No. _____

IN THE SUPREME COURT OF THE UNITED STATES

_____

DOMONIC McCARNS,

Petitioner,

vs.

UNITED STATES OF AMERICA

Respondent.

_____

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

_____

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APPENDIX

Appendix A: Opinion of the United States Court of Appeals for the Ninth Circuit, filed August 21, 2018

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. DOMONIC MCCARNS, *Defendant-Appellant.*	Nos. 16-10410 17-10016 D.C. No. 2:08-cr-00116-KJM-5 OPINION

Appeals from the United States District Court
for the Eastern District of California
Kimberly J. Mueller, District Judge, Presiding

Argued and Submitted July 10, 2018
San Francisco, California

Filed August 21, 2018

Before: Susan P. Graber and Richard C. Tallman, Circuit Judges, and Ivan L.R. Lemelle,* Senior District Judge.

Opinion by Judge Lemelle

* The Honorable Ivan L.R. Lemelle, Senior United States District Judge for the Eastern District of Louisiana, sitting by designation.

SUMMARY[**]

Criminal Law

The panel affirmed a conviction and sentence for conspiracy to commit mail fraud.

Rejecting the defendant's contention that the district court failed to comply with the Speedy Trial Act, the panel held that the district court's references to Eastern District of California local codes – which correspond to the factors set forth in 18 U.S.C. § 3161(h)(7)(B) – sufficiently explain the district court's reasons for its findings that the "ends of justice" were served by granting continuances.

Because any error was harmless, the panel did not reach the question of whether the district court erred when it increased the defendant's Sentencing Guidelines offense level for being a manager or supervisor pursuant to U.S.S.G. § 3B1.1(b). The panel held that the defendant's Guidelines sentence is necessarily 240 months because the 240-month statutory maximum for the defendant's offense is less than the minimum of the applicable Guidelines range, regardless of whether the § 3B1.1(b) enhancement applies.

The panel addressed other issues in a memorandum disposition.

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

COUNSEL

Amitai Schwartz (argued), Law Offices of Amitai Schwartz, Emeryville, California, for Defendant-Appellant.

Matthew G. Morris (argued) and Michael D. Anderson, Assistant United States Attorneys; Camil A. Skipper, Appellate Chief; McGregor W. Scott, United States Attorney; United States Attorney's Office, Sacramento, California; for Plaintiff-Appellee.

OPINION

LEMELLE, Senior District Judge:

Domonic McCarns appeals his conviction and sentence for conspiracy to commit mail fraud in violation of 18 U.S.C. § 1349. McCarns raises eight issues on appeal, including that the district court failed to comply with the Speedy Trial Act and that the district court erred at sentencing by increasing McCarns' offense level for being a manager or supervisor. We address these two issues in this published opinion and all other issues in an unpublished memorandum disposition filed concurrently with this opinion. We affirm McCarns' conviction and sentence.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The scheme at the center of this case is as follows. Co-defendant Charles Head established a trio of entities—one that solicited distressed homeowners, one that recruited straw buyers, and a third that obtained mortgages from lenders. McCarns worked with the first entity as a

salesperson; his job was to convince homeowners to participate in the scheme.

The scheme would identify distressed homeowners who had equity in their homes. Salespeople, including McCarns, would approach these homeowners with a proposal—sell your home to an "investor" for one year, repair your credit during that year by making monthly "rent" payments while staying in your home, then repurchase your home at the end of the year. The scheme was pitched as a way for distressed homeowners to stay in their homes while regaining their financial footing, but actually involved a series of fraudulent transactions and regularly resulted in the victims losing their homes.

The scheme accomplished its hidden agenda by identifying "investors"—who were really straw buyers for the defendants—to purchase the homes. The defendants would create fraudulent loan applications for the straw buyers, allowing them to secure mortgages for up to 100% of the value of the victims' homes. When a lender issued a mortgage, the defendants would pay off the victim's original mortgage, make a small upfront payment to the victim, pay a fee to the straw buyer, and keep the remainder of the proceeds. This series of transactions allowed the defendants to extract the equity that had accumulated in the victims' homes and essentially left the victims as renters. If the victims missed "rent" payments, the defendants would evict them and sell the property.

In February 2010, the Government filed a superseding indictment charging McCarns with one count of conspiracy

to commit mail fraud.[1] One of McCarns' co-defendants was Charles Head, the leader of the scheme. Head was charged with conspiracy to commit mail fraud and mail fraud.[2] Prior to trial, McCarns filed a motion to dismiss the charges against him for violation of the Speedy Trial Act. The motion was denied. McCarns and Head proceeded to a jury trial and were convicted on all counts in December 2013. On September 21, 2016, McCarns was sentenced to 168 months of imprisonment, followed by 36 months of supervised release. McCarns was later ordered to pay $4.9 million in restitution, pursuant to a stipulation agreed to by McCarns and the Government. McCarns timely filed two notices of appeal, one after sentencing and the other after the order of restitution.

JURISDICTION AND STANDARD OF REVIEW

The district court had jurisdiction pursuant to 18 U.S.C. § 3231. We have appellate jurisdiction pursuant to 28 U.S.C. § 1291.

"We review the district court's interpretation and application of the Speedy Trial Act de novo . . . ." *United States v. Medina*, 524 F.3d 974, 982 (9th Cir. 2008). We review a district court's interpretation of the Sentencing Guidelines de novo, its factual findings for clear error, and

[1] McCarns was initially indicted in March 2008.

[2] The Government had previously indicted Head and McCarns, along with other co-defendants, in February 2008 on separate charges of conspiracy to commit mail fraud, mail fraud, and conspiracy to commit money laundering. Those charges related to a similar scheme, also orchestrated by Head, that was executed immediately before the scheme presently at issue. The charges against McCarns in the earlier case were dismissed after McCarns was sentenced in this case.

its application of the Guidelines to the facts of the case for abuse of discretion. *United States v. Gasca-Ruiz*, 852 F.3d 1167, 1170 (9th Cir.) (en banc), *cert. denied*, 138 S. Ct. 229 (2017).

I. SPEEDY TRIAL ACT

The Speedy Trial Act requires that a defendant's criminal trial begin within seventy days of the defendant being charged. 18 U.S.C. § 3161(c)(1). But the Act also allows for continuances under various circumstances, including when the district court "find[s] that the ends of justice served by [granting a continuance] . . . outweigh the best interest of the public and the defendant in a speedy trial." *Id.* § 3161(h)(7)(A). The Act provides four factors for the district court to consider when making the "ends of justice" finding. *Id.* § 3161(h)(7)(B). The district court's "reasons for" its "ends of justice" finding must be "set[] forth, in the record of the case, either orally or in writing," for the continuance to be excluded from the Act's seventy-day limit. *Id.* § 3161(h)(7)(A).

On three occasions before McCarns' trial began, the district court continued the trial by referring to local codes—T2 and T4—which are defined in the Eastern District of California's General Order No. 479.[3] General Order No. 479 was issued "to facilitate the recording of excludable time on the record" and defines local codes to correspond to various provisions of the Speedy Trial Act. General Order No. 479 (E.D. Cal. Oct. 15, 2009). T2 corresponds to

[3] McCarns' trial was continued more than three times, but McCarns challenges only three continuances on appeal. Cumulatively, these three continuances lasted longer than seventy days.

§ 3161(h)(7)(B)(ii), *see id.* at 3, which is relevant when a case is notably "unusual or complex."[4] T4 corresponds to § 3161(h)(7)(B)(iv), *see* General Order No. 479 at 3, which is relevant when the parties need more time to retain counsel or effectively prepare for trial.[5] Prior to trial, McCarns moved to dismiss the indictment for violations of the Speedy Trial Act. The district court denied McCarns' motion to dismiss, concluding that its explanations for the various trial continuances satisfied the requirement in § 3161(h)(7)(A) that the district court explain the reasons for its "ends of justice" findings.

McCarns does not dispute that the three challenged continuances were factually supported by the complexity of the case and counsel's need for more time to adequately prepare. Instead, McCarns argues that the district court failed to make the requisite "ends of justice" findings on the record when it referred to local codes T2 and T4. McCarns maintains that the district court's references to the local

[4] Section 3161(h)(7)(B)(ii) instructs a district court to consider "[w]hether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section."

[5] Section 3161(h)(7)(B)(iv) instructs a district court to consider "[w]hether the failure to grant such a continuance in a case which, taken as a whole, is not so unusual or so complex as to fall within [§ 3161(h)(7)(B)(ii)], would deny the defendant reasonable time to obtain counsel, would unreasonably deny the defendant or the Government continuity of counsel, or would deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence."

codes in General Order 479 were only "reasons that could support" the "ends of justice" findings.

McCarns' argument fails because the Speedy Trial Act only requires a district court to state "its *reasons* for finding that the ends of justice served by granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial." 18 U.S.C. § 3161(h)(7)(A) (emphasis added). A district court does not need to recite specific statutory language to satisfy § 3161(h)(7)(A) as long as its reasoning is sufficient to justify excluding the continuance from the Act's seventy-day limit. *See Medina*, 524 F.3d at 985–86; *United States v. Brickey*, 289 F.3d 1144, 1150–51 (9th Cir. 2002), *overruled on other grounds by United States v. Contreras*, 593 F.3d 1135, 1136 (9th Cir. 2010) (en banc); *United States v. Ramirez-Cortez*, 213 F.3d 1149, 1157 n.9 (9th Cir. 2000). A district court's "discussion of the statutory factors is adequate to support a continuance that serves the ends of justice" when it is clear that the district court "considered the factors in § 3161(h)([7])(B) and determined that the continuance was merited based on" the applicable factor or factors. *Medina*, 524 F.3d at 986. In fact, because the Speedy Trial Act only requires a record of the reasons for a continuance, "[d]istrict courts may fulfill their Speedy Trial Act responsibilities by adopting stipulated factual findings which establish valid bases for Speedy Trial Act continuances."[6] *Ramirez-Cortez*, 213 F.3d at 1157 n.9.

[6] Nor must a district court put the requisite findings on the record when it grants the continuance, it can do so later if and when a defendant moves to dismiss the indictment for failure to comply with the Speedy Trial Act. *See Medina*, 524 F.3d at 986. That being said, "the reasons [later] stated must be the actual reasons that motivated the court at the time the continuance was granted." *United States v. Engstrom*, 7 F.3d

The district court's references to the local codes, which correspond to the § 3161(h)(7)(B) factors, sufficiently explain the district court's reasons for its "ends of justice" findings. *See Medina*, 524 F.3d at 985–86. Each of the three challenged continuances occurred at the end of a status conference during which counsel for the parties described the need to review voluminous discovery and then engage in motions practice prior to trial. During the status conferences, the court discussed the complexity of the case and the parties' need for more time for adequate preparation. At the end of each conference, the district judge continued the trial to a certain date and stated the local codes that justified each continuance. The district court's use of the local codes creates an adequate record of the reasons for its "ends of justice" findings because the local codes clearly identify the statutory factors that the district court considered when granting the continuances. *See id.*

II. MANAGER OR SUPERVISOR ADJUSTMENT

"All sentencing proceedings are to begin by determining the applicable Guidelines range." *United States v. Carty*, 520 F.3d 984, 991 (9th Cir. 2008) (en banc). "The range must be calculated correctly" because "the Guidelines are the starting point and the initial benchmark, and are to be kept in mind throughout the process." *Id.* (internal citations and quotation marks omitted). McCarns argues that the district court erred when it increased his offense level by three levels for being a manager or supervisor pursuant to

1423, 1426 (9th Cir. 1993) (internal quotation marks and citation omitted).

U.S.S.G. § 3B1.1(b).[7] Normally, "[a] mistake in calculating the recommended Guidelines sentencing range is a significant procedural error that requires us to remand for resentencing." *United States v. Munoz-Camarena*, 631 F.3d 1028, 1030 (9th Cir. 2011) (per curiam). "However, if there is a mistake made in the Guidelines calculation, harmless error review does apply." *United States v. Leal-Vega*, 680 F.3d 1160, 1170 (9th Cir. 2012); *see also Munoz-Camarena*, 631 F.3d at 1030 & n.5.

We do not reach the question of whether the district court erred when it increased McCarns' offense level for being a manager or supervisor because any error was harmless; the district court correctly calculated the Guidelines sentencing range. McCarns does not dispute that his criminal history category was V. ***See*** McCarns' offense level would have been 35 without the 3-level adjustment for being a manager or supervisor.[8] The Guidelines sentencing range for a defendant with a criminal history category of V and an offense level of 35 is 262 to 327 months of imprisonment. *See* U.S.S.G. § 5A. With the 3-level adjustment, McCarns' offense level was 38. The Guidelines sentencing range for a defendant with a criminal history category of V and an offense level of 38 is imprisonment for 360 months to life. *See id.*

[7] All citations are to the 2015 edition of the Guidelines, which was used at McCarns' sentencing.

[8] McCarns challenged two other components of the Guidelines calculation—the calculation of loss per U.S.S.G. § 2B1.1 and the upward adjustment for targeting vulnerable victims per U.S.S.G. § 3A1.1(b)(1). We affirmed the district court's loss calculation and upward adjustment for vulnerable victims in the unpublished memorandum disposition issued concurrently with this opinion.

Ultimately, the difference between an offense level of 35 and an offense level of 38 does not affect the Guidelines calculation because the statutory maximum sentence for conspiracy to commit mail fraud is 240 months. *See* 18 U.S.C. §§ 1341, 1349. "Where the statutorily authorized maximum sentence is less than the minimum of the applicable guideline range, the statutorily authorized maximum sentence shall be the guideline sentence." U.S.S.G. § 5G1.1(a). "For example, if the applicable guideline range is 51–63 months and the maximum sentence authorized by statute for the offense of conviction is 48 months, the sentence required by the guidelines under [U.S.S.G § 5G1.1(a)] is 48 months; a sentence of less than 48 months would be a guideline departure." *Id.* cmt. Therefore, McCarns' Guidelines sentence was 240 months regardless of whether the manager or supervisor enhancement was applied. Any error with respect to that enhancement was therefore harmless. *See cf. Munoz-Camarena*, 631 F.3d at 1030 & n.5.

Our conclusion is consistent with that reached by other circuits that have encountered this same issue. *See United States v. Ramos*, 739 F.3d 250, 253–54 (5th Cir. 2014) (holding that sentencing error was harmless because, even if error were corrected, the statutory maximum sentence would remain the Guidelines sentence); *United States v. Stotts*, 113 F.3d 493, 499 (4th Cir. 1997) (same); *United States v. Rice*, 43 F.3d 601, 608 n.12 (11th Cir. 1995) (same); *see also United States v. Kruger*, 839 F.3d 572, 580–81 (7th Cir. 2016) (holding that district court did not plainly err because there is no prejudice when statutory maximum sentence would remain the Guidelines sentence if error were corrected). Moreover, our conclusion is consistent with the Supreme Court's recent discussion in *Koons v. United States*

about the relationship between the Sentencing Guidelines and statutory minimum sentences. 138 S. Ct. 1783 (2018).

In *Koons*, petitioners sought sentence reductions pursuant to 18 U.S.C. § 3582(c)(2) because the United States Sentencing Commission lowered the sentencing ranges that applied to their crimes of conviction. *Id.* at 1786–88. But when the petitioners were originally sentenced, "the [district] court discarded the advisory ranges in favor of the mandatory minimum sentences" because "the top end of the Guidelines range fell below the applicable mandatory minimum sentence." *Id.* at 1787 (referring to U.S.S.G. § 5G1.1(b)). The Court held that the petitioners were not entitled to sentence reductions because "the [district] court scrapped the ranges in favor of the mandatory minimums, and never considered the ranges again; as the [district] court explained, the ranges dropped out of the case." *Id.* at 1788. The Court went on to explain that a key consideration when assessing the role of the Guidelines at sentencing "is the role that the Guidelines range played in the selection of the sentence eventually imposed—not the role that the range played in the initial calculation." *Id.* at 1789.

The Court's reasoning in *Koons* buttresses our conclusion that any error in applying the manager or supervisor enhancement was harmless because the district court properly based McCarns' sentence on the statutory maximum. At sentencing, defense counsel argued that "the 20 year[] [statutory maximum] [wa]s where the court need[ed] to start, not 360 to life." The district court agreed, explaining that it "do[es]n't think about that guideline range when there is a statutory maximum." The district court further disclaimed that the Guidelines range "d[id] not inform [its] thinking in any way whatsoever." As explained in *Koons*, McCarns' sentence was therefore based on the

statutory maximum, not the calculated Guidelines range. *See* 138 S. Ct. at 1787–89.

AFFIRMED.

Appendix B: Memorandum of the United States Court of Appeals for the Ninth Circuit, filed August 21, 2018

FILED

AUG 21 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. DOMONIC MCCARNS, Defendant-Appellant.	Nos. 16-10410 17-10016 D.C. No. 2:08-cr-00116-KJM-5 MEMORANDUM*

Appeals from the United States District Court
for the Eastern District of California
Kimberly J. Mueller, District Judge, Presiding

Argued and Submitted July 10, 2018
San Francisco, California

Before: GRABER and TALLMAN, Circuit Judges, and LEMELLE,** Senior District Judge.

In an opinion filed concurrently with this unpublished memorandum disposition, we addressed two issues raised on appeal and affirmed Domonic McCarns' conviction and sentence for conspiracy to commit mail fraud in violation

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Ivan L.R. Lemelle, Senior United States District Judge for the Eastern District of Louisiana, sitting by designation.

of 18 U.S.C. § 1349. We now resolve the remaining issues.

1. The district court did not plainly err when instructing the jury. The elements of conspiracy and of mail fraud (the object of the conspiracy) were in separate instructions. McCarns argues that this allowed the jury to convict him without considering mail fraud's mailing element. *See* 18 U.S.C. § 1341. McCarns has not shown that his substantial rights were affected because there is "strong and convincing evidence that the prosecution has adequately proved the missing element of the crime." *United States v. Conti*, 804 F.3d 977, 981-83 (9th Cir. 2015) (internal quotation marks omitted). For example, McCarns stipulated that, when a home was sold as part of the conspiracy, a copy of the deed was mailed via the United States Postal Service. The Government also admitted e-mails in which McCarns discussed using the mails in furtherance of the conspiracy.

Nor was there a constructive amendment of the indictment. McCarns' constructive amendment argument simply restates, in different terms, his previous argument that the jury instructions omitted an essential element.

2. There was sufficient evidence of McCarns' identity. A defense witness who worked with McCarns identified him in court. McCarns stipulated to writing a series of e-mails that discussed the conspiracy. McCarns' co-defendants testified about working with him and expressed no concern that the wrong man was on trial.

Viewing this evidence in the light most favorable to the prosecution, a rational trier of fact could have found McCarns' identity beyond a reasonable doubt. *See United States v. Alexander*, 48 F.3d 1477, 1489-91 (9th Cir. 1995).

3. The district court did not abuse its discretion when it denied McCarns' motion to sever. We reverse the denial of a motion to sever when "a joint trial was so manifestly prejudicial as to require the trial judge to exercise his discretion in but one way, by ordering a separate trial." *United States v. Sullivan*, 522 F.3d 967, 981 (9th Cir. 2008) (per curiam) (internal quotation marks omitted). That was not the case here. "A joint trial is particularly appropriate where," as here, "the co-defendants are charged with conspiracy." *United States v. Barragan*, 871 F.3d 689, 701 (9th Cir. 2017) (internal quotation marks omitted), *cert. denied*, 138 S. Ct. 1565 *and* 138 S. Ct. 1572 (2018). The limiting instructions used at trial, further weigh against severance "because the prejudicial effects of the evidence of codefendants are neutralized." *United States v. Stinson*, 647 F.3d 1196, 1205 (9th Cir. 2011) (internal quotation marks omitted).

4. The district court properly calculated the loss. The court sufficiently explained its conclusion that McCarns was aware of the full scope of the conspiracy based on his active role, the duration of his involvement, and his physical location at headquarters. *See United States v. Blitz*, 151 F.3d 1002, 1012-14 (9th Cir. 1998). McCarns knew that lenders were involved in each of the

transactions he closed; lenders' losses were therefore reasonably foreseeable. *See United States v. Treadwell*, 593 F.3d 990, 1004-05 (9th Cir. 2010); *Blitz*, 151 F.3d at 1012-14.

5. The vulnerable victim adjustment was warranted. Victims of fraud can be "vulnerable victims" when they are targeted because of their poor credit histories. *See United States v. Peters*, 962 F.2d 1410, 1415-18 (9th Cir. 1992). The vulnerable victim adjustment was appropriate here because McCarns targeted homeowners who were in financial distress and could not make payments on their existing mortgages. *See id.*

6. McCarns' below-Guidelines sentence was substantively reasonable.

AFFIRMED.

Appendix C: General Order 479 (2009),
United States District Court,
Eastern District of California

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

IN RE:	)	
	)	
PLAN FOR PROMPT DISPOSITION OF CRIMINAL CASES PURSUANT TO SPEEDY TRIAL ACT OF 1974	)	**GENERAL ORDER NO. 479**

Under General Order No. 92, the court adopted its Plan for Prompt Disposition of Criminal Cases pursuant to the requirements of the Federal Rules of Criminal Procedure, the Speedy Trial Act of 1974, and the Federal Juvenile Delinquency Act.

Section 6 of the Plan sets forth the Computation of Excludable Time. Subsection 6(b)(1) requires that "Determinations concerning excludable time shall be made on the record by the Court" and Subsection 6 requires that "The clerk of the Court shall enter on the docket information with respect to any periods of excludable time as to each defendant which have been determined on the record by the Court."

In order to facilitate the recording of excludable time on the record and in docket entries, the court has developed Excludable Delay Codes with arabic numerals corresponding to specific statutory provisions of 18 U.S.C. §3161(h) to be used at the discretion of each judge. Individual judges have found that the use of the codes helps to expedite court proceedings and the entry of docket information.

From time to time, it becomes necessary to update the Excludable Delay Codes to correspond to amendments to 18 U.S.C. §3161(h). Therefore, the court adopts the attached updated Excludable Delay Codes as modified on August 24, 2009. Individual judges may utilize the codes at their discretion.

Dated: October 15, 2009.

FOR THE COURT:

ANTHONY W. ISHII, Chief Judge
Eastern District of California

EXCLUDABLE DELAY CODES

Modified on 8/24/09

18:3161	CODE	EXCLUDABLE DELAY CODES
(h)(1)(A)	A	Exam or hearing for mental or physical incapacity (18 U.S.C. § 4244)
(h)(1)(A)	B	NARA Exam (28 U.S.C. § 2902)
(h)(1)(B)	C	State or Federal trials or other charges pending
(h)(1)(C)	D	Interlocutory Appeals
(h)(1)(D)	E	Pretrial Motions (from filing to hearing or other prompt disp.)
(h)(1)(E)	F	Transfers from other districts
(h)(1)(F)	G	Proceedings under advisement not to exceed 30 days
	H	Miscellaneous proceedings: parole or probation revocation, deportation or extradition
(h)(2)	5	Deferral of prosecution under 28 U.S.C. § 2902
(h)(1)(F)	6	Transportation from another district or to/from examination or hospitalization in ten days or less
(h)(1)(G)	7	Consideration by court of proposed plea agreement
(h)(2)	I	Prosecution deferred by mutual agreement
(h)(3)(A)(B)	M	Unavailability of defendant or essential witness
(h)(4)	N	Period of mental or physical incompetence of defendant to stand trial
(h)(4)	O	Period of NARA Commitment or treatment
(h)(5)	P	Superseding indictment and/or new charges
(h)(6)	R	Defendant awaiting trial of co-defendant when no severance granted
(h)(7)(A)(B)	T	Continuance granted per (h)(7) - use "T" alone if more than one of the reasons below are given in support of continuance
(h)(7)(B)(i)	T1	1) Failure to continue would stop further proceedings or result in miscarriage of justice
(h)(7)(B)(ii)	T2	2) Case unusual or complex
(h)(7)(B)(iii)	T3	3) Indictment following arrest cannot be filed in 30 days
(h)(7)(B)(iv)	T4	4) Continuance granted in order to obtain or substitute counsel; give reasonable time to prepare
(i)	U	Time up to withdrawal of guilty plea
(b)	W	Grand jury indictment time extended 30 days

Appendix D: Order Denying Motion to Dismiss, United States District Court for the Eastern District of California

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES,

Plaintiff, No. CR 08-0116 KJM

vs.

CHARLES HEAD, *et al.*,

Defendants.

_____/

UNITED STATES,

Plaintiff, No. CR 08-0093 KJM

vs.

CHARLES HEAD, *et al.*,

Defendants.

_____/

UNITED STATES,

Plaintiff, No. CR 05-0368 KJM

vs.

RICHARD JAMES PULLEY, JR.,

Defendant.

_____/

UNITED STATES,

Plaintiff, No. CR 09-0407 KJM

vs.

MARIA DEL ROCIO ARCEO-RANGEL, *et al.*, ORDER

Defendants.
_____/

Defendants in each of the above-captioned cases have moved to dismiss their indictments with prejudice based on violations of the Speedy Trial Act of 1974 ("STA" or "the Act"), and specifically the Act's requirement that trial commence within seventy days of return of the indictment or first appearance, not counting properly excluded time. 18 U.S.C. §§ 3161, *et seq*. The government opposes defendants' motions. The cases were consolidated for hearing at which James Greiner argued for defendants in the *Arceo-Rangel* and *Pulley* cases, and Scott Tedmon argued for the defendants in the *Head* cases, identified above. Assistant United States Attorneys Michael Anderson and Samuel Wong appeared for the government in all of the cases, with Todd Leras also appearing in the *Pulley* case. After careful consideration, for the reasons set forth below, defendants' motions are DENIED.

I. INTRODUCTION

The underlying cases have been pending for between two and six years. During the pendency of each case, counsel for defendants and the government have requested continuances, at times based on the STA's discretionary time exclusions under 18 U.S.C. § 3161(h)(7) ("section (h)(7)") and at other times based on other exclusions under other subsections of 18 U.S.C. § 3161(h). The question presented to the court by defendants' pending motions is narrow: whether an "ends of justice" continuance under 18 U.S.C. § 3161(h)(7) is *per se* invalid if the presiding judge excludes time by using a shorthand reference to a statutory factor and general language explaining the reasons for exclusion, but does not otherwise recite

specific statutory language found in section (h)(7). If such an exclusion is invalid, then defendants argue the appropriate remedy is dismissal with prejudice.

II. BACKGROUND ON SPEEDY TRIAL ACT AND THIS COURT'S LOCAL CODES

A. The Speedy Trial Act

The STA mandates that a criminal defendant proceed to trial within seventy days of being charged or making an initial appearance, whichever occurs later. 18 U.S.C. § 3161(c). Mindful of the frequent impediments to trial commencing within the seventy day period and variations among cases, Congress set forth several mechanisms in the STA for excluding time from the seventy day period. *See* 18 U.S.C. § 3161(h); *Zedner v. United States*, 547 U.S. 489, 497 (2006) ("[T]he Act recognizes that criminal cases vary widely and that there are valid reasons for greater delay in particular cases."). Specific, enumerated exclusions under section 3161(h)(1) are "automatic" and apply "without district court findings." *See United States v. Tinklenberg*, __U.S.__, 131 S.Ct. 2007, 2013 (2011); *Bloate v. United States*, 559 U.S. __, 130 S.Ct. 1345, 1353 (2010). These enumerated exclusions are triggered by, for example, delays resulting from trial on other charges, appeal, the filing of pretrial motions, and the court's consideration of a proposed plea agreement. *See generally* 18 U.S.C. § 3161(h)(1). Because these exclusions are automatic and do not require express findings, they can be applied in a post-hoc manner. *See United States v. Stubblefield*, 643 F.3d 291, 296 (D.C. Cir. 2011) (noting reviewing court could rely on an automatic exclusion not mentioned during trial court proceedings).

By contrast, discretionary exclusions under section 3161(h)(7) require the court to articulate on the record its reasons for finding a continuance is justified. *See* 18 U.S.C. § 3161(h)(7)(A) ("subsection (h)(7)(A)"). "Both the Act and its legislative history establish that no continuance period may be excluded [under § 3161(h)(7)] unless the court makes reasonably explicit findings that demonstrate that the ends of justice served by granting the continuance do,

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in fact, outweigh the best interests of the public and the defendant in a speedy trial." *United States v. Perez-Revelez*, 715 F.2d 1348, 1352 (9th Cir. 1983). Specifically, the statute provides the following framework for granting an "ends of justice" continuance and the periods of time that may qualify for exclusion:

> (A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.
>
> (B) The factors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (A) of this paragraph in any case are as follows:
>
> (i) Whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.
>
> (ii) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section.
>
> (iii) Whether, in a case in which arrest precedes indictment, delay in the filing of the indictment is caused because the arrest occurs at a time such that it is unreasonable to expect return and filing of the indictment within the period specified in section 3161(b), or because the facts upon which the grand jury must base its determination are unusual or complex.
>
> (iv) Whether the failure to grant such a continuance in a case which, taken as a whole, is not so unusual or so complex as to fall within clause (ii), would deny the defendant reasonable time to

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> obtain counsel, would unreasonably deny the defendant or the Government continuity of counsel, or would deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

18 U.S.C. § 3161(h)(7).[1] Section 3161(h)(7) provides courts with necessary "flexibility in accommodating unusual, complex, and difficult cases"; however, in order to prevent the exception from consuming the STA's rule requiring speedy resolution of criminal proceedings, section 3161(h)(7) "counteract[s] substantive openendedness with procedural strictness" by requiring on the record findings justifying an exclusion. *Zedner*, 547 U.S. at 498-99. In sum, section 3161(h)(7) "permits a district court to grant a continuance and to exclude the resulting delay if the court, after considering certain factors, makes on-the-record findings that the ends of justice served by granting the continuance outweigh the public's and defendant's interests in a speedy trial. This provision gives the district court discretion -- within limits and subject to specific procedures -- to accommodate limited delays for case-specific needs." *Id.* at 489.

B. Local Codes

By General Order, the Eastern District of California has adopted local codes to be used as shorthand references to corresponding STA provisions. *See* General Order No. 479, In Re: Plan for Prompt Disposition of Criminal Cases Pursuant to Speedy Trial Act of 1974 last updated October 15, 2009. The General Order states, "[i]n order to facilitate the recording of excludable time on the record and in docket entries, the court has developed Excludable Delay Codes with arabic numerals corresponding to specific statutory provisions of 18 U.S.C. § 3161(h) to be used at the discretion of each judge." By way of example, local codes "T-2" and "T-4" correspond to sections 18 U.S.C. § 3161(h)(7)(B)(ii) and (iv), respectively. These codes

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[1] Prior to Congress's October 2008 amendment of the STA, the relevant portion under discussion appeared in 18 U.S.C. § 3161(h)(8). *See* Pub. L. No. 110-406, sec. 13, 122 Stat. 4291, 4294 (redesignating 18 U.S.C. § 3161(h)(8) as 18 U.S.C. § 3161(h)(7)). For the sake of clarity, all references in this order are to § 3161(h)(7).

typically are used by judges of this district as a shorthand form to identify a factor under subsection (h)(7)(B) that the judge has determined justifies an (h)(7) continuance.

III. DEFENDANTS' ARGUMENTS

Defendants contend 18 U.S.C. § 3161(h)(7) requires a two-step process whereby the presiding judge makes findings under subsection 3161(h)(7)(B) ("subsection (h)(7)(B)") and then explicitly states on the record that the "the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial" in accordance with subsection 3161(h)(7)(A).[2] Defendants rely primarily on the cases of *Bloate* and *Zedner*. The main thrust of their argument is that section 3161(h)(7) requires consideration of a particular legal standard, and that the only conceivable way for a judge to satisfy that standard is to recite the exact language of the statute so the record is clear the proper standard has been considered and applied.

While the defendants have joined in each others' motions, their respective counsel emphasize slightly different points. The opening briefs for each defendant are nearly identical on the dispositive point; the core arguments consist primarily of a quotation from *Zedner* and a recitation of the language of section 3161(h)(7). *See, e.g.*, Gutierrez-Valencia MTD at 14-15; Head 08-93 MTD at 12-13; Head 08-116 MTD at 11-12; Pulley MTD at 9-12. In their reply papers, all defendants are in agreement that specific "ends of justice" language must be recorded in order for a continuance to be valid. Defendants assert that "express requirements" call for a

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[2] *See generally*, Def. Gutierrez-Valencia's Am. Mot. to Dismiss at 14-15, *United States v. Maria Del Rocio Arceo-Rangel, et al.*, No. 09-407-KJM (E.D. Cal. Aug. 11, 2011), ECF No. 143 ("Gutierrez-Valencia MTD"); Def. Head's Mot. to Dismiss at 12-13, *United States v. Charles Head, et al.*, No. 08-93-KJM (E.D. Cal. Aug. 4, 2011), ECF No. 489 ("Head 08-93 MTD"); Def. McCarns' Mot. to Dismiss at 19-21, *United States v. Charles Head, et al.*, No. 08-93-KJM (E.D. Cal. Aug. 4, 2011), ECF No. 489; Def. Head's Mot. to Dismiss at 10-11, *United States v. Charles Head, et al.*, No. 08-116-KJM (E.D. Cal. Aug. 4, 2011), ECF No. 239 ("Head 08-116 MTD"); Def. McCarns' Mot. to Dismiss at 11-12, *United States v. Charles Head, et al.*, No. 08-116-KJM (E.D. Cal. Aug. 4, 2011), ECF No. 240; Def.'s Mot. to Dismiss at 9-12, *United States v. Richard Pulley*, No. 05-368-KJM (E.D. Cal. Aug. 4, 2011), ECF No. 88 ("Pulley MTD").

recitation on the record of the legal standard contained in subsection 3161(h)(7)(A). *See* Def. Head's Reply at 3, *United States v. Charles Head, et al.*, No. 08-116-KJM (E.D. Cal. Sept. 22, 2011), ECF No. 258 ("In reviewing the four corners of the transcript, at no time did [the presiding judge] make a finding on the record that in granting this continuance, the ends of justice outweigh the right of the public and the defendants in a speedy trial, thereby failing to engage in the ends of justice balancing test required by 18 U.S.C. § 3161(h)(7)(A)."); *id.* at 6-7 (arguing that the court's adoption of the parties' stipulation that time be excluded under a local code where the judge signed the order under the language 'good cause appearing' is inadequate under the Act).

In addition, the defendants represented by Mr. Greiner contend that reference to a local code fails to adequately record a judge's finding of the relevant factor considered under subsection 3161(h)(7)(B), separate and apart from whether the "ends of justice" language is made on the record. According to these defendants, because the reference made by the judge is simply to a local code that means nothing to a reader of the transcript, the findings are inadequate. *See, e.g.,* Def. Pulley's Reply at 15, 21, *United States v. Richard Pulley*, No. 05-368-KJM (E.D. Cal. Oct. 26, 2011), ECF No. 119 ("The T-4 by the government does not aid the reader of the record as to any compliance with the Speedy Trial Act."); Def. Gutierrez-Valencia's Reply at 20, *United States v. Maria Del Rocio Arceo-Rangel, et al.*, No. 09-407-KJM (E.D. Cal. Oct. 26, 2011), ECF No. 208 ("the Magistrate Court used the all too familiar, yet legally insufficient use of 'T2 and T4 exclusion' that made the record, yet the record to any reader is silent as to what, if anything, a 'T2 and T4 exclusion' is."); *see also* Def. McCarns' Reply at 2-3 n.2, *United States v. Charles Head, et al.*, No. 08-93-KJM (E.D. Cal. Sept. 22, 2011), ECF No. 519. On this point, defendants do not provide any controlling authority for the view that the perspective a court must consider is that of a third-party reader. Nothing in the statute provides for the making of findings that meet an uninformed third-party test. The court finds this particular argument unavailing, without a need for further analysis.

In response to defendants' arguments, government counsel take the position that the defense is elevating form over substance, and that the record on the challenged exclusions is sufficient.[3]

IV. ANALYSIS

Defendants carry the burden of proving a STA violation. *See* 18 U.S.C. § 3162(a)(2); *see also United States v. Medina*, 524 F.3d 974, 980 (9th Cir. 2008) (paraphrasing 18 U.S.C. § 1362(a)(2)). "If the defendant carries this burden, the indictment 'shall be dismissed,' and the district court must then consider whether to dismiss the case with or without prejudice." *Id.* at 980-81.

As explained below, the court finds defendants have not met their burden. In particular, their position is at odds with the language of the STA, which requires the court to make a record of "its *reasons* for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial." 18 U.S.C. § 3161(h)(7)(A) (emphasis added); *cf. Bloate*, 130 S.Ct. at 1354 (noting that ignoring "the structure and grammar" of a statute "would violate settled principles of statutory construction"). Defendants' interpretation would read the words "its reasons for" out of the statute and place undue emphasis on the court's reciting the rest of the language contained in subsection (h)(7)(A) after indicating a basis for findings to support an exclusion of time. Defendants' position also is not consistent with the Supreme Court's decisions in *Bloate* and

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[3] Alternately, the government argues the record can be supplemented to cure any error before this court formally resolves the motions to dismiss. The court notes that other judges have declined the government's invitation to supplement their records. *See United States v. Maria Del Rocio Arceo-Rangel, et al.*, No. 09-407-KJM (E.D. Cal.) ECF Nos. 223, 226 (Orders by District Judge Frank C. Damrell, Jr. and Magistrate Judge Dale Drozd, respectively, denying plaintiff's motions to supplement the record); *United States v. Charles Head, et al.*, No. 08-093-KJM (E.D. Cal.), ECF No. 550 (same by Judge Damrell); *United States v. Charles Head, et al.*, No. 08-116-KJM (E.D. Cal.), ECF No. 275 (same). This court also declines to supplement the record of prior proceedings over which it presided, finding supplementation unwarranted, even if the government's request in this respect were timely.

Zedner, when those decisions are read closely. Additionally, it is inconsistent with Ninth Circuit case law, and authority from other circuits.

A. Statutory Language

The first sentence of subsection (h)(7)(A) provides that a court may toll the speedy trial clock for

> [a]ny period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial.

18 U.S.C. § 3161(h)(7)(A). Nothing in this first sentence requires a finding that assumes a specific form. Rather the sentence provides only that certain findings provide the basis for granting an "ends of justice" continuance. *Cf. United States v. Carpenter*, 542 F. Supp. 2d 183, 184 (D. Mass. 2008) (noting "ends of justice" finding was "implicit" in granting the continuance and court subsequently made reasoning explicit at hearing on motion to dismiss). The second sentence of subsection (h)(7)(A) demonstrates how Congress makes clear when it is requiring the creation of an explicit record:

> No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

18 U.S.C. § 3161(h)(7)(A). On its face, this sentence does expressly require the creation of a stated or written record that makes clear the reasons for an ends of justice exclusion. *See United States v. Bryant*, 523 F.3d 349, 360 (D.C. Cir. 2008) ("*Zedner* makes it plain that 'implicit' findings are insufficient to invoke the section 3161(h)([7])(A) exclusion. The *Zedner* Court held that before a judge could toll the speedy trial clock under section 3161(h)([7])(A), the judge had to make 'express findings' about *why* the ends of justice were served by a continuance . . . .")

(emphasis added). Read in conjunction, the two sentences of subsection (h)(7)(A) require a court to state the reasons a continuance is being granted, but do not require a recitation of any particular statutory language. *Cf. United States v. Solorzano-Rivera*, 368 F.3d 1073, 1078 (9th Cir. 2004) (adopting the "plain meaning" of section 3161(h)(1)(I)); *Zedner*, 547 U.S. at 508 (adopting the "straightforward reading" of (h)(7)).

B. Supreme Court Cases

The case law interpreting section 3161(h)(7) is not contrary to this reading of the statute, and does not otherwise require a rote repetition of the statute's text. The two recent Supreme Court opinions on which defendants rely address section 3161(h)(7) only indirectly. In *Zedner* and *Bloate*, the district courts relied on their understanding that certain time would be excluded on grounds other than (h)(7). In *Zedner,* the defendant executed a general waiver of his rights under the Act, and in *Bloate* the court presumed preparation time for pretrial motions was automatically excluded under section 3161(h)(1) and therefore did not make a record of reasons for finding the preparation time excluded under section 3161(h)(7).

1. *Zedner*

Specifically, in *Zedner*, the Court examined whether a defendant could prospectively waive application of the STA and if not, whether the lower court's later passing reference to complexity without any particularized findings could retrospectively support a continuance under section 3161(h)(7). 547 U.S. at 492-93. The defendant in *Zedner*, an amateur counterfeiter, was indicted in the Spring of 2006. After two brief initial continuances, the defendant asked for a three month continuance. *Id.* at 493. This request prompted the presiding judge to require the defendant to prospectively waive his rights under the STA by signing a prepared form. *Id.* at 494-95. The lower court reasoned that because section 3162(a)(2) allows a defendant to waive the STA's protections through inaction by failing to timely raise a motion to dismiss, a defendant could by extension also affirmatively waive the Act going forward. *Id.* at 503. At the next status conference at the end of the three months, the defendant requested

another continuance. The court, satisfied that the defendant had previously waived his rights under the STA, continued the case another three months, without reference to the STA and without making any findings supporting an exclusion. *Id*. at 495. After several more years of proceedings, the defendant moved to dismiss based on violation of the STA. In the interim, the court had never addressed whether the Act required formal exclusions of time, believing the defendant's waiver valid. *Id*. at 495-96. The district court denied the motion based on defendant's prior waiver of rights, and in doing so made a passing reference to the case as complex. *Id*. at 496.

The Court in *Zedner* held a defendant cannot single-handedly waive the STA's requirements because the protected rights are held by both the public and the defendant. *Id*. at 500-01. Rather, each exclusion of speedy trial time requires a proper exclusion of time under section 3161(h). The Court held that the first three-month continuance failed to comply with the STA, because the district court had not addressed the specific requirements of the STA, instead treating the continuance as an exercise of its case management authority: "Nothing in the discussion at the conference suggests that the question presented by the defense continuance request was viewed as anything other than a case-management question that lay entirely within the scope of the District Court's discretion." 547 U.S. at 506. As a result, the Court found a violation of the STA and declined to further analyze any other continuances granted.

In addressing the district court's attempt to cover all the prior continuances with a passing reference to complexity when faced with the motion to dismiss, the Court rejected this approach:

> The Act requires that when a district court grants an ends-of-justice continuance, it must "se[t] forth, in the record of the case, either orally or in writing, its reasons" for finding that the ends of justice are served and they outweigh other interests. 18 U.S.C. § 3161(h)([7])(A). Although the Act is clear that the findings must be made, if only in the judge's mind, before granting the continuance (the continuance can only be "granted ... on the basis of [the court's] findings"), the Act is ambiguous on precisely when those findings must be "se[t] forth, in the record of the case."

> However this ambiguity is resolved, at the very least the Act implies that those findings must be put on the record by the time a district court rules on a defendant's motion to dismiss under § 3162(a)(2). . . . § 3161(h)([7])(A) is explicit that "[n]o ... period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable ... unless the court sets forth ... its reasons for [its] finding [s]." Thus, without on-the-record findings, there can be no exclusion under § 3161(h)([7]). Here, the District Court set forth no such findings at the January 31 status conference, and § 3161(h)([7])(A) is not satisfied by the District Court's passing reference to the case's complexity in its ruling on petitioner's motion to dismiss.

Zedner, 547 U.S. 507-08. In this passage the Court's focus, tracking the statutory language, is on the reasons for finding the ends of justice standard is satisfied. The Court does refer to "findings" in identifying what must be recorded for a valid continuance to obtain, while also quoting the statute's passage using the word "reasons." But to construe this language to derive a rigid requirement that a court recite exact language from section (h)(7) each time it finds reasons to grant an "ends of justice" continuance is at odds with the Court's focus on (h)(7)'s ability to adapt to "case-specific" needs. *Id.* at 499 (noting that (h)(7) gives courts needed flexibility under the STA to exclude time based on the specific circumstances of each case). Moreover, as noted above, the Court in *Zedner* ultimately said that a "straightforward reading" of section h(7)(A), in the context of a motion to dismiss under section 316(a)(2), "leads to the conclusion that if a judge fails to make the requisite findings *regarding the need* for an ends-of-justice continuance, the delay resulting from the continuance must be counted" against the speedy trial clock. *Id.* at 508 (emphasis added). And while the Court, as defendants stress, did note the strategy of section 3161(h)(7) "is to counteract substantive open-endedness with procedural strictness," it followed this observation with a statement emphasizing the need for some findings "on-the-record" that reflect the consideration of "certain factors." *Id.* at 509. The Court's conclusion conveys the need for some findings, as opposed to none, "in support of" a continuance under subsection (h)(7)(A). *Id.* (holding harmless-error review is inappropriate when district court makes no findings "in support" of an exclusion under (h)(7)). The lesson this court draws from *Zedner* is

not that exact words must be uttered every time, but rather that the facts presented in requesting a continuance must be considered and the court must articulate its reasons for granting an "ends of justice" exclusion of time on the record.

2. *Bloate*

In *Bloate*, the Supreme Court addressed "the narrow question [of] whether time granted to a party to prepare pretrial motions is automatically excludable from the Act's 70-day limit under subsection (h)(1), or whether such time may be excluded only if a court makes case-specific findings under subsection (h)(7)." 130 S.Ct at 1349. In *Bloate*, the defendant was indicted on federal weapons and drugs charges in August 2006. Pretrial motions were due by September 14, but the defendant moved to extend that date. On September 25, 2006, the defendant waived pretrial motions and on October 4, 2006, the district court found the defendant's waiver competent. When the defendant later moved to dismiss the indictment for a violation of the STA, the court excluded the time from September 7 to October 4 as time allocated to preparation of a pretrial motion under subsection 3161(h)(1)(D). *Id.* at 1350. *Bloate* held that motion preparation time is not automatically excluded under section (h)(1) and therefore requires case-specific findings under section 3161(h)(7). *Id.* at 1353-54. The Court did not address what procedures section (h)(7) requires because the record was not fully developed or argued in that respect. *Id.* at 1358. Accordingly, the case sheds little light on the precise issue presented by the pending motions in this case.

To the extent *Bloate* does discuss the requirements of section (h)(7), it does so in dicta not binding here. The decision does note that subsection (h)(7)(B) identifies "statutory factors that justify a continuance under subsection (h)(7)," and that a court can exclude a period of "delay only where the district court makes findings justifying the exclusion." *Id.* at 1356-57. In explaining that motion preparation time may be excluded under section (h)(7), the Court in *Bloate* notes "trial judges always have to devote time to assessing whether the reasons for the delay are justified, given both the statutory and constitutional requirement of speedy trials.

Placing these *reasons* in the record does not add an appreciable burden on these judges." *Id.* at 1357 (emphasis added). *Bloate* concludes by stating, "a district court may exclude preparation time under subsection (h)(7) if it grants a continuance for that purpose based on recorded findings 'that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial.'" *Id.* at 1357-58. While the Court places the "ends of justice" language in quotes, without citation, a fair reading of this passage is that the quotes reflect a recognition that the language is a verbatim transcription of the statute. The Court goes on to characterize subsection (h)(7) as providing "much of the Act's flexibility," giving "district courts 'discretion - within limits and subject to specific procedures . . .'." *Id.* at 1358 (quoting *Zedner*, 547 U.S. at 498-99). Taking all of the foregoing in context, it reads too much into *Bloate* to construe it as requiring that a district court intone particular language.[4] Rather, read in context, the message of this portion of *Bloate* -- although far from a holding -- is that recording the reasons for exclusions of time are paramount.

In sum, nothing in *Zedner* or *Bloate* requires a district court's transformation into an automaton in order to imbue an exclusion of time with validity under the STA.

C. Circuit Authority

1. Ninth Circuit Case Law

Ninth Circuit precedent addresses the procedural requirements of section (h)(7) more directly, in the context of the questions raised by the defense: "A district court must satisfy

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[4] While Justice Alito's dissent includes a line objecting that the requirement that a judge "recite this determination [the ends of justice will be served by an extension] on the record will often be an empty exercise," *Bloate*, 130 S.Ct. at 1365 (Alito, J., dissenting), he makes this observation in the context of importing the "ends of justice" requirement into defense-initiated continuance requests that are properly supported by separate sections of the Act. This dissenting complaint is not properly read as responding to any majority holding requiring that precise statutory text be parroted every time an (h)(7)(A) exclusion is made. Rather, Justice Alito observes "[v]iewed in their proper context, subsection (h)(1) and its subparagraphs carve out exceptions to the general rule of § 3161(h)(7)(A) requiring ends-of-justice findings for continuances"; therefore, in his view, requiring an ends of justice finding for the continuance contested in the *Bloate* case would be an "empty exercise," as unnecessary. *Id.*

two requirements when it grants an 'ends of justice' continuance under section 3161(h)(7): '(1) the continuance must be specifically limited in time; and (2) it must be justified on the record with reference to the facts as of the time the delay is ordered.'" *United States v. Lewis*, 611 F.3d 1172, 1176 (9th Cir. 2010) (quoting *United States v. Lloyd*, 125 F.3d 1263, 1268 (9th Cir. 1997)). In granting a section (h)(7) continuance, the court must "conduct an appropriate inquiry to determine whether the various parties actually want and need a continuance, how long a delay is actually required, what adjustments can be made with respect to the trial calendars or other plans of counsel, and whether granting the requested continuance would 'outweigh the best interest of the public and the defendants in a speedy trial.'" *Lloyd*, 125 F.3d at 1269 (quoting § 3161(h)(7)).

Defendants rely heavily on the Circuit's earlier decision in *Perez-Revelez* where a judge's cursory reference to a factor under 18 U.S.C. § 3161(h)(7), without any factual support in the record, was determined to be insufficient to uphold an "ends of justice" exclusion. In that case, the defendant noted his intention to call co-defendants as witnesses once their pleas were entered. 715 F.2d at 1349-50. The court granted a continuance without any mention of the Act. At the next status a month later, the defendant stressed his intention to assert his rights under the Act and said he wished to proceed to trial immediately. *Id.* at 1350. Because neither the government nor the court were prepared to go to trial, the trial was put over a month at which point the defendant moved for dismissal based on a speedy trial clock violation. The district judge denied the motion, having excluded the twenty-nine days after the initial status conference when the defendant noted he intended to call co-defendants as witnesses; in doing so, the court made a passing reference to the case being complex. *Id.* The Circuit Court determined the twenty-nine day period was not excludable because the district court merely concluded the case was complex without any factual basis: "the mere conclusion that the case is complex is insufficient. The statement gives no indication why the court considered the case complex, and the record suggests that findings could not have been made to support the conclusion." *Id.* at

1352. *Perez-Revelez* is distinguishable from the instant cases because defendants do not contest that the exclusions challenged lacked a factual basis.[5] Instead, defense counsel suggest that *Perez-Revelez* itself imposes a "particularity" requirement that the court make an explicit ends of justice finding that incorporates the statutory language. The particularity requirement in *Perez-Revelez*, however, refers to justifications for a continuance and not the conclusion that the ends of justice are served. *See id.* at 1352 ("no continuance period may be excluded unless the court makes *reasonably* explicit findings that *demonstrate* that the ends of justice served by granting the continuance do, *in fact*, outweigh the best interests of the public and the defendant in a speedy trial"(emphases added)); *id.* at 1352 ("As the legislative history of the Act makes clear, those *reasons* must be 'set forth with particularity.'"(emphasis added)). A requirement that a fixed phrase be automatically articulated is at odds with the exercise of thought and judgment required by the STA.

Defendants also suggest that *Perez-Revelez* mandates a two-step process, with the first step reflecting an express consideration of a factor under subsection (h)(7)(B) and the second step overtly tracking the language of subsection (h)(7)(A). *Perez-Revelez* does note two limitations on a court's granting a continuance under section (h)(7): first, Congress directs that certain factors be considered under subsection (h)(7)(B); and second, Congress has mandated that a court's justification for a continuance be made of record. *Id.* at 1351. This framework reenforces the statute's clear language, which requires only the reason for a continuance be made explicit. *Id.* ("The essential inquiry in this case is whether the trial court satisfied [the] requirement [for an explicit finding] by stating, either orally or in writing, its reasons for granting the August 24 continuance.").

In *United States v. Murillo*, 288 F.3d 1126, 1134 (9th Cir. 2002), the Circuit cautioned against over-reliance on *Perez-Revelez* by distinguishing it in favor of *United States v.*

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[5] Defendant Pulley's argument that references to "T2" and "T4" are inadequate as a shorthand to capture the court's findings is addressed above. *See* pages 7-8 *supra*.

Murray, 771 F.2d 1324 (9th Cir.1985) (per curiam). In *Murray*, a district judge had granted an ends of justice continuance after hearing a lengthy justification by the Assistant United States Attorney and issuing an order that "found that the complexity of the case against Murray, the ongoing nature of the investigation, and the potential multiplicity of defendants supported the extension of time." As summarized by *Murillo*, "[t]his Court found that the reasons stated by the district court [in *Murray*] — and their degree of particularity — to be 'wholly in accordance' with the requirements of the ends of justice provision." 288 F.3d at 1134 (quoting *Murray*, 771 F.3d at 1328). In *Murillo*, the court noted that the facts of *Perez-Revelez* did not disclose simply an error with respect to satisfying a particularity standard; rather the trial court's stated reason in *Perez-Revelez* was unsupported by the record and referenced a factor that was not available, factually, under section (h)(7). *Murillo*, 288 F.3d at 1134; *Perez-Revelez*, 715 F.3d at 1152 ("The [court's reference to complexity] gives no indication why the court considered the case complex, and the record suggests that findings could not have been made to support the conclusion.").

Finally, in response to defendants' argument that exclusions of time based on the parties' agreement are invalid if the (h)(7)(A) language is missing from a stipulation, the Circuit has found that "[d]istrict courts may fulfill their Speedy Trial Act responsibilities by adopting stipulated factual findings which establish valid bases for Speedy Trial Act continuances." *United States v. Ramirez-Cortez*, 213 F.3d 1149, 1157 n.9 (9th Cir. 2000). Neither *Bloate* nor *Zedner* disturbed *Ramirez-Cortez*. *Ramirez-Cortez* also reenforces the importance of the presiding judge's making a particularized factual inquiry that supports finding a continuation is warranted. *Id.* at 1154 (rejecting an ends of justice continuance as inadequate where "a particularized inquiry as to the actual need and reasons for a continuance [was] not made, [and] the transcript reveal[ed] that the Magistrate Judge was granting blanket continuances"). *See also Medina*, 524 F.3d at 986 (9th Cir. 2008) (post-*Zedner* case upholding a continuance where "[t]he court's explanation document[ed] that it considered the factors in section 3161(h)([7])(B) and

determined that the continuance was merited based on two of the factors mentioned in section 3161(h)([7])(B)(iv)" - without any ends of justice language).

2. Other Circuits

Although the Ninth Circuit has not spoken directly on the ultimate issue raised by the defense motions here, other circuits have concluded, after *Zedner*, that particular language is not necessary for an ends of justice exclusion to be valid. *See, e.g., United States v. Williams*, 511 F.3d 1044, 1056 (10th Cir. 2007) ("[A] district court need not necessarily expressly conduct a balancing or use particular language, so long as the court gives some indication of balancing contemporaneous with the grant of the continuance, to which the later findings referred") (citation, quotation and alterations omitted); *United States v. O'Connor*, 656 F.3d 630, 640 (7th Cir. 2011) (post-*Bloate* decision stating "[T]he Speedy Trial Act does not require the court 'to cite ... sections [of the Act] or to track the statutory language in a lengthy legal opinion,' but rather to make findings 'sufficiently specific to justify a continuance[ ] and comport with the purposes of the Act.") (quotations and citations omitted); *United States v. Whitfield*, 590 F.3d 325, 357 (5th Cir. 2009) ("Our decisions do not require that the phrase "ends of justice" always be used, so long as the district court offers an acceptable reason for granting the continuance on the record.").

V. CONCLUSION

Defendants' motions assume that for an exclusion of time under the Speedy Trial Act to be effective, a presiding judge must say out loud or put in print each time the following words: "the ends of justice served by excluding time outweigh the interests of the public and the defendant in a speedy trial." While recognizing the importance of finding legally justifiable reasons for excluding time and providing a record that makes those reasons comprehensible, this court finds that the constraints the defense would impose on judges are not supported by the

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Speedy Trial Act, the Supreme Court, or the Ninth Circuit. The court need not reach the remainder of defendants' arguments. Defendants' motions to dismiss are DENIED.

IT IS SO ORDERED.

DATED: December 27, 2011.

UNITED STATES DISTRICT JUDGE

Appendix E: Instructions Given to the Jury, United States District Court for the Eastern District of California (partial)

Now that you have heard all the evidence, it is my duty to instruct you on the law that applies to this case. A copy of these instructions is, as I just said, available in your binder for you to consult.

It is your duty to weigh and to evaluate all the evidence received in the case, and in that process to decide the facts. It is also your duty to apply the law as I give it to you to the facts as you find them, whether you agree with the law or not. You must decide the case solely on the evidence and the law, and must not be influenced by any personal likes or dislikes, opinions, prejudices or sympathy. You will recall that you took an oath promising to do so at the beginning of the case.

You must follow all of these instructions and not single out some and ignore others. They are all important. Please do not read into these instructions or into anything I may have said or done any suggestion as to what verdict you should return. That is a matter entirely up to you.

The Superseding Indictment is not evidence. Each defendant has pled not guilty to the charge or charges against him. Each defendant is presumed to be innocent unless and until the Government proves that defendant guilty beyond a reasonable doubt.

In addition, each defendant does not have to testify or present any evidence to prove innocence. The Government has

the burden of proving every element of the charges beyond a reasonable doubt.

You are here only to determine whether each defendant is guilty or not guilty of the charge or charges against him in the Superseding Indictment. The defendants are not on trial for any conduct or offense not charged in the Superseding Indictment.

Because of the presumption of innocence, a defendant does not have to prove innocence. The burden of proof is always on the Government and never shifts to the defendant.

The burden on the Government is to prove every element of each charge against each defendant beyond a reasonable doubt. Proof beyond a reasonable doubt is proof that leaves you firmly convinced that the defendant is guilty. It is not required that the Government prove guilt beyond all possible doubt.

A reasonable doubt is a doubt based upon reason and common sense and is not based purely on speculation. It may arise from a careful and impartial consideration of all the evidence or from lack of evidence.

If after a careful and impartial consideration of all the evidence, you are not convinced beyond a reasonable doubt that a defendant is guilty, it is your duty to find that defendant not guilty.

However, if after a careful and impartial

consideration of all the evidence, you are convinced beyond a reasonable doubt that a defendant is guilty, it is your duty to find that defendant guilty.

A defendant in a criminal case has a constitutional right not to testify. You may not draw any inference of any kind from the fact that Charles Head and Domonic McCarns did not testify.

Defendant Benjamin Budoff has testified. You should treat his testimony just as you would the testimony of any other witness.

The evidence you are to consider in deciding what the facts are consists of: Number one, the sworn testimony of any witness; number two, the exhibits received into evidence; and, number three, any facts to which the parties have agreed or stipulated.

Certain charts and summaries have been admitted into evidence. Charts and summaries are only as good as the underlying supporting material. You should therefore give them only such weight as you think the underlying material deserves.

In reaching your verdict, you may consider only the testimony and exhibits received into evidence. The following things are not evidence, and you may not consider them in deciding what the facts are:

1. Questions, statements, objections, and arguments by the lawyers are not evidence. The lawyers are not

witnesses. Although you must consider a lawyer's questions to understand the answers of a witness, the lawyer's questions are not evidence. Similarly, what the lawyers have said in their opening statements, closing arguments, and at other times is intended to help you interpret the evidence, but it is not evidence. If the facts, as you remember them, differ from the way the lawyers state them, your memory of them controls.

2. Any testimony that I have excluded, stricken, or instructed you to disregard is not evidence. In addition, some evidence was received for a limited purpose only. When I have instructed you to consider certain evidence in a limited way, you must do so.

3. Any diagrams or summaries shown to you only in any closing argument in order to help explain the evidence in the case are not evidence. Unlike charts or summaries that were admitted into evidence, these summaries were not admitted into evidence and will not go into the jury room with you. They are not, themselves, evidence or proof of any facts. If they do not correctly reflect the facts or figures shown by the evidence in the case, you should disregard these diagrams or summaries and determine the facts from the underlying evidence.

4. Anything you may have seen or heard when court was not in session is not evidence. You are to decide the case solely on the evidence received at trial.

Evidence may be direct or circumstantial. Direct

evidence is direct proof of a fact such as testimony by a witness about what that witness personally saw, or heard, or did. Circumstantial evidence is indirect evidence, that is, it is proof of one or more facts from which you could find another fact.

You are to consider both direct and circumstantial evidence. Either can be used to prove any fact. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. It is for you to decide how much weight to give to any evidence.

In deciding the facts in this case, you may have to decide which testimony to believe, and which testimony not to believe. You may believe everything a witness says, or part of it, or none of it. In considering the testimony of any witness you may take into account the following:

1. The witness' opportunity and ability to see, or hear, or know the things testified to;

2. The witness' memory;

3. The witness' manner while testifying;

4. The witness' interest in the outcome of the case, if any;

5. The witness' bias or prejudice, if any;

6. Whether other evidence contradicted the witness' testimony;

7. The reasonableness of the witness' testimony in

light of all the evidence; and

8. Any other factors that bear on believability.

The weight of the evidence as to a fact does not necessarily depend on the number of witnesses who testify. What is important is how believable the witnesses were, and how much weight you think their testimony deserves.

You have heard testimony that Benjamin Budoff and Domonic McCarns each made a statement to Chris Fitzpatrick. It is for you to decide whether the defendant made the statement, and, if so, how much weight to give to it. In making those decisions, you should consider all the evidence about the statement including the circumstances under which the defendant may have made it.

You have heard evidence that Benjamin Budoff made one or more statements to Chris Fitzpatrick. Further clarifying, I instruct you that this evidence is admitted only for the limited purpose of establishing whether Benjamin Budoff is guilty, and, therefore, you must consider it only for that limited purpose, and not for any other purpose.

You have heard evidence that Domonic McCarns made one or more statements to Chris Fitzpatrick. I instruct you that this evidence is admitted only for the limited purpose of establishing whether Domonic McCarns is guilty, and, therefore, you must consider it only for that limited purpose and not for any other purpose.

You may not consider the statements made by Benjamin Budoff to determine the guilt of Domonic McCarns or Charles Head. You may not consider the statements made by Domonic McCarns to determine the guilt of Benjamin Budoff or Charles Head.

You have heard testimony from Kou Yang, Keith Brotemarkle, and Jack Corcoran, witnesses who pleaded guilty to a crime arising out of the same events for which each defendant is on trial. Their guilty pleas are not evidence against any defendant, and you may consider them only in determining these witnesses' believability.

For this reason, in evaluating the testimony of Kou Yang, Keith Brotemarkle, and Jack Corcoran, you should consider the extent to which or whether their testimony may have been influenced by this factor.

In addition, you should examine the testimony of Kou Yang, Keith Brotemarkle, and Jack Corcoran with greater caution than that of other witnesses.

You also have heard evidence that Kou Yang and Jack Corcoran were each convicted of other crimes unrelated to the events for which each defendant is on trial. You may consider this evidence in deciding whether or not to believe these witnesses and how much weight to give to the testimony of these witnesses.

You have heard testimony from Justin Wiley, who

pleaded guilty to a crime arising out of events other than those for which each defendant is on trial. This guilty plea is not evidence against any defendant, and you may consider it only in determining Mr. Wiley's believability.

For this reason, in evaluating the testimony of Justin Wiley, you should consider the extent to which or whether his testimony may have been influenced by this factor. In addition, you should examine the testimony of Justin Wiley with greater caution than that of other witnesses.

You have heard evidence in the form of the testimony of Justin Wiley and Shannon Taylor that Charles Head committed other acts not charged in this case. You may consider this evidence only for its bearing, if any, on the question of the defendant's intent, motive, opportunity, preparation, plan, knowledge, identity, absence of mistake, absence of accident and for no other purpose. You may not consider this evidence as evidence of guilt of the crimes for which Benjamin Budoff and Domonic McCarns are now on trial.

An act is done knowingly if a defendant is aware of the act and does not act through ignorance, mistake or accident. The Government is not required to prove that the defendant knew that his acts or omissions were unlawful. You may consider evidence of a defendant's words, acts, or omissions along with all the other evidence in deciding whether a defendant acting knowingly.

A separate crime is charged against one or more of the defendants in each count. The charges have been joined for trial. You must decide the case of each defendant on each crime charged against that defendant separately. Your verdict on any count as to any defendant should not control your verdict on any other count or as to any other defendant. All the instructions apply to each defendant and to each count unless a specific instruction states that it applies only to a specific defendant or a specific count.

Now turning to the counts. Defendant Charles Head is charged in Count 1 of the Superseding Indictment with conspiracy to commit mail fraud, in violation of Title 18 of the U.S. Code, Section 1349, and in Counts 2 through 4 with mail fraud, in violation of 18 U.S. Code Section 1341.

Defendant Benjamin Budoff and Defendant Domonic McCarns each are charged in Count 1 of the Superseding Indictment with conspiracy to commit mail fraud, in violation of Title 18 of the U.S. Code, Section 1349.

Each defendant is charged in Count 1 of the Indictment. Again, with conspiring to commit mail fraud, in violation of Section 1349 of Title 18 of the U.S. Code.

The Superseding Indictment alleges that the object of the conspiracy was for the defendants to target homeowners in financial distress, and through materially false and fraudulent pretenses, through material omissions, and by making materially

false and fraudulent representations and promises to those homeowners, the defendants used straw buyers to obtain title in order to gain control of the property and steal any equity that existed in the home. It also alleges that the defendants received rental payments from the homeowners as a part of the scheme to defraud.

In order for a defendant to be found guilty of this charge, the Government must prove each of the following elements beyond a reasonable doubt:

First, beginning on or about March 19th, 2005, and ending on or about June 30th, 2006, there was an agreement between two or more persons to commit mail fraud, and, second, the defendant became a member of the conspiracy knowing of at least one of its objects and intending to help accomplish it.

A conspiracy is a kind of criminal partnership, an agreement of two or more persons to commit one or more crimes. The crime of conspiracy is the agreement to do something unlawful. It does not matter whether the crime agreed upon was committed.

For a conspiracy to have existed, it is not necessary that the conspirators made a formal agreement, or that they agreed on every detail of the conspiracy. It is not enough, however, that they simply met, discussed matters of common interest, acted in similar ways, or perhaps helped one another.

You must find that there was a plan to commit at

least one of the crimes alleged in the Indictment as an object of the conspiracy, with all of you agreeing as to the particular crime which the conspirators agreed to commit.

One becomes a member of a conspiracy by willfully participating in the unlawful plan with the intent to advance or further some object or purpose of the conspiracy, even though the person does not have full knowledge of all the details of the conspiracy.

Furthermore, one who willfully joins an existing conspiracy is as responsible for it as the originators.

On the other hand, one who has no knowledge of the conspiracy but happens to act in a way which furthers some object or purpose of the conspiracy does not thereby become a conspirator.

Similarly, a person does not become a conspirator merely by associating with one or more persons who are conspirators, nor merely by knowing that a conspiracy exists.

A conspiracy may continue for a long period of time and may include the performance of many transactions. It is not necessary that all members of the conspiracy join it at the same time. And one may become a member of a conspiracy without full knowledge of all the details of the unlawful scheme or the names, identities, or locations of all of the other members.

Even though a defendant did not directly conspire with other conspirators in the overall scheme, the defendant

has, in effect, agreed to participate in the conspiracy if the Government proves each of the following beyond a reasonable doubt: That, number one, the defendant directly conspired with one or more conspirators to carry out at least one of the objects of the conspiracy; two, the defendant knew or had reason to know that other conspirators were involved with those with whom the defendant directly conspired; and, three, the defendant had reason to believe that whatever benefits the defendant might get from the conspiracy were probably dependent upon the success of the entire venture.

It is not a defense that a person's participation in a conspiracy was minor or for a short period of time.

If you decide that a defendant was a member of a scheme to defraud, and that the defendant had the intent to defraud, the defendant may be responsible for other co-schemer's actions during the course of and in furtherance of the scheme, even if the defendant did not know what they said or did.

For a defendant to be guilty of an offense committed by a co-schemer in furtherance of the scheme, the offense must be one that the defendant could reasonably foresee as a necessary and natural consequence of the scheme to defraud.

Fraudulent intent is shown if a representation is made with reckless indifference to its truth or falsity.

You must decide whether the conspiracy charged in the

Indictment existed, and, if it did, who at least some of its members were. If you find that the conspiracy charged did not exist, then you must return a not guilty verdict even though you may find that some other conspiracy existed.

Similarly, if you find that any defendant was not a member of the charged conspiracy, then you must find that defendant not guilty even though that defendant may have been a member of some other conspiracy.

Charles Head is charged in Counts 2, 3 and 4 of the Indictment with mail fraud, in violation of Section 31 of Title 18 of the United States Code.

In order for a defendant to be found guilty of one of these charges, the Government must prove each of the following elements beyond a reasonable doubt: First, the defendant knowingly participated in or devised a scheme or plan to defraud, or a scheme or plan for obtaining money or property by means of false or fraudulent pretenses, representations or promises; second, the statements made or facts omitted as part of the scheme were material, that is, they had a natural tendency to influence or were capable of influencing a person to part with money or property; third, the defendant acted with the intent to defraud, that is, the intent to deceive or cheat; and, fourth, the defendant used or caused to be used the mails to carry out or attempt to carry out an essential part of the scheme.

In determining whether a scheme to defraud exists, you may consider not only the defendant's words and statements, but also the circumstances in which they are used as a whole.

A mailing is caused when one knows that the mails will be used in the ordinary course of business or when one can reasonably foresee such use. It does not matter whether the material mailed was itself false or deceptive so long as the mail was used as part of the scheme, nor does it matter whether the scheme or plan was successful or that any money or property was obtained.

Regarding good faith. Good faith is a complete defense to the charges of the Superseding Indictment. A person who acts or causes another person to act on a belief or an opinion honestly held is not guilty of the charges merely because the belief or opinion turns out to be inaccurate, incorrect, or wrong.

An honest mistake in judgment or in error in management does not rise to the level of intent to defraud.

A defendant does not act in good faith if even though he honestly holds a certain opinion or belief, that defendant also knowingly makes material false or fraudulent pretenses, representations, or promises to others.

While the term good faith has no precise definition, it means, among other things, a belief or opinion honestly held, an absence of malice or ill will, and an intention to

avoid taking unfair advantage of another.

The burden of proving good faith does not rest with the defendant because the defendant does not have any obligation to prove anything in this case.

In determining whether or not the Government has proven beyond a reasonable doubt that a defendant acted with the required intent, or whether a defendant acted in good faith, you, the jury, must consider all the evidence in the case bearing on the defendant's state of mind.

The punishment provided by law for the crimes charged in the Superseding Indictment is for the Court to decide. You may not consider punishment in deciding whether the Government has proved its case against each defendant beyond a reasonable doubt.

Regarding your deliberations. When you begin your deliberations, elect one member of the jury as your foreperson, who will preside over the deliberations and speak for you here in court. You will then discuss the case with your fellow jurors to reach agreement, if you can do so.

Your verdict, whether guilty or not guilty, must be unanimous. Each of you must decide the case for yourself, but you should do so only after you have considered all the evidence, discussed it fully with the other jurors, and listened to the views of your fellow jurors.

Do not be afraid to change your opinion if the

discussion persuades you that you should. But do not come to a decision simply because other jurors think it is right. It is important that you attempt to reach a unanimous verdict, but, of course, only if each of you can do so after having made your own conscientious decision.

Do not change an honest belief about the weight and effect of the evidence simply to reach a verdict.

Because you must base your verdict only on the evidence received in the case and on these instructions, I remind you that you must not be exposed to any other information about the case or to the issues it involves except for discussing the case with your fellow jurors during your deliberations.

These are your current ground rules. Do not communicate with anyone in any way, and do not let anyone else communicate with you in any way about the merits of the case or anything to do with it. This includes discussing the case in person, in writing, by phone or electronic means, via e-mail, text messaging, or any internet chat room, blog, website, or other feature.

This applies to communicating with your family members, your employer, the media or press, and the people involved in the trial.

If you are asked or approached in any way about your jury service or anything about this case, you must respond that

you have been ordered not to discuss the matter and then report that contact to the Court.

Do not read, watch, or listen to any news or media accounts or commentary about the case, or anything to do with it. Do not do any research such as consulting dictionaries, searching the internet, or using other reference materials. And do not make any investigation or in any other way try to learn about the case on your own.

The law requires these restrictions to ensure the parties have a fair trial based on the same evidence that each party has had an opportunity to address.

A juror who violates these restrictions jeopardizes the fairness of these proceedings, and a mistrial could result that would require the entire trial process to start over.

If any juror is exposed to any outside information, please, again, notify the Court immediately.

Your verdict must be based solely on the evidence and on the law as I have given it to you in these instructions, however, remember that nothing I have said or done at any time is intended to suggest what your verdict should be. That is entirely for you to decide.

Some of you have taken notes during trial. Whether or not you took notes, you should rely on your own memory of what was said. Notes are only to assist your memory. You should not be overly influenced by your notes or those of your

fellow jurors.

A verdict form for each defendant has been prepared for you. After you have reached unanimous agreement on a verdict, your foreperson should complete that verdict form according to your deliberations, and sign and date it.

You should repeat this process for each verdict form. Once your foreperson has completed each verdict form, the foreperson should advise the clerk that you are ready to return to the courtroom.

If it becomes necessary during your deliberations to communicate with me, you may send a note through the security officer signed by any one or more of you. No member of the jury should ever attempt to communicate with me except by a signed writing. And I will respond to the jury concerning the case only in writing or here in open court.

If you send out a question, I will consult with the lawyers before answering it, which make take some time. You may continue your deliberations while waiting for the answer to any question.

Remember, that you are not to tell anyone, including me, how the jury stands numerically or otherwise on any question submitted to you, including the question of the guilt of the defendants, until after you have reached a unanimous verdict or have been discharged.

Ladies and gentlemen, those are your final jury

instructions. I'm going to have Ms. Schultz swear the security officer who will escort the jury that will be deliberating to the jury room.

The jury that will be deliberating is 12 jurors. And so I'm going to give you some clarifying instructions at this time. And I do need to ask Ms. Whitehead to stay after. So if you could stay in the courtroom.

And then Ms. McKenzie, should she follow the jurors to collect her items?

THE CLERK: Yes.

THE COURT: You may follow the jurors to collect your items, but then you can report tomorrow morning. Ms. Schultz can give you clarifying instructions. But you can report tomorrow morning to the jury assembly room on the fourth floor and be available if needed. Is that understood?

So with that, I'm going ask Ms. Schultz to swear the security officer who will escort the jury to the jury room. We understand that you will leave promptly today. You had said you would stay until 4:30. We're right at 4:30. You don't need to report to the courtroom at 9:00 tomorrow morning. You can report directly to the jury room.

Unless I hear from you before, I will just call you in at 2:30, your time for adjournment tomorrow, and check in with you then and give some parting instructions as you leave tomorrow. All right. Ms. Schultz.

Appendix F: Final Indictment in the United States District Court for the Eastern District of California (partial)

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IN THE UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. CHARLES HEAD, KEITH BROTEMARKLE, BENJAMIN BUDOFF, JOHN CORCORAN aka Jack Corcoran, DOMONIC McCARNS, LISA VANG, and KOU YANG, Defendants.	No. 2:08-cr-116 FCD DAD VIOLATIONS: 18 U.S.C. § 1349 - Conspiracy to Commit Mail Fraud; 18 U.S.C. § 1341 - Mail Fraud (3 Counts); Forfeiture Allegations

S U P E R S E D I N G I N D I C T M E N T

COUNT ONE: [18 U.S.C. § 1349 - Conspiracy to Commit Mail Fraud]

The Grand Jury charges:

CHARLES HEAD,
KEITH BROTEMARKLE,
BENJAMIN BUDOFF,
JOHN CORCORAN aka Jack Corcoran,
DOMONIC McCARNS,
LISA VANG, and
KOU YANG,

defendants herein, as follows:

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I. INTRODUCTION

1. Beginning at a date no later than on or about March 19, 2005, and continuing to at least June 30, 2006, in the State and Eastern District of California and elsewhere, the defendants conspired to target homeowners in financial distress and perpetrate an "equity stripping" scheme and artifice to defraud. As part of the agreed to scheme and artifice to defraud, the defendants communicated with these homeowners and made varying material misstatements and omissions to assure homeowners that they would be able to enter a program that would allow them to repair their damaged credit, refinance their home within a year, and keep their home. Further, as a part and result of the scheme and artifice to defraud, the defendants: 1) paid straw buyers who replaced the homeowners on the titles to the properties; 2) used the straw buyers to apply for mortgages to extract the maximum available equity from the homes; and 3) received "rents" paid by the victim homeowners. After the one year term, and most times before, homeowners were left without homes, equity, or repaired credit.

II. PARTIES, PERSONS AND ENTITIES

A. Head Financial Services and Creative Loans

2. On or about August 15, 2001, defendant CHARLES HEAD incorporated, and caused to be incorporated, Head Financial Services, Inc. (HFS), in the State of California. A corresponding bank account for HFS was opened at Pacific Mercantile Bank on or about August 26, 2004. Defendants CHARLES HEAD and KOU YANG were the original signatories on the account. On or about June 6, 2005, defendant JOHN CORCORAN was added as a

signatory.

3. On or about June 15, 2004, defendant CHARLES HEAD created, and caused to be created, a limited liability company, Creative Loans, LLC (Creative Loans), in the State of California. A corresponding bank account for Creative Loans was opened at Pacific Mercantile Bank on or about October 12, 2004.

4. At times relevant to this Indictment, defendants KEITH BROTEMARKLE, BENJAMIN BUDOFF, DOMONIC McCARNS, LISA VANG and KOU YANG were employees of HFS and/or Creative Loans.

B. Other Business Entities Used in the Scheme to Defraud

5. At times relevant to this Indictment, Nations Property Management was a property management entity that aided the execution of the scheme to defraud. Defendant JOHN CORCORAN represented himself as working for this entity. A Pacific Mercantile Bank account listed Creative Loans as "doing business as" Nations Property Management.

6. At times relevant to this Indictment, A-One Property Investments was a property management entity that aided the execution of the scheme to defraud. Defendant JOHN CORCORAN represented himself as working for this entity.

7. At times relevant to this Indictment, the defendants used other business names and websites to perpetuate the fraud including, but not limited to, FundingForeclosure.com, Funding Foreclosure, and $30kperyear.com.

8. At times relevant to this Indictment, Premiere Services was an entity used by defendants BENJAMIN BUDOFF and KOU YANG, and others known and unknown to the Grand Jury, to handle loan applications and otherwise perpetuate the scheme.

C. Defendants' Additional Roles During the Scheme to Defraud

9. Defendant CHARLES HEAD was a mortgage broker licensed with the State of California, and was listed as such on certain transactions.

10. Defendant KEITH BROTEMARKLE was listed as a mortgage broker on at least one transaction, but has never been licensed by the State of California as a mortgage broker.

11. Defendant BENJAMIN BUDOFF was listed as a broker on at least one transaction, but has never been licensed by the States of California or Colorado as a mortgage broker.

III. THE CONSPIRACY

12. Beginning at a date no later than on or about March 19, 2005, and continuing to at least June 30, 2006, in the State and Eastern District of California and elsewhere, defendants CHARLES HEAD, KEITH BROTEMARKLE, BENJAMIN BUDOFF, JOHN CORCORAN, DOMONIC McCARNS, LISA VANG, and KOU YANG, together and with others known and unknown to the Grand Jury, knowingly combined, conspired, confederated, and agreed among themselves to devise a material scheme and artifice to defraud, and, to obtain property and money by means of materially false and fraudulent pretenses, representations, and promises, and to use the United States Mails and any private and commercial interstate carrier to execute the scheme and artifice to defraud, in violation of Title 18, United States Code, Section 1341 (Mail Fraud).

13. The object of the conspiracy was for the defendants to target homeowners in financial distress, and, through materially false and fraudulent pretenses, through material omissions, and by making materially false and fraudulent representations and

promises to those homeowners, the defendants used straw buyers to obtain title in order to gain control of the property and steal any equity that existed in the home. The defendants also received "rental" payments from the homeowners as a part of the scheme to defraud. As a result of the aforementioned, the conspiracy acquired at least $5.9 million in equity from homeowners.

IV. MANNER AND MEANS OF THE CONSPIRACY

The manner and means by which the conspiracy sought to accomplish its objectives were the following:

14. Defendant CHARLES HEAD devised the "equity stripping" scheme and artifice to defraud, and he employed and directed other defendants, as well as persons known and unknown to the Grand Jury, to execute the fraud with him.

15. In order to perpetuate the scheme to defraud, defendant KEITH BROTEMARKLE and others made contact with brokers, via the internet and phone, in order to solicit referrals to homeowners in distress. In turn, brokers provided contact information to the defendants regarding homeowners in distress, and for each homeowner that completed a transaction with the defendants, the broker was paid a $4,000 referral fee.

16. Defendants DOMONIC McCARNS and JOHN CORCORAN, and others known and unknown to the Grand Jury, acted as sales agents and were responsible for communicating with and soliciting the homeowner in distress. For each transaction that closed successfully, the sales agents typically received 3% of the equity in the home, in addition to their salary from defendant CHARLES HEAD.

17. When homeowners responded, the sales agents would offer them a plan in which they could keep their home and repair their damaged credit. The plan was typically explained as follows: the existing mortgage would be paid off, the homeowner would make monthly "rent" payments for one year to repair his or her credit, and after the year, the homeowner would repurchase the home.

18. During the process of acquiring the homes, the defendants made and caused to be made one or more materially false promises, representations, and statements to the homeowners, including but not limited to:

- assurances about title, including: the homeowners would remain on title with an "investor" or business, that the homeowners would be off title for one year and then put back on, or that the homeowners would be the only ones on title;
- assurances that property and/or equity would be put in "trust";
- assurances that the homeowners would be able to repurchase or buy back the home after an initial period, typically one year;
- assurances that the homeowners would be the only ones who could repurchase the home;
- assurances that little or no equity belonging to the homeowners would be depleted;
- assurances that the home could be repurchased at an agreed upon price;
- assurances that commissions for the defendants and their businesses were set at a particular amount;
- assurances that the equity could be used to refinance the

home at the end of the initial period; and

- assurances that the homeowners' credit would be repaired.

19. During the process of acquiring the homes, the defendants omitted and failed to disclose material information to the homeowners, including but not limited to:

- the fact that at least one additional mortgage would be taken out on the property;
- the fact that defendants would extract a significant portion of the equity in the property; and
- the fact that the defendants would not actively assist in the repair of the homeowners' credit.

20. As a further part of the conspiracy, the defendants sought to strip equity from the homes by taking mortgages out on the homes to generate the funds to be stolen.

21. To qualify for the mortgages, defendants KEITH BROTEMARKLE, KOU YANG, LISA VANG and BENJAMIN BUDOFF, and others known and unknown to the Grand Jury, solicited and dealt with straw buyers via the internet and otherwise. In exchange for becoming "investors", the straw buyers were given $5,000 per transaction.

22. Using the straw buyers' name and credit information, the defendants then made, and caused to be made, one or more materially false statements on loan applications, pertaining to:

- assets;
- monthly income;
- ownership of other properties and liabilities; and
- employment history.

23. The loan applications submitted to the lenders were

purportedly verified by brokers; however, these verifications were often false, as it was signed by other members of the conspiracy, who knew the documents contained false information.

24. To further assist the approval of the loan applications for the straw buyers, defendants KOU YANG, JOHN CORCORAN and LISA VANG, and others known and unknown to the Grand Jury, would wire and otherwise cause funds to be transferred to the straw buyers' accounts to ensure they had sufficient cash on hand to proceed with closing the various transactions.

25. The collection of monthly rental payments from homeowners was coordinated by defendant JOHN CORCORAN, other defendants, and others known and unknown to the Grand Jury, through the business entities Nations Property Management and, later in the scheme, by A-One Property Investments.

V. OVERT ACTS

In furtherance of the conspiracy, and to achieve the objects thereof, the defendants, and others known and unknown to the Grand Jury, performed, among others, the following overt acts in the State and Eastern District of California and elsewhere:

26. In or about January 2006, defendant KEITH BROTEMARKLE solicited B.G. of Corona, California, to be a straw buyer.

27. Between in or about April 2006 and in or about May 2006, defendant CHARLES HEAD called M.S., a straw buyer in Modesto, California, and convinced him to continue working with the defendants as an investor purchasing "investment properties."

28. On or about April 24, 2006, defendant JOHN CORCORAN signed a $5,000 check drawn on the Creative Loans' bank account at Pacific Mercantile Bank made payable to straw buyer M.S. of

Modesto, California.

29. In or about April 2006, defendant KOU YANG met with straw buyer S.K., in person, and told her to represent on a loan application that she was employed and earning $60,000 per year, when, in fact, she was unemployed.

30. On or about May 8, 2006, defendant LISA VANG sent a California Overnight package containing loan documents related to a home located in Orange, New Jersey, to straw buyer H.P. of West Sacramento, California.

31. Between in or about November 2005 and in or about August 2006, defendant DOMONIC McCARNS gave false information to K.S., a homeowner from Miramar, Florida, concerning her home and a purported plan to ensure that she could keep the home.

All in violation of Title 18, United States Code, Sections 1349 and 2.

COUNTS TWO THROUGH FOUR: [18 U.S.C. § 1341 - Mail Fraud]

The Grand Jury further charges:

CHARLES HEAD,
JOHN CORCORAN aka Jack Corcoran, and
LISA VANG,

defendants herein, as follows:

I. INTRODUCTION

1. Paragraphs 1 through 11 and 14 through 31 of Count One are realleged and incorporated herein, as if fully set forth.

II. THE SCHEME TO DEFRAUD

2. Beginning at a date no later than on or about March 19, 2005, and continuing to at least on or about June 30, 2006, in the State and Eastern District of California and elsewhere, defendants CHARLES HEAD, JOHN CORCORAN, and LISA VANG, together

and with others known and unknown to the Grand Jury, did knowingly devise and intend to devise a material scheme and artifice to defraud, and, to obtain property and money by means of materially false and fraudulent pretenses, representations, and promises.

III. WAYS AND MEANS

3. It was part of the scheme and artifice to defraud that the defendants undertook the actions described in the allegations set forth in paragraphs 14 through 31 of Count One of this Superseding Indictment, which allegations are realleged and incorporated herein.

4. Pursuant to the scheme to defraud, defendants CHARLES HEAD, JOHN CORCORAN, and LISA VANG, and others known and unknown to the Grand Jury, caused items to be sent and delivered by the Postal Service or by private commercial interstate carrier, to and from governmental entities, private citizens, various businesses in Southern California, and elsewhere.

IV. THE MAILINGS

5. On or about the dates set forth below, in the Eastern District of California and elsewhere, the defendants, together and with others known and unknown to the Grand Jury, for the purpose of executing such scheme and artifice to defraud, did place and cause to be placed in any post office and authorized depository for mail matter, any matter and thing whatever to be sent or delivered by the Postal Service, and deposited and caused to be deposited any matter and thing whatever to be sent and delivered by any private and commercial interstate carrier, and took and received therefrom, any such matter and thing, and

knowingly caused to be delivered by mail and such carrier according to the direction thereon, and at the place at which it was directed to be delivered by the person to whom it was addressed, all in violation of Title 18, United States Code, Section 1341 (Mail Fraud).

6. For the purpose of executing such scheme to defraud, the defendants, as identified below, knowingly caused mailings and deliveries by the United States Postal Service and by private commercial carriers as specified below:

COUNT	DEFENDANTS	DATE	FROM	TO	ITEM
2	CHARLES HEAD LISA VANG	May 8, 2006	Lisa Vang, Head Financial Services	H.P., a straw buyer in West Sacramento, California	Loan Documents
3	CHARLES HEAD JOHN CORCORAN	May 26, 2006	Sacramento County Clerk/Recorder	C.R., a straw buyer in Florence, SC	Grant Deed (homeowner A.L. of Sacramento, California)
4	CHARLES HEAD JOHN CORCORAN	June 14, 2006	Jack Corcoran, Nations Property Management	Homeowner A.L. of Sacramento, California	Contract documents

All in violation of Title 18, United States Code, Sections 1341 and 2.

FORFEITURE ALLEGATIONS: [18 U.S.C. § 981(a)(1)(C), 28 U.S.C. § 2461(c), Fed.R.Cr.P. 32.2(a) - Criminal Forfeiture]

The Grand Jury further charges: T H A T

1. Upon conviction of the offense alleged in Count One of this Superseding Indictment, 18 U.S.C. § 1349 - Conspiracy to Commit Mail Fraud, defendant CHARLES HEAD shall forfeit to the United States, pursuant to Title 18, United States Code, Section

981(a)(1)(C) and Title 28, United States Code, Section 2461(c), any property, real or personal, constituting or derived from proceeds traceable to said violation, including but not limited to the following:

a) a sum of money equal to the total amount of money involved in the scheme, for which defendant is convicted.

2. Upon conviction of the offenses alleged in Counts Two through Four of this Superseding Indictment, 18 U.S.C. § 1341 - Mail Fraud, defendant CHARLES HEAD shall forfeit to the United States, pursuant to Title 18, United States Code, Section 981(a)(1)(C) and Title 28, United States Code, Section 2461(c), any property, real or personal, constituting or derived from proceeds traceable to said violations, including but not limited to the following:

a) a sum of money equal to the total amount of money involved in each offense, or conspiracy to commit such offense, for which defendant is convicted.

3. If any property subject to forfeiture, as a result of the offenses alleged in Counts One through Four of this Superseding Indictment:

a) cannot be located upon the exercise of due diligence;

b) has been transferred or sold to, or deposited with, a third person;

c) has been placed beyond the jurisdiction of the Court;

d) has been substantially diminished in value; or

e) has been commingled with other property which cannot be subdivided without difficulty;

it is the intent of the United States, pursuant to Title 18, United States Code, Section 982(b)(1), incorporating Title 21, United States Code, Section 853(p), to seek forfeiture of any other property of said defendant up to the value of the property subject to forfeiture.

DATED: February 11, 2010

A TRUE BILL.

/s/ Signature on file w/AUSA

FOREPERSON

BENJAMIN B. WAGNER
United States Attorney