the specific details of the

harm caused thereby, is a request for "the very type of evidentiary minutiae that is not appropriate in a bill of particulars." *Mitlof*, 165 F.Supp.2d at 569. Indeed, the information that Defendants seek "is in the nature of the 'wheres, whens and with whoms' that Courts have held to be beyond the scope of a bill of particulars." *Id.*; *see also United States v. Torres*, 901 F.2d 205, 233-34 (2d Cir.1990) (affirming denial of request for bill of particulars that sought date defendant joined conspiracy, identities of co-conspirators, and precise dates and locations relating to overt acts involved in conspiracy).

The Government has provided Defendants with information sufficient to advise them of the nature of the charges against them, to enable them to prepare defenses, and to avoid unfair surprise at trial. Accordingly, Defendants' Motion for a Bill of Particulars is DENIED. (Dkt, No. 98.)

III. DEFENDANTS' MOTION TO DISMISS COUNTS ONE THROUGH FIVE AS UNTIMELY

18 U.S.C. § 3282(a) provides for a five-year statute of limitations period for substantive wire fraud offenses and conspiracies to commit wire fraud.[4]

[4] Where such an offense involves defrauding or attempting to defraud the United States, the limitations period is six years. *See* 26 U.S.C. § 6531(1). Because the Defendants contend that all of the alleged misconduct falls outside a six-year period from the date the Indictment was first filed, whether a five-year

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However, "if the offense affects a financial institution," the statute of limitations period is extended to ten years, pursuant to 18 U.S.C. § 3293(2). With the exception of Count Four,[5] all of the conduct underlying the charges is alleged to have occurred more than five years prior to December 9, 2010, the date on which the original Indictment was filed and from which any applicable limitations period must be measured. *See United States v. Pan ebianco*, 543 F.2d 447, 454 (2d Cir.1976) ("A superseding indictment containing substantially the same charge as the superseded indictment should have no effect on the initial tolling of the statute of limitations so long as the defendant is not significantly prejudiced by the delay."). The Government contends that the ten-year

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limitations period would apply to some counts and a six-year limitations period would apply to others is of no consequence to the instant motion.

[5] As to Count Four, the Indictment alleges that Provider B, the winning provider of the transaction underlying the count, made a scheduled payment to the municipal issuer on or about November 1, 2006, a date within the five-year statute of limitations period. (Indictment ¶ 53(h)(iii).) Defendants contend that the scheduled payment is part of the routine administration of an investment contract and is merely the result of a completed conspiracy that ended as early as 2004. The Government argues that the payment is an act in furtherance of the conspiracy because it constitutes the receipt of an anticipated economic benefit of the conspiracy – *i.e.*, an increase in profits based on interest payments made at below-market rates. Because the Court finds that the five-year statute of limitations period is extended to ten years based on the applicability of 18 U.S.C. § 3293(2), it need not decide whether Count Four is timely within the standard five-year limitations period.

statute of limitations period applies to Counts One Through Five because the charged conduct "affect [ed]" certain financial institutions within the meaning of § 3293(2) by exposing them to the risk of financial loss and causing them to experience actual financial loss, in the form of civil monetary settlements with the Securities & Exchange Commission ("SEC") and other regulators, as well as attorneys' costs and fees associated with reaching resolutions of non-prosecution agreements with the Department of Justice Antitrust Division ("DOJ"). Defendants argue, *inter alia*, that: (1) Congress could not have intended § 3293(2) to apply where the negative "effect" on a financial institution was outweighed by any benefit it received as a result of the illegal conduct; (2) the settlements and non-prosecution agreements are insufficient to demonstrate a direct relationship between the charged conduct and the effects on the financial institutions that entered into those agreements; and (3) the admission of evidence that Defendants' employer entered into settlements and a non-prosecution agreement in relation to the circumstances underlying the Indictment would unfairly prejudice Defendants because it would cause a jury to improperly infer their guilt.

A. *Applicable Law*

In determining whether the ten-year statute of limitations period under § 3293(2) is applicable, the Second Circuit has broadly interpreted the statute's requirement that an offense "affect" a financial

institution. *See United States v. Bouyea*, 152 F.3d 192, 195 (2d Cir.1998). The statute's applicability is not limited to circumstances in which a financial institution is the object or victim of a scheme to defraud. *See United States v. Ohle*, 678 F.Supp.2d 215, 228-29 (S.D.N.Y.2010) (Sand, J.) (holding that financial institution was affected within meaning of § 3293 even where it was "active participant in the fraud"); *United States v.. Daugerdas*, No. S309 Cr. 581, 2011 WL 6020113, at * 1 (S.D.N.Y. Apr. 5, 2011) (Pauley, J.) ("[N]othing in [§ 3293(2)]'s language precludes its application to a financial institution that participated in the fraud."); *see also United States v. Serpico*, 320 F.3d 691, 695 (7th Cir.2003) ("[T]he 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' [under § 3293(2)]. . . .").

Where a financial institution is exposed to a risk of loss and experiences actual loss as a result of its participation in the offense, it is "affected" within the meaning of § 3293(2). *See Bouyea*, 152 F.3d at 195. Although the Second Circuit has not addressed the issue, several courts, including the Seventh and Tenth Circuits, have concluded that a financial institution is also "affected" for purposes of § 3293(2) where it is exposed to the risk of loss, but does not experience any actual loss. *See Serpico*, 320 F.3d at 694-95 (upholding jury instruction that, under § 3293(2) "[a] financial institution need not have actually suffered a loss in order to have been affected

by the scheme"); *United States v. Mullins*, 613 F.3d 1273, 1278 (10th Cir.2010) (holding that "a new or increased risk of loss is plainly a material, detrimental effect on a financial institution, and falls squarely within the proper scope of [§ 3293(2)]") (internal quotation marks omitted); *cf. United States v. Agne*, 214 F.3d 47, 52 (1st Cir.2000) (without deciding the issue, acknowledging the possibility that an increased risk of loss alone is sufficient to establish the applicability of § 3293(2), provided that the risk is not too attenuated from the fraudulent conduct).[6]

The Court finds these decisions persuasive in light of the plain meaning and purpose of § 3293(2). "Statutory construction must begin with the language employed by Congress and the assumption that the

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[6] Also instructive is the treatment courts have given to 18 U.S.C. § 1344, which criminalizes schemes to defraud financial institutions, and which is also subject to a ten-year statute of limitations under § 3293(2). In this Circuit and others, exposing a financial institution to a risk of loss alone is enough to prove a scheme to defraud under that statute. *See United States v. Jacobs*, 117 F.3d 82, 93 (2d Cir.1997) (citing *United States v. Stavroulakis*, 952 F.2d 686) (2d Cir.1992)); *Mullins*, 613 F.3d at 1279 (citing *United States v. Swanson*, 360 F.3d 1155, 1161 (10th Cir.2004)); *United States v. Cotton*, 231 F.3d 890, 907 (4th Cir.2000); *United States v. Longfellow*, 43 F.3d 318, 324 (7th Cir.1994) (quoting *United States v. Hord*, 6 F.3d 276, 282 (5th Cir.1993)). As the Tenth Circuit observed in *Mullins,*"[i]t would be anomalous to say exposing a financial institution to a risk of loss defrauds or 'victimizes' the institution, yet at the same time doesn't 'affect' it. The latter term would seem to suggest a lesser standard pertains, and in any event certainly not a greater one." 613 F.3d at 1279 (internal citation omitted).

ordinary meaning of that language accurately expresses the legislative purpose," *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004) (quoting *Park'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985)).18 U.S.C. § 3293(2) provides that "[n]o person shall be prosecuted, tried, or punished for a violation of, or a conspiracy to violate . . . section 1343, if the offense affects a financial institution . . . unless the indictment is returned or the information is filed within 10 years after the commission of the offense." The most common meaning of the verb "affect" is "to produce an effect upon." Webster's Third New International Dictionary 35. The word is secondarily defined as "to produce a material influence upon or alteration in," and tertiarily defined as "to have a detrimental influence on." *Id.* Although Congress may have meant to use "affect" as the word is most commonly used – that is, "to produce an effect upon" – it could have intended to invoke the term's tertiary meaning, deterring *negative* effects upon financial institutions. However, there is no indication from the statute's language or legislative history that the detriment caused must be an *actual* financial loss, as opposed to a risk thereof. As the Tenth Circuit noted in *Mullins*, "whatever limits there may be, a new or increased risk of loss is plainly a material, detrimental effect on a financial institution, and falls squarely within the proper scope of the statute." 613 F.3d at 1278-79.

Moreover, interpreting § 3293(2) to cover conduct that exposes a financial institution to a new or increased

risk of loss is also consistent with the statute's legislative purpose, which is "to protect financial institutions, a goal it tries to accomplish in large part by deterring would-be criminals from including financial institutions in their schemes." *Serpico*, 320 F.3d at 694. Deterrence is best served by a broad reading of the statute rather than a narrow one. As the Seventh Circuit noted, "[j]ust as society punishes someone who recklessly fires a gun, whether or not he hits anyone, protection for financial institutions is much more effective if there's a cost to putting those institutions at risk." *Id.*

Defendants contend that even where a wire fraud offense causes an actual financial loss, the loss must be offset against any benefit the financial institution may have derived from the conduct. (Mem. of Law in Supp. of Defs.' Joint Mot. to Dismiss Counts One Through Five of the Indictment as Untimely ("Defs.' SOL Mem.") at 23.) However, there is nothing in the statute or its history to support this interpretation. Indeed, reading such a requirement into the statute would create two untenable problems. First, limiting the statute's reach to cases in which financial institutions suffered a net loss would perversely incentivize financial institutions to participate in frauds in which they expect to earn a net benefit, which is behavior that the statute seeks to discourage. Second, determining whether a scheme ultimately resulted in a net benefit or a net loss for a financial institution would require a court to perform extremely complex and speculative calculations. In this case, for each Financial

Institution, the Court would need to weigh the costs of reaching a non-prosecution agreement and multiple settlements, as well as any other financial losses that could be sufficiently traceable to the fraud, against the value added to the transactions as a result of the fraud, and which could include not only the value of the trades but also supplementary financial benefits, such as potential future transactions, that are impossible to value with any precision. Even assuming such calculations were feasible, it is doubtful that Congress intended for a court to undertake such a difficult and indefinite exercise. Indeed, in several cases where financial institutions participated in and received benefits from schemes to defraud but also incurred actual losses, courts in this district have not required that the loss exceed the benefits received. *See, e.g.*, *United States v. Ohle* (holding that a bank was "affect[ed]" under § 3293(2) by its employees' fraud, even where the fraud "generated extraordinary fee income for [the bank], because it was "not only exposed to substantial risk but experienced actual losses," including over $28 million in settlement costs and attorneys' fees); *United States v. Rubin/Chambers, Dunhill Ins. Servs.*(*CDR*), 831 F.Supp.2d 779 (S.D.N.Y.2011) (Marrero, J.) (applying § 3293(2) to similar (and partially overlapping) scheme to defraud as that alleged in the Indictment in this case on ground that co-conspirator financial institutions incurred losses in the form of settlement payments and attorneys' fees despite benefitting from the fraudulent transactions). Therefore, the Court finds that, for purposes of 18 U.S.C. § 3293(2), a wire

fraud offense may be deemed to "affect[ ] a financial institution" where it exposes such institution to a new or increased risk of loss, even if there is no actual or net loss.

Whether an offense affected a financial institution is a question of fact for a jury to decide. *See CDR*, 831 F.Supp.2d at 875. Therefore, the Court must determine whether the evidence the Government intends to submit 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).

B. *Analysis*

The Indictment alleges that several co-conspirator financial institutions (Financial Institutions A, C, and D) were made susceptible to loss and suffered actual loss as a result of the conduct alleged in Counts One through Five. (Indictment ¶¶ 12, 32, 44, 49, 58.) To establish that the charged conduct affected these financial institutions, the Government intends to introduce evidence that Financial Institutions A, C, and D, and Provider B, entered into civil settlements with the SEC and other regulators (collectively, the "Settlement Agreements"), and evidence that Financial Institutions A and C, and Provider B, entered into non-prosecution agreements with the DOJ (collectively, the "Non-Prosecution Agreements"), which each related to the participation of those institutions' employees in bid-rigging activity in the

municipal derivatives market, which included the actions with which the Defendants are charged in the instant case. The Government intends to submit as evidence the documents underlying the Settlement Agreements and Non-Prosecution Agreements, as well as live testimony regarding those Agreements from representatives of the Financial Institutions. The Court briefly reviews the substance of the Agreements before analyzing whether they constitute evidence sufficient to permit a jury to find that the charged conduct "affected" a financial institution under § 3293(2).

1. Settlement Agreements

On or about May 6, 2011, Financial Institution A simultaneously entered into settlement agreements with the SEC, IRS, and 25 state attorneys general. The settlement agreements required Financial Institution A to pay a total of $160 million to the IRS and various municipalities affected by the conduct. (Govt's Mem. of Law in Opp. to Defs.' Joint Mot. to Dismiss Counts One Through Five of the Indictment as Untimely ("Govt's SOL Mem.") at 11.) The settlement agreement that the SEC reached with Financial Institution A is expressly intended to compensate the Government for losses it experienced as a result of

approximately 105 transactions, (Govt's SOL Mem., Ex. B), 38 of which will be the subject of this trial.[7]

On or about July 8, 2011, Financial Institution C entered into settlement agreements with the SEC, IRS, OCC, the Federal Reserve, and 25 state attorneys general. The settlement agreements required Financial Institution C to pay a total of $228 million to the IRS and various municipalities affected by the conduct. (Govt.'s SOL Mem. at 12.) The settlement agreement that the SEC reached with Financial Institution C is expressly intended to compensate the Government for losses it experienced as a result of, *inter alia*, at least three transactions that form the basis for the charges in Count One, which together represent approximately $4.7 million of the total settlement sum. (*Id.* at 12-13; Govt.'s SOL Mem., Ex. D.)

On December 7, 2010, Financial Institution D entered into settlement agreements with the SEC, IRS, OCC, and 20 state attorneys general. The settlement agreements required Financial Institution D to pay a total of $137.3 million to the IRS and various

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[7] As noted in Part II, *supra*, the Government listed 48 transactions on its Draft BOP that it initially intended to use in its case-in-chief; it now intends to use only 38 of those transactions. In support of its contention that the Defendants' conduct affected a financial institution by causing it to pay restitution and civil penalties, the Government submits that of the original 48 transactions, 41 are referenced in Financial Institution A's settlement agreement with the SEC, and together represent approximately $18.4 million of the total settlement sum.

municipalities affected by the conduct. (Govt.'s SOL Mem. at 13.) The settlement agreement that the SEC reached with Financial Institution D is expressly intended to compensate the Government for losses it experienced as a result of, *inter alia*, at least one transaction that forms the basis for the charges in Count One, and the transaction at issue in Count Three, which together represent approximately $7.1 million of the total settlement sum. (*Id.* at 13; Govt.'s SOL Mem., Ex. F.)

On January 23, 2012, Provider B entered into settlement agreements with the SEC, IRS, and 25 state attorneys general. The settlement agreements required Provider B to pay a total of $70 million to the IRS and various municipalities affected by the conduct. (Govt.'s Mem. of Law in Opp. to Defs.' Mot. in Limine to Preclude Evidence of Settlements By Financial Institutions With Govt. Authorities ("Govt.'s Mot. in Limine") at 2 n. 1.) The settlement agreement that the SEC reached with Provider B is expressly intended to compensate the Government for losses it experienced as a result of, *inter alia*, at least eight transactions that form the basis for the charges in Counts One through Five, which together represent approximately $1.4 million of the total settlement sum. (*Id.*; Govt's Mot. in Limine, Ex. B.)

Provider B and Financial Institutions A, C, and D entered into the above-described Settlement Agreements without admitting or denying the allegations of the underlying complaints.

2. Non-Prosecution Agreements

On May 4, 2011 and July 6, 2011, Financial Institutions A and C, respectively, entered into near-identical Non-Prosecution Agreements with the DOJ related to the conduct charged in the Indictment. As part of the Agreements, each Financial Institution expressly stipulated that it "admits, acknowledges and accepts responsibility for the conduct of its former employees," which was defined as "enter[ing] into unlawful agreements to manipulate the bidding process and rig bids on certain relevant municipal contracts, and made payments and engaged in other activities in connection with those agreements, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, and certain sections of Title 18 of the United States Code ." (Govt's SOL Mem., Exs. A, C.)

On December 23, 2011, Provider B entered into a Non-Prosecution Agreement with the DOJ related to the conduct charged in the Indictment. As part of the Agreement, Provider B expressly stipulated that it "admits, acknowledges and accepts responsibility for . . . certain former traders who bid on municipal contracts on behalf of the company [who] entered into unlawful agreements to manipulate the bidding process on certain relevant municipal contracts, and caused [Provider B] to make payments and engage in other related activities in connection with those agreements . . . in violation of certain sections of Title 18 of the United States Code." (Govt.'s Mot. in Limine, Ex. A.)

3. Sufficiency and Admissibility of Evidence Relating to the Settlements and Non-Prosecution Agreements

Defendants' primary argument is that evidence of the Settlement Agreements and Non-Prosecution Agreements is insufficient to establish that the Financial Institutions were affected by the conduct charged in the Indictment, because financial institutions settle civil claims and criminal charges for a variety of reasons, such as purely economic considerations or the desire to avoid negative publicity, even if they believe they are not liable for any wrongdoing, (Defs.' SOL Mem. at 22.) Therefore, Defendants assert, due process and the Confrontation Clause require that Defendants be able to probe, through supplemental discovery and cross-examination, the Financial Institutions' intent behind entering into the Settlement Agreements and Non-Prosecution Agreements, so that they may establish that the Financial Institutions did so not because of the charged conduct, but for other business reasons. (*Id.* at 22-23.) Defendants contend that this process "would create impossible trial-within-a trial problems," including the need for evidentiary hearings and additional discovery. (*Id.* at 22.) Defendants further argue that the Court should also exclude the evidence because Defendants would be extremely and unfairly prejudiced by proof that their employer, Financial

Institution A,[8] entered into settlements and a non-prosecution agreement related to the misconduct of its employees in the municipal bond division at the same time that Defendants worked there, (*Id.* at 25.)

The Court rejects Defendants' contention that the evidence the Government intends to introduce at trial is insufficient to establish that the alleged conduct, if proved, "affected" a financial institution. The Settlement Agreements and Non-Prosecution Agreements illustrate that the alleged conduct created an increased risk of loss for Provider B and Financial Institutions A, C, and D in the form of exposure to restitution payments, civil penalties, and criminal prosecution, a risk that was ultimately realized – in the form of restitution payments and civil penalties – when those entities entered into the Settlement Agreements and Non-Prosecution Agreements. Moreover, the Government intends to have representatives of the Financial Institutions and Provider B testify that those entities entered into the Agreements in part because of the conduct alleged in the Indictment. Because the documentary evidence and testimony would be sufficient to establish that alleged conduct caused the exposure to, and realization of, the risk of loss, Defendants need not inquire into other potential reasons that may have motivated the Financial Institutions' decision to enter into those agreements,

[8] As noted in Part I, *supra*, Defendants are employees of FSC, which is a wholly owned subsidiary of Financial Institution A.

thereby eliminating the need for supplemental discovery and cross-examination of the representatives into such collateral issues as to how financial institutions interact with regulators and arrive at settlement decisions, which could potentially confuse the jury.

Defendants next contend that the Government's evidence is extremely prejudicial because a jury will infer that, if Defendants' employer, Financial Institution A, entered into settlement agreements and non-prosecution agreements for conduct related to defendants' prosecution, that Defendants must be guilty of that conduct. (Defs.' SOL Mem. at 25.) However, the Non-Prosecution Agreements acknowledge guilty conduct by only "certain then-employees [from 2001 to 2006] at its municipal reinvestment and derivatives desk and related and/or predecessor desks." The Agreements do not mention any particular employee by name or description, and there is no acknowledgement that the Defendants in this case engaged in the conduct that led (at least in part) to the Agreements. Moreover, the Government's presentation of evidence will be limited to what is necessary to establish that financial institutions were exposed to the risk of loss as a result of the conduct alleged in the Indictment. The Court will provide an instruction

that the evidence is to be used for that purpose only, and not as evidence of Defendants' guilt.[9]

The Court will therefore admit the Non-Prosecution Agreements, Settlement Agreements, and related testimony for the limited purpose of establishing the applicability of § 3293(2). Because the Court finds that the Government has admissible and sufficient evidence to permit a jury to find that Defendants' conduct "affect[ed] a financial institution" within the meaning of 18 U.S.C. § 3293(2), thereby extending the statutory limitations period from five years to ten years, it DENIES Defendants' Motion to Dismiss Counts One through Five as Untimely.[10] (Dkt. No. 99.)

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[9] The Court notes that if the parties were to agree to stipulate that the alleged conduct affected a financial institution, the potential for prejudice would be eliminated because admission of the Non-Prosecution Agreements, Settlement Agreements, and related testimony would be unnecessary.

[10] In reaching its decision, the Court has also considered Defendants' letter of June 22, 2012 and rejects the argument made therein. The Government is not precluded from arguing for the applicability of § 3293(2) merely because, in the plea agreements and colloquies for several cooperating witnesses who pled guilty to, *inter alia*, violations of 18 U.S.C. § 1343, it did not argue for a 30-year maximum period of incarceration, which is the statutory maximum for wire fraud offenses that "affect[ ] a financial institution." 18 U.S.C. § 1343. First, the various informations and indictments to which those cooperating witnesses pled did not contain allegations that the conduct affected a financial institution. Second, to the extent that those documents contain language that could be interpreted to allege the applicability of § 3292(2), *see CDR*, 831 F.Supp.2d at 786,
(Continued on following page)

IV. DEFENDANTS' MOTION FOR RELIEF AS TO COUNTS ONE, TWO, AND FOUR AS MULTIPLICITOUS

Defendants contend that the Indictment violates the Double Jeopardy Clause of the United States Constitution because it erroneously charges Counts One, Two, and Four as three separate and distinct conspiracies when they instead charge conduct that would comprise a single, overarching conspiracy of industry-wide bid rigging in the municipal bond investment business. Defendants argue that the Court must dismiss the offending counts, compel the Government to prosecute only one of the counts at trial, or require the Government to redraft the Indictment to allege a single conspiracy. The Government responds that the three counts each allege a different conspiracy, and that procedurally, Second Circuit law precludes pre-trial relief because the question of whether the Government has proven one or multiple conspiracies is a factual question to be decided by a jury.

A. *Applicable Law*

"'An indictment is multiplicitous when it charges a single offense as an offense multiple times, in

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Federal Rule of Criminal Procedure 11(c)(1)(A) specifically contemplates plea agreements in which defendants plead guilty to lesser or fewer charges than they might have faced had they proceeded to trial.

separate counts, when in law and fact, only one crime has been committed.'" *United States v. Kerley*, 544 F.3d 172, 178 (2d Cir.2008) (quoting *United States v. Chacko*, 169 F.3d 140, 145 (2d Cir.1999)). A multiplicitous indictment violates the Double Jeopardy Clause of the Fifth Amendment because it would subject a defendant to punishment for the same crime more than once. *See* U.S. Const. amend. V (providing that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb"). "Where . . . separate counts of a single indictment allege that [a] defendant participated in more than one conspiracy in violation of the same statutory provisions, but allege that the conspiracies existed for different – albeit overlapping – periods of time, and that the defendant, in each alleged conspiracy, had different groups of coconspirators, the question of whether one, or more than one, conspiracy has been proven is a question of fact for a properly instructed jury." *United States v. Jones*, 482 F.3d 60, 72 (2d Cir.2006); *see also Ohle*, 678 F.Supp.2d at 222 n. 5 ('The Second Circuit has repeatedly emphasized that the determination of whether a single conspiracy or multiple conspiracies exists is a question of fact for the jury."). Furthermore, where an indictment alleges more than one conspiracy in violation of different statutory provisions, "the Double Jeopardy Clause does not protect against simultaneous prosecutions for the same offense, so long as no more than one punishment is eventually imposed," *United States v. Josephberg*, 459 F.3d 350, 355 (2d Cir.2006). "If the jury convicts on more than one multiplicitous count, the defendant's

right not to suffer punishments for the same offense will be protected by having the court enter judgment on only one of the multiplicitous counts." *Id.*

B. *Analysis*

As described in detail in Part I, *supra*, Count One alleges a conspiracy to commit wire fraud in violation of 18 U.S.C. § 371, and Counts Two and Four allege conspiracies to commit wire fraud in violation of 18 U.S.C. § 1349. Defendants contend that the Government has improperly "subdivide[ed] an overarching conspiracy into ostensibly different crimes by alleging different sets of overt acts and naming different co-conspirators in different counts." (Mem. of Law in Supp. of Defs.' Mot. for Relief as to Counts One, Two, and Four as Multiplicitous at 11.) However, insofar as Counts Two and Four allege more than one conspiracy in violation of the same statutory provision, "the question of whether one, or more than one, conspiracy has been proven is a question of fact for a properly instructed jury." *Jones*, 482 F.3d at 72. To the extent that the Indictment alleges more than one conspiracy in violation of different statutory provisions (*i.e.,* 18 U.S.C. § 371 and 18 U.S.C. § 1349), Defendants' multiplicity challenge is premature. *Josephberg*, 459 F.3d at 355 ("Where two statutory sections operate independently of one another, there is no bar to the Government's proceeding with prosecution simultaneously under the two statutes.") (internal quotation marks omitted). Should the jury convict Defendants on what the Court ultimately determines to be

multiplicitous counts, the Court will enter judgment on only one of the multiplicitous convictions.[11] *Id.*

Accordingly, the Court DENIES Defendants' Motion for Relief as to Counts One, Two, and Four as Multiplicitous. (Dkt. No. 100.)

V. DEFENDANTS' MOTION TO DISMISS COUNTS TWO AND FOUR BASED ON THE *EX POST FACTO* AND DUE PROCESS CLAUSES

Counts Two and Four of the Indictment charge two separate conspiracies to commit wire fraud in violation of 18 U.S.C. § 1349, which provides that a defendant convicted of conspiring or attempting to violate an offense under Chapter 63 of Title 18

[11] Citing *United States v. Reed*, 639 F.2d 896, 904 (2d Cir.1981) for the proposition that the submission of multiplicitous counts "may improperly prejudice a jury by suggesting that a defendant has committed not one but several crimes," Defendants argue that waiting until after trial to determine whether the counts are multiplicitous will unfairly prejudice Defendants by making it appear to the jury that they have engaged in more than one conspiracy. (Reply Mem. in Supp. of Defs.' Mot. for Relief as to Counts One, Two, and Four as Multiplicitous at 2-3.) Although the Second Circuit may have at one time voiced this concern, it was not sufficient to keep that court from recently concluding in *Josephberg* that the pre-trial dismissal of potentially multiplicitous counts is premature (nor was it even mentioned in the decision). *See United States v. Jahedi*, 681 F.Supp.2d 430, 437 n. 49 (S.D.N.Y.2009) (rejecting, in light of *Josephberg*, defendant's argument that *Reed* compelled pre-trial resolution of multiplicity challenge).

(relating to fraud offenses) "shall be subject to the same penalties" prescribed for the substantive offense that was the object of the conspiracy.[12] Prior to the statute's enactment on July 30, 2002, conspiracy (or attempt) to commit the fraud offenses in Chapter 63 was governed by the basic conspiracy statute, 18 U.S.C. § 371, which provides for a maximum incarceration period of five years. Following the enactment of 18 U.S.C. § 1349, a defendant convicted of conspiracy to commit wire fraud would be subject to a maximum incarceration term of 20 years, or 30 years if the conduct "affects a financial institution." *See* 18 U.S.C. § 1343.

The conspiracies charged in Counts Two and Four are alleged to have begun prior to the statute's enactment date, and to have continued thereafter. Count Two is alleged to have extended from "as early as March 2001 to at least November 2004." (Indictment ¶ 33.) Count Four is alleged to have occurred from "as early as January 2002 to at least November 2006." (Indictment ¶ 50.) The Government intends to

[12] Count Two alleges that, in relation to FSC's role as a provider, all three Defendants conspired to defraud municipal bond issuers, the Treasury, and the IRS by vertically colluding with a thirdparty broker to manipulate and control the bidding process in exchange for kickback payments to that broker. Count Four alleges that, in relation to FSC's role as a broker, Defendants Heinz and Welty conspired to commit wire fraud by manipulating the bidding process for multiple investment agreements in favor of a certain provider, Provider B, in exchange for Provider B entering into hedging transactions, known as swaps, with Financial Institution A at inflated rates.

present 18 transactions in its case-in-chief for Count Two, 10 of which were completed pre-enactment; and 10 transactions for Count Four, 6 of which were completed pre-enactment. (Govt.'s Mem. of Law in Opp. to Defs.' Joint Mot. to Dismiss Counts Two and Four of the Indictment Based on the Ex Post Facto and Due Process Clauses ("Govt.'s Ex Post Facto Mem.") at 4.) Defendants argue that the Court should dismiss Counts Two and Four because those counts rely substantially on transactions that were completed prior to the statute's enactment. They contend that the charges violate the Ex Post Facto and Due Process Clauses of the United States Constitution because a jury will be unable to distinguish between pre- and post-enactment transactions, and might therefore convict Defendants based exclusively upon pre-enactment conduct. (Mem. of Law in Supp. of Defs.' Joint Mot. to Dismiss Counts Two and Four of the Indictment Based on the Ex Post Facto and Due Process Clauses ("Defs.' Ex Post Facto Mem.") at 4-5.) Defendants further argue that if the Court declines to dismiss the counts, it should prohibit the Government from introducing evidence of pre-enactment transactions at trial. (*Id.*)

A. *Applicable Law*

The Ex Post Facto Clause prohibits Congress from passing a law that: "(1) makes an act a crime that was legal when committed; (2) makes a crime greater than it was when it was committed; (3) increases the punishment for a crime after it has been

committed; or (4) deprives the accused of a legal defense that was available at the time the crime was committed." *United States v. Harris*, 79 F.3d 223, 228 (2d Cir.1996) (citing *Collins v. Youngblood*, 497 U.S. 37, 41-42 (1990)). Although the Ex Post Facto Clause constrains the legislative branch, "its protections have been extended to the application of judicial precedent by the courts under the Due Process Clause of the Fifth Amendment." *Id.* at 229. With respect to statutes governing continuing offenses, such as conspiracy, the law is clear that "the Ex Post Facto clause is not violated by application of a statute to an enterprise that began prior to, but continued after, the effective date of the statute." *Id.* at 229 (internal quotation marks and alteration omitted). However, conduct that occurred prior to the date of the charging statute's enactment is admissible for limited purposes only. "When it is shown that a conspiracy straddled the enactment of a statute, the government may introduce pre-enactment evidence to demonstrate the conspiracy's genesis, its purpose, and its operation overtime." *United States v. Monaco*, 194 F.3d 381, 386 (2d Cir.1999). Pre-enactment evidence is also admissible "to prove the intent and purpose of the conspirators' later acts." *United States v. Ferrara*, 458 F.2d 868, 874 (2d Cir.1972). A conviction for a conspiracy that straddles a statute's enactment date "will not run afoul of the Ex Post Facto clause unless it was possible for the jury, following the court's instructions, to convict *exclusively* on pre-enactment conduct." *Monaco*, 194 F.3d at 386 (internal quotation marks omitted).

B. *Analysis*

Defendants concede that the Government has properly charged the alleged conspiracies at issue, because the Indictment alleges that the conspiracies began before 18 U.S.C. § 1349 was enacted and continued thereafter. *See Harris*, 79 F.3d at 229 ("It is well-settled that when a statute is concerned with a continuing offense, the Ex Post Facto clause is not violated by application of a statute to an enterprise that began prior to, but continued after, the effective date of the statute."); *United States v. Duncan*, 42 F.3d 97, 104 (2d Cir.1994) ("[A]ccording to our precedent, continuing offenses such as conspiracy or bank fraud do not run afoul of the *Ex Post Facto* Clause if the criminal offenses continue after the relevant statute becomes effective."). Defendants argue that the Court must nevertheless dismiss Counts Two and Four because, despite any instructions the Court would give as to the limited evidentiary value of pre-enactment conduct, a jury would be unable to differentiate between pre- and post-enactment transactions, and would instead simply rely on the pre-enactment transactions as to which there is more evidence than there is as to post-enactment transactions. However, Defendants have not offered, nor is the Court aware of, any legal support for the proposition that dismissal of properly alleged charges is the appropriate remedy for the risk that a jury will be unable to understand or abide by a court's limiting instructions.

As an alternative to dismissal, Defendants argue that evidence of pre-enactment transactions must be

excluded in order to prevent the jury from ignoring the Court's instructions and reaching a conviction based exclusively on that conduct. To support this assertion, Defendants indirectly invoke the principles underlying Federal Rule of Evidence 403, which permits a court to "exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Defendants argue that the pre-enactment transactions have limited probative value because each transaction is a "self-contained" and "essentially independent" event that has little or no bearing on any other transaction, (Defs.' Ex Post Facto Mem. at 4-5), and that any probative value is substantially outweighed by the likelihood that jurors will be unable to differentiate between pre- and post-enactment transactions, despite any limiting instructions given by the Court. (Defs.' Ex Post Facto Mem. at 3.)

Carefully crafted limiting instructions are a court's first line of defense against the risk of unfair prejudice. Where pre-enactment evidence is introduced, limiting instructions are routinely used to mitigate the risk that a jury will convict based solely upon pre-enactment conduct. *See, e.g.*, *Monaco*, 194 F.3d at 386 (no Ex Post Facto violation where "the jury was soundly instructed on the proper evidentiary value of pre-enactment conduct, and was reminded of the post-statute date range of the charge"). Moreover, "[a]bsent evidence to the contrary, [a court] must

presume that juries understand and abide by a district court's limiting instructions." *United States v. Downing*, 297 F.3d 52, 59 (2d Cir.2002). The presumption is abandoned only "where there is an overwhelming probability that the jury will be unable to follow the court's instructions and the evidence is devastating to the defense." *United States v. Williams*, 585 F.3d 703, 709 (2d Cir.2009); *see also United States v. Becker*, 502 F.3d 122, 130-31 (2d Cir.2007) ("[W]e have found it inappropriate to presume that a district court's limiting instructions were obeyed when such instructions required jurors to perform mental acrobatics.") (internal quotation marks omitted).

Defendants' contention that the jury will have to "perform mental gymnastics" in order to differentiate between pre-enactment evidence and post-enactment evidence is speculative and unsupported, particularly in light of their argument that the transactions are discrete, independent events. (Reply Mem. of Law in Supp. of Defs.' Joint Mot. to Dismiss Counts Two and Four of the Indictment Based on the *Ex Post Facto* and Due Process Clauses ("Defs.' Ex Post Facto Reply Mem.") at 3.) Therefore, the Court will permit the Government to seek to introduce of pre-enactment evidence in order to show the alleged conspiracies' geneses, purposes, or operations over time, *Monaco*, 194 F.3d at 386, or the intent and purpose of the conspirators' later acts, *Ferrara*, 458 F.2d at 874, and will admit such evidence only pursuant to appropriate limiting instructions. The Court will further instruct the jury that to convict, it must find that the

conspiracy continued after July 30, 2002, during the post-enactment periods alleged in the Indictment. *See Monaco*, 194 F.3d at 386. Because the Court has no reason to believe that the jury will be unable to follow these instructions, Defendants' Motion to Dismiss Counts Two and Four Based on the *Ex Post Facto* and Due Process Clauses is DENIED. (Dkt. No. 101.)

VI. DEFENDANTS HEINZ AND WELTY'S MOTION TO SEVER COUNT SIX

Count Six charges only Heinz with witness tampering in violation of 18 U.S.C. § 1512(b)(1) and (3). The Indictment alleges that after becoming aware of the grand jury investigation in this case, Heinz attended a luncheon on November 26, 2006 with Welty and two other colleagues from FSC, one of whom was cooperating with the Government ("CW1"). At the luncheon, Heinz allegedly discussed the Mass I Transaction – the investment agreement at issue in Count Three – with CW1, who was FSC's primary broker on the transaction. Heinz is alleged to have told CW1 to "forget that deal," and to have instructed CW1 to meet with another cooperating witness ("CW2") who was CW1's counterpart at Financial Institution D (with whom FSC allegedly colluded), "so that they could get their story straight regarding a payment [CW2] caused Financial Institution D to make to Financial Institution A and FSC in exchange for FSC steering an investment agreement to Financial Institution D." (Indictment ¶ 64.) Defendants Ghavami and Welty move to sever Count Six from the

trial of the remaining counts, on the ground that evidence of the witness tampering alleged against Heinz will prejudice them as to the other counts, particularly Count Three.

A. *Applicable Law*

Pursuant to Federal Rule of Criminal Procedure 14 ("Rule 14"), the Court has discretion to sever properly joined charges where joinder would result in undue prejudice to a defendant.[13] [14] Fed, R.Crim. P. 14(a); *see also United States v. Rittweger*, 524 F.3d 171, 179 (2d Cir.2008). However, "for reasons of economy, convenience and avoidance of delay, there is

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[13] Federal Rule of Criminal Procedure 8(a) permits joinder of offenses against a single Defendant if the charged offenses "are of the same or similar character, or are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan." Federal Rule of Criminal Procedure 8(b) allows joinder of two or more defendants "if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions, constituting an offense or offenses." There is proper joinder of all three Defendants because they are alleged to have participated in the conspiracies and wire fraud charged in Counts One through Three, and Count Six is properly joined with the remaining counts because it alleges witness tampering in order to conceal the misconduct alleged in Count Three.

[14] Rule 14 provides, in relevant part: "If the joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires." Fed.R.Crim.P. 14(a).

a preference in the federal system for providing defendants who are indicted together with joint trials." *United States v. Feyrer*, 333 F.3d 110, 114 (2d Cir.2003). "Acknowledged in this policy is the inevitable tolerance of some slight prejudice to codefendants, which is deemed outweighed by the judicial economies resulting from the avoidance of duplicative trials." *United States v. Cardascia*, 951 F.2d 474, 482 (2d Cir.1991). Therefore, severance should be granted "only if there is a serious risk that a joint trial would compromise a specific right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." *Zafiro v. United States*, 506 U.S. 534, 539 (1993). "Such a risk might occur when evidence that the jury should not consider against a defendant and that would not be admissible if a defendant were tried alone is admitted against a codefendant." *Id.* However, "the fact that evidence may be admissible against one defendant but not another does not necessarily require a severance." *United States v. Carson*, 702 F.2d 351, 367 (2d Cir, 1983). Even in cases where there is a high risk of prejudice, "less drastic measures, such as limiting instructions, often will suffice to cure any risk of prejudice." *Zafiro*, 506 U.S. at 539. Indeed, "limiting instructions to the jury have emerged as the preferred device for curing any prejudicial spillover that may result from a multi-defendant, multi-count trial." *United States v. Santiago*, 174 F.Supp.2d 16, 22 (S.D.N.Y.2001) (Marrero, J.)

B. ***Analysis***

Ghavami and Welty argue that the evidence introduced to support Count Six will unfairly associate them with Heinz's alleged witness tampering and will imply that they were part of an alleged attempt to cover up the Mass I Transaction that is the basis for Count Three. Specifically, they contend that the mere existence of the obstruction count prejudices them in defending against the substantive wire fraud charge in Count Three, because if the jury convicts Heinz of obstruction, it will inevitably infer that the Mass I Transaction involved unlawful conduct and would improperly convict based on that inference instead of independently assessing the legality of the underlying financial transactions. (Mem. of Law in Supp. of Def. Michael Welty's Mot. to Sever Count Six ("Welty Severance Mem.") at 2; Mem. of Law in Supp. of Def. Peter Ghavami's Mot. to Sever Count Six ("Ghavami Severance Mem.") at 1.) They contend that this risk is particularly acute because the financial transactions at issue are so complex and unfamiliar to jurors that the jury is more likely to forego analyzing them and instead improperly rely on evidence of witness tampering. (Welty Severance Mem. at 11; Ghavami Severance Mem. at 2.) In addition, Welty argues that the risk of unfair prejudice is compounded by the weakness of the evidence against him on Count Three, and by the fact that he was present at the luncheon with Heinz. (Welty Severance Mem. at 7, 10.) He further contends that he will also suffer prejudice with respect to Count Four, because the

conspiracy charged in Count Four "resembles in some respects" the illegal conduct alleged in Count Three and overlaps in time with the obstruction alleged against Heinz in Count Six.[15] (*Id.* at 8.)

The risk that Ghavami and Welty will be unfairly prejudiced by joinder of the witness tampering count is insufficiently severe to overcome the strong presumption against severance. Joinder of obstruction charges in multiple defendant trials, in which some but not all defendants are charged with obstruction, is commonplace. *See, e.g.*, *United States v. Hernandez*, 85 F.3d 1023, 1029-30 (2d Cir.1996); *United States v. Teitler*, 802 F.2d 606, 617 (2d Cir.1986); *United States v. Upton*, 856 F.Supp. 727, 737-38 (E.D.N.Y.1994) (Glasser, J.). The propriety of joinder in these cases rests on the presumptions that a jury will capably review and compartmentalize the evidence, and will follow limiting instructions from the court to consider each count separately.

In the case at bar, there is no reason to believe that a limiting instruction will not effectively mitigate any potential prejudice caused by the introduction of obstruction evidence on Count Six. *See Zafiro*, 506 U.S. at 539. Defendants contend that a jury would disregard the Court's limiting instruction

[15] Count Four charges Welty and Heinz only. The Indictment alleges that the conspiracy charged in that Count continued "[f]rom at least as early as January 2002 until at least November 2006," the latter month being the month in which Heinz's alleged obstruction occurred. (Indictment ¶ 50.)

because the nexus between Counts Three and Six is too close to ignore, and because the temptation to avoid assessing the legality of the complex transactions underlying Count Three is too great. Welty adds that a jury is even more likely to make improper inferences in his case because he was present at the luncheon where Heinz allegedly engaged in obstruction.[16] However, "juries are presumed to follow their instructions," *Zafiro*, 506 U.S. at 540-41, and Defendants' contention that a jury would be incapable or unwilling to do so is too speculative to warrant abandoning that presumption. The Court will provide appropriate instructions to the jury with respect to the differences in the nature of the charges against each defendant, what evidence can and cannot be considered against a particular defendant, and the need to consider the evidence against each defendant individually for each count. *See, e.g.*, *Rittweger*, 524

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[16] Welty also argues that the risk of unfair prejudice is further increased because the evidence against him as to Count Three is weak. To support the proposition that the strength of the evidence on Count Three is a factor the Court should consider, he relies on case law that addresses retroactive misjoinder, which requires a defendant to show "compelling prejudice," such as "prejudicial spillover from evidence used to obtain a conviction subsequently reversed on appeal." *United States v. Hamilton*, 334 F.3d 170, 181 (2d Cir.2003).

The key to the retroactive misjoinder test is "whether the jury was able to distinguish between counts or between defendants, and to assess separately the evidence pertinent to each." *Id.* at 183. As discussed *supra*, there is no reason to doubt that the jury will be able to follow the Court's instructions to assess separately the evidence against each Defendant on each count.

F.3d at 179 (rejecting claim of prejudicial spillover where "the district court gave limiting instructions throughout the trial explaining when evidence could not be considered against a particular defendant, and the jury charge carefully explained that the jurors must consider the case against each defendant separately"); *United States v. Salameh*, 152 F.3d 88, 116 (2d Cir.1998) (finding risk of prejudicial spillover mitigated by district court's "repeated admonitions to the jury that each defendant's guilt had to be separately and individually considered"); *United States v. Hernandez*, 85 F.3d at 1030 (same). The Court will also instruct the jury that a defendant need not be engaged in criminal conduct in order to be found guilty of witness tampering under 18 U.S.C. § 1512.[17]

Considerations of judicial economy further counsel in favor of jointly trying all six counts of the Indictment. The parties estimate that a joint trial will take four to six weeks. Defendants argue that a separate trial as to Count Six would by contrast be "brief and uncomplicated" because it "involves only a single alleged conversation during a single lunch relating to a single transaction." (Welty Severance

[17] For the same reasons, the Court rejects Welty's argument that he is also unfairly prejudiced with respect to Count Four because it somewhat resembles Count Three, His argument that unfair prejudice results from the slight overlap in time with the misconduct alleged against Heinz in Count Six is insufficient to overcome the presumption that the jury will be able to differentiate between counts and between defendants, and to consider separately the evidence against each defendant on each count.

Mem. at 11; Reply Mem. in Supp. of Def. Michael Welty's Mot. to Sever Count Six at 7.) However, a separate trial on Count Six would require the expenditure of substantial resources from the Court, the parties, the witnesses, and jurors. Although the Government would not have to prove that Heinz engaged in the underlying alleged criminal conduct that is the object of the obstruction charge, evidence of that underlying conduct is relevant and necessary to explain the background of the charge. Therefore, much of the same evidence, including testimony from the same witnesses, would have to be introduced at a separate trial of Count Six.

Because the Court finds that the risk of prejudice is not "sufficiently severe to outweigh the judicial economy that would be realized by avoiding lengthy multiple trials," *Cardascia*, 951 F.2d at 482, Ghavami and Welty's Motions to Sever Count Six are DENIED. (Dkt.Nos.102, 103.)

VII. CONCLUSION

For the foregoing reasons, the Court DENIES Defendants' jointly filed (1) Motion for a Bill of Particulars; (2) Motion to Dismiss Counts Two and Four Based on the *Ex Post Facto* and Due Process Clauses; (3) Motion for Relief as to Counts One, Two, and Four as Multiplicitous; and (4) Motion to Dismiss Counts

One Through Five as Untimely. (Dkt Nos. 98-101.) The Court also DENIES Defendants Welty and Ghavami's Motions to Sever Count Six. (Dkt.Nos.102-103.)

SO ORDERED.