Nos. 13-3119, 13-3296
(consolidated with No. 13-3121)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

v.

GARY HEINZ &
MICHAEL WELTY,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
(JUDGE KIMBA M. WOOD)

OPPOSITION OF APPELLEE UNITED STATES OF AMERICA TO EMERGENCY MOTIONS FOR RELEASE PENDING APPEAL OF DEFENDANTS GARY HEINZ AND MICHAEL WELTY

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PRELIMINARY STATEMENT

On August 8, 2013, the District Court, the Honorable Kimba M. Wood, U.S. District Judge, entered judgments of conviction against Gary Heinz and Michael Welty on several counts of conspiracy and wire fraud that "affect[ed] a financial institution," sentencing Heinz to 27 months' imprisonment and a $400,000 fine, and Welty to 16 months' imprisonment and a $300,000 fine, among other things.[1] The District Court denied the defendants release pending appeal and ordered them to report to prison on July 17, 2014. Op. & Order on New Trial and Release Mots., May 15, 2014, Dkt. 474 ("Release Order").[2] The defendants appealed their convictions and now seek release from this Court, claiming that the indictment[3] was untimely, that the jury was instructed incorrectly, and that lay testimony was wrongly admitted, such that there are substantial questions likely to result in reversal or a new trial on appeal.[4] These claims do not raise a close question.

The indictment charged and the government proved that the defendants, while

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[1] *See* Michael Welty's Emergency Mot. for Release Pending Appeal ("Welty Mot."), Ex. 1 (Amended Judgment); Gary Heinz's Emergency Mot. for Release Pending Appeal ("Heinz Mot."), Ex. 1 (Amended Judgment). Co-Defendant Peter Ghavami was also convicted on two counts of conspiracy and one count of wire fraud and sentenced to 18 months' imprisonment and a $1 million fine. He has appealed his conviction, but he is not seeking release pending appeal.

[2] The Release Order is appended as Exhibit 2 to both Welty Mot. and Heinz. Mot.

[3] Here and elsewhere, "indictment" refers the Superseding Indictment, Dkt. 30, Tulley Decl., Ex. A, which the grand jury returned on September 15, 2011.

[4] Heinz Mot. 8-14; Welty Mot. 3-9.

working at UBS Financial Services, Inc. (formerly UBS PaineWebber) ("UBS"), conspired to defraud municipalities by manipulating bidding on investment contracts for municipal bond proceeds. The indictment further alleged that the five charged offenses "affected a financial institution." Superseding Indictment, Dkt. 30, Tulley Decl., Ex. A ¶¶ 24, 34, 42, 51, 59.

Before trial, the court properly denied a motion to dismiss the indictment as untimely, ruling that admissible evidence could enable a jury to find that the charged offenses "affect[ed] a financial institution" and therefore the ten-year statute of limitations provided by 18 U.S.C. § 3293(2) would apply. *United States v. Ghavami*, 10 Cr. 1217 (KMW), slip op. at 19 (S.D.N.Y. July 13, 2012), Dkt. 211, Tulley Decl., Ex. B ("Pretrial Order").

At trial, the defendants chose to stipulate that "each offense charged . . . , 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," Affected a Financial Institution Stipulation, Tulley Decl., Ex. C ("S-4"), rather than test the government's evidence. Heinz now claims the offenses did not affect a financial institution. Heinz Mot. 8-9. But the defendants cannot "evade the consequences of [their] unsuccessful tactical decision." *United States v. Coonan*, 938 F.2d 1553, 1561 (2d Cir. 1991). "Upon entering into a stipulation on an element, a defendant waives his right to put the government to its proof of that element." *United States*

v. Harrison, 204 F.3d 236, 240 (D.C. Cir. 2000).

In any event, three financial institutions—UBS, J.P. Morgan Chase & Co., and Bank of America—were affected by the charged offenses. Because the offenses were committed by the defendants within the scope of their UBS employment (and by their co-conspirators within the scope of their employment at JP Morgan and Bank of America), those financial institutions were exposed to serious criminal and civil liability and experienced substantial, actual losses.

Nor is there any merit in Heinz's judicial estoppel arguments. *See* Heinz Mot. 11-13. The government is not estopped from charging the defendants with fraud that affects a financial institution simply because the defendants' co-conspirators pleaded guilty to wire fraud charges without the government's charging, or their admitting, that the offenses also affected a financial institution.

Welty also complains about the district court's instruction to the jury, made at Ghavami and Heinz's request, that: "You may not consider a [bid] certification to be false if you find that an intentionally losing bid was submitted only for a legitimate business purpose[.]" Tr. 4769.[5] This instruction supported the defendants' theory that not all intentionally losing bids were improper. Welty now claims it was prejudicially erroneous because it allowed the jury to find fraud without considering materiality. Welty Mot. 4. But simply because the instruction

[5] "Tr." refers to trial transcript pages.

defined one situation in which the jury could not infer a material falsehood, it does not imply the jury was told to infer a material falsehood in all other situations. Jury instructions are to be considered "as a whole," *United States v. Carr*, 880 F.2d 1550, 1555 (2d Cir. 1989), and the district court separately instructed the jury that fraud requires proof of a material misrepresentation.

Finally, Welty complains about the testimony by his co-worker and co-conspirator Mark Zaino, who decoded the meaning of terms Welty and his co-conspirators used. Welty Mot. 3-4. But the district court did not abuse its discretion in admitting this lay witness testimony. "[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." *United States v. Yannotti*, 541 F.3d 112, 126 (2d Cir. 2008).

STATEMENT OF THE FACTS

From 2001 through at least 2002, 2004, or 2006 (depending on the count), defendants Heinz, Welty, and Ghavami conspired with brokers (including Chambers, Dunhill, Rubin & Co., or "CDR") and providers (including JP Morgan, Bank of America, and GE) to defraud dozens of municipalities and the IRS during the bidding and awarding of municipal investment contracts. In so doing the defendants involved their employer UBS in their schemes.

The defrauded municipalities hired brokers to conduct competitive bidding for investment contracts. These municipalities expected that they would receive actually competitive bids from several investment contract providers, that the bidding process would satisfy the requirements for a safe harbor in the applicable Treasury regulations when necessary, and that they would obtain the best possible terms from the winning bidder. *See*, *e.g.*, Tr. 1846-47, 2825-28, 2861-62. Heinz and Welty corrupted this process at every step. When bidding on investment contracts on behalf of UBS as a provider, Heinz and Welty conspired with other providers to manipulate those bids and win deals at non-competitive rates. When UBS was the underwriter for municipal bond offerings, Heinz and Welty helped co-conspirator CDR get hired as a broker and paid CDR kickbacks in return for its steering UBS investment contracts at highly profitable rates. And when UBS served as a broker, Heinz and Welty steered deals to providers, such as GE, JP Morgan, and Bank of America in return for kickbacks and other favors.

1. Count 1: Defendants and UBS Conspired with Other Providers

In Count 1, the indictment charged Heinz, Welty, and Ghavami with conspiracy in violation of 18 U.S.C. § 371. Superseding Indictment, ¶¶ 1, 23. They, acting through UBS, conspired with JP Morgan and Bank of America to suppress competition in the bidding process for municipal investment agreements and deceive the municipal issuers about that lack of competition. Two witnesses

from JP Morgan and another from Bank of America testified that they agreed with Heinz and Welty to submit intentionally losing bids or to refrain from bidding on various investment contracts that UBS won. *See, e.g.*, Tr. 1962-69 (City of Detroit); Tr. 2444-63 (Rhode Island Tobacco); Tr. 2685 (two City of Anchorage contracts). For example, Welty asked Douglas Campbell of Bank of America to let UBS win the Rhode Island Tobacco contract, GX 204408; Tr. 2444-45, promising to share the profit with Bank of America, Tr. 2450, 2453-54. Bank of America agreed not to bid on the deal. Tr. 2463. Welty then falsely represented that UBS "did not consult with any other potential provider about its bid." GX 24-9. On one of the Anchorage transactions, Heinz told Alex Wright of JP Morgan what to bid to "have a losing bid that still looks reasonable," Tr. 2064; *see also* GX 441720. Wright bid just above that number, GX 441731, 22-19; Tr. 2066-67, and his bid lost. Wright falsely certified that he had not consulted with another potential bidder about JP Morgan's bid. GX-19; Tr. 2068. Bank of America's Campbell also submitted "intentionally losing bids, courtesy bids" on the Anchorage transactions at the request of Zaino and Welty. *See* Tr. 766; GX 204355. Campbell falsely certified that he had not consulted with any other providers and had not submitted his bid solely as a courtesy bid. Tr. 2429; GX 22-17, 22-13. Moreover, the defendants agreed to, and did submit, intentionally losing bids on at least two such deals that JP Morgan won. *See, e.g.*, Tr. 696 (Pennsylvania

Intergovernmental Cooperation Authority); Tr. 1933-42; GX 101814, 101853, 524617 (Greater Orlando Aviation Authority).

2. Count 2: Defendants and UBS Conspired with Broker CDR

In Count 2, the indictment charged Heinz, Welty, and Ghavami with conspiracy in violation of 18 U.S.C. 1349. Superseding Indictment, ¶¶ 27, 33. Through UBS in its role as a provider and underwriter, the defendants conspired with broker CDR to manipulate the bidding process on municipal investment contracts. Three witnesses from CDR testified that they steered at least seven deals to the defendants and UBS. In return, the defendants paid CDR kickbacks, submitted intentionally losing bids, and performed other favors. For example, on more than one occasion, Welty assisted CDR in getting hired as a broker on a deal, and in return CDR set up the transaction so that Welty's bid would win. *See, e.g.*, Tr. 885-90 (Bridgeport); Tr. 2932, 2972-77 (Georgia Baptist); *see also* Tr. 885-90 (Bridgeport). CDR also steered deals to UBS in return for payments, which CDR did not disclose to the issuers. *See, e.g.*, Tr. 866-68, 878-80, 2955-56 (Centinela School District). On other occasions, the defendants submitted intentionally losing bids on deals, even if UBS could not provide that kind of contract, helping CDR to steer the deal to another provider. *See* Tr. 982-87, 2934-37 (Columbia College); Tr. 987-90, 2943-49 (Gladstone Institutes); Tr. 943-44, 966-67, 2968-69 (Allegheny County Airport).

3. Count 4: Defendants and UBS (as Broker) Conspired with Provider GE

In Count 4, the indictment charged Heinz and Welty with conspiracy in violation of 18 U.S.C. § 1349. Superseding Indictment, ¶¶ 44, 50. Heinz and Welty agreed with Peter Grimm at GE that UBS (as broker) would steer investment contracts to GE and its subsidiaries in return for kickbacks in the form of revenue from interest rate swaps that GE entered into with UBS. *See, e.g.*, Tr. 1061-6868 (Commonwealth of Puerto Rico); Tr. 1083-84, 1156-57 (Massachusetts Education Financing Authority); Tr. 1172-78, 1201-02, 1222-23 (Catholic Health Initiatives). For example, Grimm told Welty he wanted to "take" the New Mexico Educational Assistance Foundation deal at "LIBOR, less 8," but that if he could "get it at a better spread" GE could give UBS "a bigger fee." GX 411634; *see also* GX 411623. Welty later told Grimm that other bids were significantly higher than GE's, and so Grimm asked Welty to "just let me know where it's coming in." GX 411635. Grimm reduced his bid as a result, to LIBOR less 9, but still won. GX 32-6. Grimm signed a provider certification, GX 32-8, which led the foundation to believe, incorrectly, that GE "did not have discussions with . . . the broker staff that provided them additional information that the other bidders did not have," and that GE "bid without knowing or seeing what the other bidders were submitting." Tr. 1858-59.

4. Counts 3 and 5: Heinz Committed Substantive Wire Fraud

The indictment also charged Heinz with two counts (Counts 3 and 5) of substantive wire fraud, 18 U.S.C. § 1343, in connection with UBS serving as a broker.[6] Superseding Indictment, ¶¶ 37, 42, 54, 59. On Count Three, Campbell and Zaino testified that they agreed with Ghavami and Heinz to steer the Commonwealth of Massachusetts deal, brokered by UBS, to Campbell and Bank of America, in return for payments and other favors to UBS. Tr. 618-23, 2383-84, 2399-2400, 2406, 2679-80. On Count Five, Alex Wright testified that Heinz steered to Wright's employer, JP Morgan, the investment contract for the New Jersey Healthcare/Robert Wood Johnson Medical Center, which was bid by the New Jersey Health Care Facilities Financing Authority in June, 2002. Tr. 2083-87.

5. Effect on Financial Institutions

The defendants stipulated that the charged offenses "affected a financial institution," S-4, and therefore the trial record does not contain evidence of an effect on a financial institution other than that stipulation. Because of pretrial proceedings in which the defendants questioned the indictment's allegations that the offenses affected financial institutions, however, the appellate record contains some evidence showing that the charged offenses in fact affected several financial institutions. The government never made a complete proffer of its effect evidence,

[6] Ghavami was also charged and convicted on Count 3; and Welty was also charged on Count 3 but was acquitted of that charge.

though, and therefore the record does not fully reflect what the government would or could have offered at trial had the defendants not stipulated.

The record shows that the defendants' schemes affected UBS, JP Morgan, and Bank of America, all financial institutions that admitted responsibility for the charged offenses. On May 4, 2011, UBS entered into a non-prosecution agreement with the U.S. Department of Justice, Antitrust Division, in which UBS admitted responsibility for the manipulation and rigging of bids by certain former employees at its municipal reinvestment and derivatives desk in violation of, among other things, certain provisions of 18 U.S.C. UBS also entered into settlement agreements with the SEC, IRS, and 25 state attorneys general that required it to pay $160 million in fines and restitution.

JP Morgan and Bank of America also entered into similar non-prosecution and settlement agreements. In total, these three financial institutions paid over half a billion dollars in fines, restitution, and disgorgement pursuant to these settlement agreements with federal and state government authorities.

Finally, these three financial institutions were exposed to additional potential civil liability in connection with related private lawsuits. *See, e.g., In re Mun. Derivatives Antitrust Litig.*, 252 F.R.D. 184 (S.D.N.Y. 2008).

STANDARD FOR OBTAINING RELEASE PENDING APPEAL

After a guilty verdict and sentencing, there is a "presumption in favor of

detention." *United States v. Abuhamra*, 389 F.3d 309, 319 (2d Cir. 2004). "[T]here is absolutely no reason for the law to favor release pending appeal or even permit it in the absence of exceptional circumstances." *United States v. Miller*, 753 F.2d 19, 22 (3d Cir. 1985) (quoting H. Rep. No. 91-907, 2d Sess., at 186-87 (1970)). Thus, each defendant must be detained pending appeal unless the judicial officer finds (1) "by clear and convincing evidence" the defendant is neither a flight risk nor likely to pose a danger to the community and (2) "that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in" reversal, a new trial, a new sentence without imprisonment, or a reduced sentence. 18 U.S.C. § 3143(b).

A "substantial question" is "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 quotation mark and citation omitted). Release may not be granted unless a defendant establishes a substantial question likely to result in a reversal or new trial on every count on which he is incarcerated. *Id.* On all these issues, "the burden of persuasion rests on the defendant." *Id.*

After having noticed an appeal from a conviction, a defendant may seek review of a district court's release order by motion in the Court of Appeals. Fed. R. App. P. 9(b). The district court has "greater familiarity with the record" and thus "is

normally in a far better position than the court of appeals to make such determinations in the first instance," *United States v. Hochevar*, 214 F.3d 342, 344 (2d Cir. 2000); therefore, the "[d]ecision[] of the District Court with respect to bail [is] entitled to 'great deference,'" *Mecom v. United States*, 434 U.S. 1340, 1341 (1977) (Powell, Circuit Justice) (citation omitted).

ARGUMENT

The Defendants Have Not Presented a Substantial Question Allowing Release

Defendants claim to raise substantial questions of law relating to (1) the ten-year statute of limitations, (2) the jury instruction on intentionally losing bids, and (3) the lay testimony of a cooperating witness. None of these questions is close.

I. The Ten-Year Statute of Limitations Applies Because the Defendants Stipulated that their Schemes Affected a Financial Institution, a Fact the Government was Prepared to Prove

Heinz's statute of limitations arguments do not raise a close question on appeal. The defendants stipulated that their crimes affected a financial institution, thereby waiving any argument that the offense did not affect a financial institution. Moreover, the district court's decisions not to dismiss the indictment and to admit the settlement evidence are not reviewable. In any event, the district court correctly denied the defendants' pretrial motion to dismiss, which was bound up with issues for trial and advanced an erroneously narrow interpretation of 18 U.S.C. § 3293(2). Last, judicial estoppel does not bar the application of § 3293(2).

A. The Defendants Should be Held to their Stipulation that their Charged Offenses Affected a Financial Institution

The statute of limitations for wire fraud, or for a conspiracy to commit wire fraud, is ten years "if the offense affects a financial institution." 18 U.S.C. § 3293(2). The defendants cannot now complain about the district court's application of this limitations period because they stipulated at trial that "each offense charged . . . , 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."[7] S-4; *see also* Tr. 312-13, 3837.

A factual stipulation is a "binding," "formal concession[]" that has the effect of "withdrawing a fact from issue and dispensing wholly with the need for proof of the fact." *Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 2983 (2010) (internal quotation marks and citation omitted). By stipulating to an element of an offense, a defendant waives the right to challenge on appeal the sufficiency of the evidence for that element. *See United States v. Celaj*, 649 F.3d 162, 170 n.5 (2d Cir. 2011); *United States v. Barlow*, 479 F. App'x 372, 373 & n.1 (2d Cir. 2012)

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[7] Section 1343 provides a maximum prison term of 20 years for wire fraud, but increases that maximum to 30 years "[i]f the violation . . . affects a financial institution." 18 U.S.C. § 1343. Section 1349 provides the same penalties for a conspiracy to violate §1343 as prescribed for the offense. 18 U.S.C. § 1349. Accordingly, for purposes of increasing the defendant's maximum prison sentence from 20 to 30 years, affecting a financial institution is an element of the offense. *See Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

(summary order). The stipulation thus relieved the Government of its need to introduce the bank settlements, and the defendants benefited "because [such] potentially prejudicial facts . . . w[ould] not be admitted." *United States v. Harrison*, 204 F.3d 236, 243 (D.C. Cir. 2000). The defendants, therefore, should "not be permitted . . . to suggest, on appeal, that the facts were other than as stipulated." *Christian Legal Soc'y*, 130 S. Ct. at 2983 (citation omitted).

The defendants agreed at trial that they were "not going to argue, if [they] ever needed to, on appeal, that the information – the evidence was insufficient at trial because there wouldn't have been any." Tr. 2195. They did insist, however, that they preserved their "legal," as opposed to factual, arguments relating to the district court's pretrial ruling on § 3293(2). *Id*. But "[t]o assert that a stipulation to an element of a crime does not affect legal defenses is to build an artificial wall between factual and legal arguments." *United States v. Meade*, 175 F.3d 215, 223 (1st Cir. 1999). Indeed, on appeal as well as before the trial court, the defendants' primary complaint was fact-bound—claiming that the issue was whether the government had alleged a sufficiently close connection between the alleged offenses and the bank settlements. Mem. of Law in Sup. of Defs.' Joint Mot. to Dismiss Counts One Through Five ("Defs. Pretrial Mot.") at 20.

The defendants may disagree with the district court's pretrial determination to "admit the Non-Prosecution Agreements, Settlement Agreements, and related

testimony for the limited purpose of establishing the applicability of § 3293(2)." Pretrial Order 19. But that decision is not reviewable as it concerns evidence that the government never introduced and upon which the jury did not rely. *See Ohler v. United States*, 529 U.S. 753, 755-59 (2000); *United States v. Luce*, 469 U.S. 38, 41-43 (1984); *United States v. Ortiz*, 857 F.2d 900, 905-06 (2d Cir. 1998).

As the district court found in its Release Order under review, the "Government did not, however, present [bank witness] 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)." Release Order 23. Any harm that could have resulted from admitting those bank settlements is therefore "wholly speculative." *Ohler*, 529 U.S. at 759. Because the bank witnesses never took the stand and the jury never saw the settlements and related documents, a reviewing court is "handicapped in any effort" to rule on whether the government could have proven the defendants' schemes affected a financial institution "outside [the] factual context" that a trial on that issue would have afforded. *Luce*, 469 U.S. at 41. The defendants did not allow the adverse evidence to be introduced in order to "bring a fully developed record to this Court," *Ortiz*, 857 F.2d at 906, and so they failed to preserve their claim of error.

B. The District Judge Correctly Denied the Defendants' Motion to Dismiss

In any event, the district court's pretrial ruling was correct. The indictment was facially valid; indeed, the government had no obligation to anticipate the defendants' affirmative statute of limitations defense. *See United States v. Sisson*, 399 U.S. 267, 288 (1970); *United States v. Cook*, 84 U.S. 168, 179-80 (1872). And a district judge should not dismiss an indictment on the basis of an affirmative defense where, as here, the court cannot "determine [the question] without a trial of the general issue." Fed. R. Crim. P. 12(b)(2). First, determining whether the offense "affects a financial institution" requires determination of what the offense is and what effects it had and thus goes to the general issue. Second, "affects a financial institution" is relevant not only to the statute of limitations, but also is an element of the charged offenses. *See supra* n.7. It thus cannot be said that "trial of the facts surrounding the commission of the alleged offense would be of no assistance in determining the validity of the defense" in which the defendants claimed the government had insufficient evidence to prove the ten-year statute of limitations applied. *United States v. Covington*, 395 U.S. 57, 60 (1969).

In addition, the district court correctly held that the bank settlements were relevant evidence to prove the defendants' schemes to defraud municipalities affected UBS, JP Morgan, and Bank of America. The ten-year statute of limitations "*broadly* applies to any act of wire fraud 'that affects a financial

institution.'" *United States v. Bouyea*, 152 F.3d 192, 195 (2d Cir. 1998) (emphasis added) (quoting *United States v. Pelullo*, 964 F.2d 193, 215-16 (3d Cir. 1992)). The district court properly interpreted § 3293(2) "to cover conduct that exposes a financial institution to a new or increased risk of loss." Pretrial Order 11.

Defendants did not take issue with the risk-of-loss standard at trial, *see* Defs. Pretrial Mot. 24, but they now complain that the district court's risk-of-loss standard was "erroneous," Heinz Merits Br. 33 n.26. It was not. Three circuits have expressly held that § 3293(2) requires proof only of a risk of loss. *See United States v. Stargell*, 738 F.3d 1018, 1022-23 (9th Cir. 2013); *United States v. Mullins*, 613 F.3d 1273, 1278-79 (10th Cir. 2010); *United States v. Serpico*, 320 F.3d 691, 694-95 (7th Cir. 2003). No court of appeals has held otherwise. *See, e.g.*, *United States v. Agne*, 214 F.3d 47, 52 (1st Cir. 2000) (assuming without deciding that a risk of loss is sufficient for § 3293(2)); *United States v. Ubakanma*, 215 F.3d 421, 426 & n.4 (4th Cir. 2000) (citing *United States v. Schinnell*, 80 F.3d 1064, 1070 (5th Cir. 1996), which applied risk-of-loss standard, with approval). And two more circuits have held that risk of loss satisfies a (now superseded) sentencing guideline enhancement for offenses that "affected a financial institution." *See Schinnell*, 80 F.3d at 1070 (financial institution was "realistically exposed to substantial potential liability as the result of [defendant's] fraud" and thus "affected"); *United States v. Schultz*, 66 F. App'x 665, 666 (8th Cir. 2003)

(bank affected by fraud that resulted in civil lawsuit and thus risk of civil liability).

Moreover, this Court has determined that bank fraud—which applies to any fraud that targets a financial institution or deprives it of money or property under its ownership, control, or custody, 18 U.S.C. § 1344—requires proof only of a risk of loss, and not actual loss. *See, e.g.*, *United States v. Jacobs*, 117 F.3d 82, 91 (2d Cir. 1997). With § 3293, Congress intended to increase to ten years the statute of limitations for crimes that "affect financial institutions," including bank fraud. H.R. Rep. No. 101-54, at 399-401 (1989). And, because "much financial institution fraud . . . can be proved most readily under [mail and wire fraud] statutes," as opposed to the bank fraud statute, Congress made sure to add sections 1341 and 1343 to the list of "criminal offenses often arising within financial institutions" covered by the increased limitations period of § 3293. *Prosecuting Fraud in the Thrift Industry: Hearings on H.R. 1278 Before the Subcomm. on Criminal Justice of the Comm. on the Judiciary*, 101st Cong. 201 (1989) (statement of Rep. Barnard). In this context it would make no sense if § 3293(2)—designed to add to the list of offenses affecting financial institutions subject to a longer limitations period—required proof of actual loss even though bank fraud, listed in § 3293(1), does not.

Under the risk-of-loss standard, the defendants' schemes affected UBS, JP Morgan, and Bank of America well before those companies settled with various

government agencies, admitted wrongdoing, and paid over half a billion dollars in fines and restitution. Whenever "agents of the corporation acting within the area entrusted to them . . . violate[] the law," the corporation itself becomes criminally liable as a matter of course, *United States v. Steiner Plastics Mfg. Co.*, 231 F.2d 149, 153 (2d Cir. 1956); and so the immediate effect of the defendants' schemes was to subject their employer, UBS (and their co-conspirators' employers, JP Morgan and Bank of America) to criminal culpability and the attendant risk of criminal penalties as well as civil liability. In the context of bank fraud, this Court has held that "exposing [a] bank to the real threat of civil liability" imposes a risk of loss on the bank. *United States v. Morgenstern*, 933 F.2d 1108, 1114 (2d Cir. 1991). Subjecting a financial institution to the risk of criminal and civil liability, as the defendants' crimes did by their very nature, is therefore a sufficient risk of loss for § 3293(2). *Cf. United States v. Shandell*, 800 F.2d 322, 324 (2d Cir. 1986) (under bank robbery statute, 18 U.S.C. § 2113(a), bank was clearly "affected" by larceny directed at non-bank because bank was subjected to risk of civil liability).

In any event, the appeal need not turn on the risk-of-loss standard because the indictment's allegations were not so limited and the offenses caused substantial, actual losses. As the settlements demonstrate, UBS, JP Morgan, and Bank of America suffered actual losses when they paid over half a billion dollars to settle claims with federal and state government authorities. *See United States v. Wiant*,

314 F.3d 826, 830 (6th Cir. 2003) (for purpose of sentencing guideline, defendant "affected" financial institution by subjecting it to unquantified legal costs); *United States v. Hartz*, 296 F.3d 595, 600 (7th Cir. 2002) (bank affected, within meaning of sentencing guideline, where defendant "used the bank to commit the fraud" and bank paid $150,000 settlement "to extract itself from civil liability"); *United States v. Bennett*, 161 F.3d 171, 193 (3d Cir. 1998) (fraud affected a financial institution, for purposes of sentencing guidelines, that "agreed to pay $18 million to settle litigation resulting" from that fraud). Although Heinz maintains these substantial effects were too attenuated, Heinz Mot. 9-10, the government was prepared to prove through testimony by bank witnesses that the settlements were sufficiently attributable to the defendants' offenses, *see* Gov. Mem. of Law in Opp. to Defs.' Joint Mot. to Dismiss Counts One through Five at 11-13, had the defendants not stipulated to the requisite effect.[8]

[8] Moreover, Heinz's argument (Heinz Mot. 10-11, citing Ghavami Merits Br. 23-44) that a settlement agreement by a culpable co-conspirator cannot constitute an effect under § 3293(2) should not be considered because it contradicts positions the defendants took in the district court. *See* Defs. Pretrial Mot. 20; Reply Mem. of Law in Sup. of Defs.' Joint Mot. to Dismiss Counts One through Five at 4. But in any case the contention on appeal is meritless. The chain of causation was unbroken because, as noted above, corporate criminal responsibility follows as a direct result of an employee committing a crime within the scope of his employment.

C. The Government's Plea Bargains with Heinz's Co-Conspirators Do Not Judicially Estop the Government from Trying Heinz for a Greater Charge

Heinz argues that the government is judicially estopped from invoking § 3293(2)'s ten-year statute of limitations because the charges against his pleading co-conspirators did not include allegations that their offenses affected a financial institution. This argument is baseless. First, Heinz cannot revive his waived arguments regarding the statute of limitations by claiming a right to judicial estoppel. *See Christian Legal Soc'y*, 130 S. Ct. at 2983.

Second and more fundamentally, Heinz's argument is premised upon a complete misunderstanding of prosecutorial discretion and the structure and function of plea agreements. He is essentially arguing that if the government enters into a plea agreement with one defendant, it cannot later charge a co-defendant with a greater offense. But "prosecutors are permitted discretion as to which crimes to charge and which sentences to seek." *United States v. Gonzalez*, 682 F.3d 201, 204 (2d Cir. 2012). And prosecutors may agree to reduce a charge "to a lesser or related offense" during the plea negotiation process. Fed. R. Crim. P. 11 advisory committee's notes.

The government's decision to charge Heinz's co-conspirators with the lesser offense of wire fraud (and not wire fraud that affected a financial institution) reflects only the exercise of that prosecutorial discretion. It did not constitute an affirmative representation to the court that the co-conspirators' offenses did not

affect a financial institution. *See United States v. Rosenthal*, 454 F.2d 1252, 1255 (2d Cir. 1972) ("no inconsistency between the two counts" where one was lesser included offense of the other); *United States v. Masiello*, 445 F.2d 1324, 1325 (2d Cir. 1971) ("We have considered the 'gratuity' count a lesser included offense of the bribery count; there was therefore no inconsistency in the charges."); *United States v. Christian*, 342 F.3d 744, 748-49 (7th Cir. 2003). Heinz, by claiming estoppel arising from his co-conspirators' pleas to lesser offenses, "seriously misconstrues the purpose and operation of plea agreements." *Christian*, 342 F.3d at 748. To accept his claim would "obliterate the usefulness of plea agreements," *id.*, and find inconsistency where there is none.

II. The Jury Instructions Correctly Described the Law

Welty does not raise a substantial question about a jury instruction regarding intentionally losing bids because, read alone or in context, the instruction adequately informs the jury of the applicable law. "A jury instruction is erroneous if it misleads that jury as to the correct legal standard or does not adequately inform the jury on the law." *United States v. Pimentel*, 346 F.3d 285, 301 (2d Cir. 2003) (internal quotation marks and citation omitted). In reviewing jury instructions for error, the Court first focuses on the specific text of the challenged instruction, and then it proceeds to "[c]onsider[] the charge as a whole, . . . attempt[ing] to discern what point of law the district court was . . . seeking to

convey." *United States v. Carr*, 880 F.2d 1550, 1555 (2d Cir. 1989). This Circuit will reverse a conviction for such error "only where, viewing the charge as a whole, there was a prejudicial error." *United States v. Quattrone*, 441 F.3d 153, 177 (2d Cir. 2006) (internal quotation mark and citation omitted).

At Ghavami and Heinz's request, Tr. 4103, the court instructed the jury that: "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," Tr. 4769. This instruction endorsed the defendants' view that there were legitimate reasons to submit intentionally losing bids. *See, e.g.*, Tr. 4612-14, 4627-28 (Welty closing), 406-07 (Heinz opening), 4509 (Heinz closing).

Welty conjectures "[t]hat portion of the instruction . . . allowed the jury to conclude that a certification *was* false if it found that a bid was *not* submitted only for a business purpose that the jury deemed legitimate." Welty Mot. 5 (emphasis in original). But Welty ignores both logic and this Court's interpretive principles. His conjecture "reflect[s] a classic logical fallacy, 'denial of the antecedent,' which mistakes a necessary condition for a sufficient one." *Arar v. Ashcroft*, 585 F.3d 559, 601 n.27 (2d Cir. 2009); *see also Capitol Records, Inc. v. Naxos of Am., Inc.*, 372 F.3d 471, 480 (2d Cir. 2004). The challenged instruction merely defines one situation in which the jury is not permitted to infer falsity—when it is submitted "only for a legitimate purpose." If the jurors do not find that such a bid was

submitted only for a legitimate business purpose, however, the instruction does not command them to consider the certification false. Moreover, Welty is similarly mistaken in his contention that the instruction invited the jury to find falsity without inquiring into materiality. *See id* at 4. Even shorn of context, the instruction does not instruct the jury how to infer either falsity or materiality at all.

Read in context, the challenged instruction defies Welty's interpretation. The instruction is merely a proviso—it defines an exception, which benefits the defendants, to a general definition of a false statement. The court provided that definition in a different instruction (to which no defendant objected): "A statement, representation or document is false if it is untrue when made, and was then known to be untrue by the person making it or causing it to be made." Tr. 4738. The court also separately instructed the jurors on materiality: "The false or fraudulent representation must relate to a material fact or matter. A material fact is one which would reasonably be expected to be of concern to a reasonable and prudent person in relying upon the representation or statement in making a decision." Tr. 4738-39. Thus, the exception simply narrows the range of actions from which the jury could infer fraud. It simply cannot be that carving out a defendant-friendly exception to these correct definitions resulted in any prejudice to Welty.

Welty's real concern seems to be with use of the word "only" in the jury instruction. *See* Welty Mot. 5. That is, he would have required the jury find a

certification on an intentionally losing bid, though submitted for some illegitimate purpose, was not materially false so long as that purpose was coupled with some legitimate business purpose. The jury instructions gave an example of a legitimate business purpose—"to keep the potential provider's name visible." Tr. 4769. According to Welty's apparent view, if a provider submitted a bid (a) to further a secret agreement between providers to suppress competition and (b) to maintain its visibility, then he would presumably deem that intentionally losing bid lawful. But, the existence of any quantum of legitimate purpose cannot immunize a provider who also intentionally and materially deceives a municipal issuer.

Finally, Welty suggests that so long as a certification complied with Treasury regulations, it could not have been materially false. *Id.* at 4-5; *see also* Tr. 4113-14. But had the district judge given an instruction to this effect, it would have constituted improper fact-finding. The legal definition of materiality makes no reference to the Treasury regulations. Rather, a matter is material if "a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question" or "the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his choice of action, although a reasonable man would not so regard it." *Neder v. United States*, 527 U.S. 1, 22 n.5 (1999) (quoting Restatement (Second) of Torts § 538 (1977)). Although a jury could have

concluded that statements related to the Treasury regulations were material, and statements on other matters were not, that question was for the jury. "It is the jury's choice and responsibility to draw inferences," and so courts "disapprove of a jury instruction that invades the jury's province by implicitly mandating an inference." *United States v. Cochran*, 683 F.3d 1314, 1320 (11th Cir. 2012).

III. Testimony of a Government Cooperator was Properly Admitted as Lay Witness Testimony under Rule 701

Welty also takes issue with testimony of his co-conspirator Mark Zaino about the meaning of certain terms Welty used in recorded conversations with a GE co-conspirator that was evidence on Count 4 only.[9] Welty Mot. 3. Welty insists this testimony should have been treated as expert testimony under Federal Rule of Evidence 702 rather than admitted as lay testimony pursuant to Rule 701. *Id.* at 3-4. But his argument is foreclosed by Circuit precedent allowing a cooperating witness to provide lay testimony about the meaning of coded terms used by his co-conspirators, even when he did not participate in the conversations he interpreted for the jury. *United States v. Yannotti*, 541 F.3d 112, 126 (2d Cir. 2008).

Rule 701 requires that lay testimony be (1) based upon personal knowledge, (2) helpful to the jury, and (3) not based upon specialized knowledge. Fed. R. Evid. 701(a)-(c). As in *Yannotti*, Zaino's testimony "easily" meets the first requirement

[9] Some providers recorded their telephone calls for business purposes.

of Rule 701. 541 F.3d at 125. Zaino's "testimony was rationally based on his own perception because it derived from his direct participation" in the charged conspiracies, "not on participation in" the activities "of some unrelated criminal scheme." *Yannotti*, 541 F.3d at 125-26; *see also United States v. Lizardo*, 445 F.3d 73, 83 (1st Cir. 2006) ("[Cooperator] as a co-conspirator, was present at or a participant in many conversations between [defendants]. He was thus in a position to understand even the unclear conversations in which he was not a part.").

Much of Zaino's testimony about code words concerned his own use of those words. For example: "Q. When you used [the word "indication"] during the bidding time, how did you use it? A. As broker I would use it to signal the bidder as to a bid to submit. And as a bidder I would use it to signal to the broker as a bid that I wanted to submit." Tr. 699.

Zaino also testified at times about how he understood certain words used by other co-conspirators, but he based that testimony on his personal experience using those terms as well. When asked, based on his "knowledge and experience," how he understood the phrase "need one more guy in" in a taped conversation between Welty of UBS and Peter Grimm of GE, Zaino testified it meant that "Mike [Welty] needs one more bidder." Tr. 1118. Also, based on his "knowledge and experience" he testified that Welty was "asking for Peter[Grimm]'s bid" when Welty said to Grimm "give me your best indication." *Id.*

Moreover, contrary to Welty's claims, *see* Welty Merits Br. 39-40, the government had ample foundation for Zaino to testify about his experiences conspiring with Welty and others. As the district court found in its release order, "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)." Release Order 33.

Second, "there is little question" that Zaino's "testimony was helpful to the jury" and thus met Rule 701's second requirement. *Yannotti*, 541 F.3d at 126. The "government may call witnesses to provide insight into coded language through lay opinion testimony," especially where, as here, the conversation "was cryptic and required interpretation." *Id.* Based on these interpretations, the jury could better understand how Welty, on behalf of UBS as broker, and Grimm, on behalf of GE as provider, conspired to set up transactions for GE to win.

As for the third requirement of Rule 701, the *Yannotti* Court held: "where 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." 541 F.3d at 126. Zaino's testimony falls comfortably within that holding. Welty's reliance upon *United States v. Garcia*, 291 F.3d 127, 139 n.9 (2d Cir. 2002), to suggest it was inappropriate for Zaino to draw on his "experience" is wholly misplaced. What crossed the line in *Garcia* was for lay testimony to be based upon general "training and experience" in drug-dealing wholly unrelated to the charges at issue. *Id.* The questioning of Zaino, in contrast to *Garcia*, was specifically directed at his experiences in the charged conspiracies. The latter is exactly the type of experience contemplated by the requirement of personal knowledge.

To the extent Welty suggests Zaino's testimony fell short of the requirements of 701(c) because it was inevitably informed by his general industry experience, this Court has rejected that argument as well. In *United States v. Ferguson*, lay cooperating witnesses were permitted to testify about conversations relating to fraudulent insurance transactions. 676 F.3d 260, 293-94 (2d Cir. 2011). Their testimony was permissible, in part, because of the witnesses' "experience in the reinsurance industry." *Id.* at 294. Because the conspiracy here took place within the municipal reinvestment industry, the participants in that conspiracy of course drew on their general knowledge of that industry. But that does not prevent

Zaino's lay testimony about the conspiracy. It is not necessary that conspiring to manipulate bids on municipal investment contracts "is an activity about which the average person has knowledge," *Yannotti*, 541 F.3d at 126; rather, it is sufficient that Zaino "reached from his own . . . experience" manipulating bids "derived from a reasoning process familiar to average persons," *id.*; *see also United States v. Rigas*, 490 F.3d 208, 224 (2d Cir. 2007) (sufficient that testimony "result[ed] from a process of reasoning familiar in everyday life" (internal quotation marks and citation omitted)). In sum, a "district court does not abuse its discretion in admitting testimony by a witness with firsthand knowledge as to his understanding of words used by the defendant or other conspirators." *United States v. Scott*, 243 F.3d 1103, 1107 (8th Cir. 2001).

CONCLUSION

Heinz's and Welty's motions for release pending appeal should be denied.

Respectfully submitted.

June 5, 2014

/s/ Daniel E. Haar

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CERTIFICATE OF SERVICE

I, Daniel E. Haar, hereby certify that on June 5, 2014, I electronically filed the foregoing Opposition of Appellee United States of America to Emergency Motions for Release Pending Appeal of Defendants Gary Heinz and Michael Welty with the Clerk of the Court of the United States Court of Appeals for the Second Circuit by using the CM/ECF System.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

June 5, 2014

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