

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA

v.

MICHAEL P. O'DONNELL,
Defendant.

Criminal Case No. 13-10262-DPW

DEFENDANT'S TRIAL STIPULATION

The defendant Michael P. O'Donnell ("Defendant") stipulates and admits that he (1) engaged in a scheme or artifice to defraud or obtain money by means of materially false statements or misrepresentations; and (2) did so knowingly. He further stipulates and admits to the following:

O'Donnell was a self-employed loan originator operating through his mortgage loan originator business AMEX Home Mortgage Corporation, located in Middleton, Massachusetts. As a loan originator, O'Donnell completed mortgage loan applications based on information purportedly supplied by individuals seeking to obtain loans for the purchase or refinance of real estate, submitted these applications to mortgage companies, which then funded the loans, if approved. In or about October 2006 through April 2007, O'Donnell engaged in a scheme to defraud mortgage lenders in connection with the refinancing of a three-family dwelling located at 40 Harbor Street in Salem, Massachusetts ("the Harbor Street Property").

In 2005, L.T. purchased the Harbor Street Property and has lived in one of its units since that time. The deed was in the names of L.T. and M.A., her daughter. In late 2006, L.T. sought to refinance her

mortgage to reduce her monthly payments. In or about February and March 2007, O'Donnell knowingly submitted a loan application containing material, false information about L.T.'s income, employment and assets to Homecomings Financial Network, Inc. ("Homecomings"), located in New Jersey. In conjunction with the materially false representations in that application, O'Donnell: (1) provided bogus bank account statements [Exhibit 2.13], (2) provided bogus letters from tax preparer/accountant John Caruso (*a.k.a.* John Carter) falsely representing that Caruso had prepared L.T.'s tax returns [Exhibits 2.14, 2.15], and (3) arranged for Caruso to provide a fraudulent verbal verification of L.T.'s employment. The loan application package also falsely reflected that L.T. would pay over \$31,000 of her own money as part of the refinancing, which was a material factor in Homecoming's risk analysis and decision to approve the loan.

L.T. has a grade school education and does not speak or read English. She never completed the Uniform Residential Loan Application dated October 19, 2006 for a \$352,000 loan, which O'Donnell knowingly submitted to Homecomings. [Exhibit 2.05] L.T.'s supposed signature on the loan application dated October 19, 2006 is a forgery, although the signature on the loan application dated March 7, 2007 [Exhibit 2.06] is a true signature.

Moreover, the employment, income and asset information that O'Donnell provided for L.T. in the loan applications is false. Specifically, instead of earning over \$10,000 per month as the falsified applications claimed, L.T., in reality, earned about \$1,200 each month at that time. L.T. never had \$50,000, or even nearly that much, on deposit in a bank account, and she never provided any income or

asset information to O'Donnell. Moreover, O'Donnell fabricated the Bank of America account statements and then submitted them to Homecomings.

Further, L.T. never hired John Carter or John Caruso to prepare her tax returns and does not know anyone by those names. Caruso, in turn, had an arrangement with O'Donnell going back several years in which O'Donnell engaged Caruso to provide false letters, tax documents and verbal verifications of employment to lenders on loans O'Donnell sought on behalf of his clients. O'Donnell's arrangement with Caruso included his use of the alias John Carter. Caruso knew that if a lender called his office asking to speak to John Carter, then the lender was referring to a fraudulent loan, and Caruso provided the requested employment verification. Finally, Caruso never prepared tax returns or anything else for L.T. and did not know her.

Because L.T. in fact did not have over \$31,000 to put towards the refinancing, O'Donnell paid the money using his AMEX Home Mortgage bank account. Based on the fraudulent representations in the loan application and the HUD-1 settlement statement, and the \$37,392.16 that O'Donnell provided at closing, Homecomings funded a \$352,000 loan, secured by the Harbor Street Property, to L.T. O'Donnell received \$14,698 in various broker fees as a result of this loan, which L.T. never approved.

To recoup the \$37,392.16 that he had put into the first transaction, O'Donnell submitted an application on behalf of L.T. for a second mortgage loan in the amount of \$44,000.00. O'Donnell submitted the application and other documentation to Countrywide, where Countrywide Home Loans employees underwrote and processed the loan application. In conjunction with this second loan application, O'Donnell knowingly submitted the same

false information and documentation as he had to Homecomings, *i.e.*,: (1) a loan application in which he falsely inflated L.T.'s income and assets, (2) bogus Bank of America account statements, and (3) a bogus letter from Caruso falsely advising that he had prepared L.T.'s tax returns. O'Donnell also arranged for Caruso to provide a fraudulent verbal verification of L.T.'s employment.

Regarding the documents submitted to Countrywide on her behalf, L.T. never completed the Uniform Residential Loan Application dated October 19, 2006 for a \$44,000 loan [Exhibit 1.07]. L.T.'s supposed signature on the loan application dated October 19, 2006 is a forgery, although the signature on the loan application dated April 20, 2007 [Exhibit 1.06] is a true signature.

Countrywide's approval of L.T.'s loan application was conditioned upon satisfactory completion of various conditions, including borrower-written explanations of previous credit inquiries and late credit line payments. Countrywide also requested, among other information, a letter from a certified public accountant stating that L.T. has been self-employed for two years. O'Donnell received the list of conditions from Countrywide on or about March 26, 2007. [Exhibit 1.12] O'Donnell, in turn, fabricated responses from L.T. to answer Countrywide's questions about credit inquiries and late credit line payments. He then, again, forged L.T.'s signature and forwarded these responses to Countrywide. [Exhibit 1.15] In response to Countrywide's request for a CPA letter, O'Donnell also provided a copy of the bogus letter from Caruso, falsely advising that he had prepared L.T.'s tax returns and verifying that L.T. was supposedly self-employed at the time. L.T., however, never created or signed the documents that O'Donnell provided to Countrywide [Exhibit 1.12],

nor did she authorize O'Donnell to provide such information on her behalf to Countrywide.

The false information concerning L.T.'s income, assets and employment was material to Countrywide's decision to approve the \$44,000 loan application. Indeed, if Countrywide had known that the income, asset and employment information provided for L.T. was not true, Countrywide would not have approved the loan application that O'Donnell submitted. The \$44,000 Countrywide loan closed on or about April 20, 2007, and O'Donnell received \$37,392 directly from the proceeds by a check payable to AMEX Home Mortgage, along with an additional \$1,198 in fees.

O'Donnell admits and stipulates to the admission of the attached documents marked as Exhibits 1 -9, 11 and all subparts thereof. He further admits and stipulates to the attached Stipulations, previously filed with the Court as Docket Numbers 86 -93.

Defendant's Signature: /s/ Michael P. O'Donnell
MICHAEL P. O'DONNELL

Date: 7/10/15

Approved: /s/ Jeffrey A. Denner
JEFFREY A. DENNER

Date: 7/10/15

APPENDIX B

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
UNITED STATES OF AMERICA**

v.

MICHAEL P. O'DONNELL,

Defendant.

CRIMINAL NO. 13CR10262

VIOLATIONS:

18 U.S.C. § 1344 (Bank Fraud)

18 U.S.C. § 982(a)(2), 981(a)(1)(C) &

28 U.S.C. § 2461(c) (Criminal Forfeiture)

INDICTMENT

The Grand Jury charges that:

At all times relevant to this Indictment:

1. Defendant Michael P. O'Donnell (hereinafter "O'DONNELL") was an individual residing in Middleton, Massachusetts.

2. AMEX Home Mortgage Corporation (hereinafter "AMEX Home Mortgage") was a business organized under Massachusetts law which maintained an office at One Central Street, Suite 201, Middleton, Massachusetts.

3. Countrywide Bank, FSB (hereinafter "Countrywide Bank") was a federal savings bank with offices at 119 North Fairfax Street, Suite 500, Alexandria, VA, 22314 and Homecomings Financial Network, Inc. (hereinafter "Homecomings") was a corporation organized and existing under the laws of

Delaware with offices at 9 Sylvan Way, Suite 100, Parsippany, New Jersey, 07054.

THE SCHEME TO DEFRAUD

4. Beginning in or about January 2004 and continuing through in or about December 2007, O'DONNELL engaged in a scheme to defraud and to obtain money and property of various mortgage lenders in connection with the origination of residential mortgage loans secured by property located in Massachusetts.

5. At all times relevant to this indictment, O'DONNELL was a loan originator employed by AMEX Home Mortgage, a mortgage loan origination company nominally operated by O'DONNELL's wife. As a loan originator for AMEX Home Mortgage, O'DONNELL completed mortgage loan applications based upon information purportedly supplied by individuals seeking to obtain mortgage loans for the purchase or refinance of real estate, and submitted these applications to mortgage companies which in turn would fund the loans, if approved. O'DONNELL operated a bank account in the name of AMEX Home Mortgage at North Shore Bank.

6. As a part of the scheme to defraud the mortgage lenders, O'DONNELL knowingly submitted loan applications to lenders containing material misrepresentations about the terms of the transactions for which financing was being sought, including but not limited to material misrepresentations about income, assets, and funds to be paid by the borrower at loan closings.

7. As a part of the scheme to defraud the mortgage lenders, defendant O'DONNELL prepared, and caused to be prepared, false and fraudulent

documents supporting the material misrepresentations on the loan applications about income, assets, and funds to be paid by the borrowers at loan closings, and he submitted these documents to the lenders. These bogus documents included tax returns and Form W-2 Wage and Tax Statements, letters purporting to be from an accountant employed by the borrowers, bank account statements, and gift letters from purported relatives of the loan applicants confirming bogus gifts to the borrowers.

8. As a part of the scheme to defraud the mortgage lenders, O'DONNELL arranged to supply the funds required to be paid by the borrower at loan closings, creating the false appearance that borrowers had complied with the terms of their loan agreements. O'DONNELL routinely arranged for such funds to be repaid from proceeds of loans to the borrowers.

9. As a part of the scheme to defraud the mortgage lenders, defendant O'DONNELL received compensation, through AMEX Home Mortgage, based on fees and commissions for loans that were funded and closed.

10. The transactions for which O'DONNELL prepared and submitted materially false loan applications, and arranged sham payments purporting to come from the borrower at loan closings, included but were not limited to the following:

03/12/07 Loan to L.T. -40 Harbor Street, Salem

a. On or about March 12, 2007, O'DONNELL arranged a \$352,000 first mortgage loan from Homecomings to L.T., secured by property owned by L.T. and M.A. at 40 Harbor Street, Salem, Massachusetts. At the loan closing, the loan documents reflected that L.T. and M.A. paid

\$37,612.16 in funds due from the borrower. In truth and in fact, on or about March 12, 2007, O'DONNELL withdrew the sum of \$37,392.16 from the account of AMEX Home Mortgage and paid the sum to the closing attorney. In truth and in fact, as defendant O'DONNELL well knew, L.T. and M.A. paid no funds at the loan closing.

b. In conjunction with this loan, in or about February and March, 2007, O'DONNELL submitted a loan application to Homecomings and knowingly (1) falsely inflated the loan applicant's income and assets, (2) provided bogus bank account statements and bogus letters from the purported tax preparer and accountant of the loan applicant falsely advising that the accountant had prepared the applicant's tax returns, and (3) arranged a fraudulent verbal verification of the applicant's employment with the purported accountant.

04/25/07 Loan to L.T. -40 Harbor Street, Salem, MA

c. On or about April 20, 2007, O'DONNELL arranged a \$44,000.00 loan from Countrywide Bank to L.T. that was secured by a second mortgage on property owned by L.T. and M.A. at 40 Harbor Street, Salem, Massachusetts. This loan enabled O'DONNELL and AMEX Home Mortgage to be repaid the sum of \$37,392.16, which had been supplied by O'DONNELL in conjunction with the above described mortgage loan made on March 12, 2007.

d. In conjunction with the April 20, 2007 loan, defendant O'DONNELL knowingly (1) submitted a loan application for the borrower that inflated the loan applicant's income and assets and (2) provided bogus bank account statements and bogus letters from the purported tax preparer and accountant of

the loan applicant falsely advising that the accountant had prepared the applicant's tax returns.

e. On or about April 25, 2007, defendant O'DONNELL received a check in the amount of \$37,392.00 from the proceeds of Countrywide Bank's \$44,000.00 loan to L.T.

COUNT I

(Bank Fraud -18 U.S.C. § 1344)

11. The United States Attorney re-alleges and incorporates by reference paragraphs 1 through 10 of this Indictment and further charges that:

12. On or about April 20, 2007, in the District of Massachusetts and elsewhere,

MICHAEL P. O'DONNELL,

the defendant herein, together with others known and unknown to the Grand Jury, knowingly executed and attempted to execute a scheme and artifice to defraud Countrywide Bank, FSB, a federally-insured financial institution, and to obtain moneys, funds, credits, assets, securities, and other property owned by and under the custody and control of Countrywide Bank, FSB, by means of false and fraudulent pretenses, representations, and promises concerning material facts and matters in conjunction with a mortgage loan in the amount of \$44,000 for property located at 40 Harbor Street, Salem, Massachusetts.

All in violation of Title 18, United States Code, Sections 1344 and 2.

FRAUD FORFEITURE ALLEGATIONS

**(18 U.S.C. §§ 982(A)(2), 981(a)(1)(c) & 28 U.S.C.
§ 2461(c))**

13. The allegations of Count One of this Indictment are hereby re-alleged and incorporated by reference for the purpose of alleging forfeiture pursuant to Title 18, United States Code, Section 982(a)(2), Title 18, United States Code, Section 981(a)(1)(c) and Title 28, United States Code, Section 2461(c).

14. Upon conviction of the offense alleged in Count One of this Indictment, the defendant,

MICHAEL P. O'DONNELL

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, that constitutes, or is derived from, proceeds traceable to the commission of the offenses, and/or shall forfeit to the United States, pursuant to Title 18, United States Code, Section 982(a)(2) any property constituting, or derived from, proceeds obtained directly or indirectly, as a result of the offenses.

15. If any of the property described in paragraph 14 hereof as being forfeitable pursuant to Title 18, United States Code, Section 982(a)(2), Title 18, United States Code, Section 981(a)(1)(c) and Title 28, United States Code, Section 2461(c), as a result of any act or omission of the defendant

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

b. has been transferred to, sold to, or deposited with a third party;

c. has been placed beyond the jurisdiction of this Court;

d. has been substantially diminished in value;
or

e. has been commingled with other property which cannot be divided without difficulty;

it is the intention of the United States, pursuant to Title 28, United States Code, Section 2461(c) and Title 18, United States Code, Section 982(b)(I), both incorporating Title 21, United States Code, Section 853(P), to seek forfeiture of all other property of the defendant up to the value of the property described in paragraph 14 above.

All pursuant to Title 18, United States Code, Section 982, Title 18, United States Code, Section 981 and Title 28, United States Code, Section 2461(c).

A TRUE BILL

/s/ Brenda L. Hannon
Foreperson of the Grand Jury

/s/ Lori J. Holik
Lori J. Holik
Assistant U.S. Attorney

DISTRICT OF MASSACHUSETTS September , 2013
Returned into the District Court by the Grand Jurors
and filed.

/s/
Deputy Clerk
9/11/13
12:35 ms

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA

v.

MICHAEL P. O'DONNELL,
Defendant.

No. 1:13-cr-10262-DPW

**DEFENDANT'S MOTION TO DISMISS
AND INCORPORATED MEMORANDUM OF LAW**

The defendant, Michael O'Donnell, by and through undersigned counsel, hereby respectfully requests this Honorable Court to dismiss Count One of the Indictment alleging a violation of 18 U.S.C. § 1344 (bank fraud) for failure to state a criminal offense and for lack of jurisdiction pursuant to Fed. R. Crim. P. 12(b)(3)(B). As grounds therefore, the indictment fails to satisfy an element of § 1344 which requires that the defrauded bank be insured by the Federal Depository Insurance Corporation ("FDIC"). Contrary to the indictment, the bank at issue is not FDIC-insured and the count alleging bank fraud must be dismissed.

FACTS

A. Relevant Facts Set Forth in the Indictment

The defendant, Michael O'Donnell, is alleged to be a "loan originator employed by AMEX Home Mortgage." Indictment [hereinafter, Ind.] at ¶ 4. On March 12, 2007, O'Donnell allegedly "arranged a \$352,000 first mortgage loan from Homecomings [Financial Network] to L.T., secured by property owned by L.T. and M.A." *Id.* at ¶ 10a. A payment of

\$37,612.16 was owed by the borrower, L.T., to Homecoming. Loan documents allegedly state that L.T. and M.A. paid the \$37,612.16 from their own funds, but the money was actually drawn from AMEX Home Mortgage's account. *Id.*

On April 20, 2007, O'Donnell allegedly "arranged a \$44,000.00 loan from Countrywide Bank[, FSB] to L.T. that was secured by a second mortgage on property owned by L.T. and M.A. *Id.* at ¶ 10c. The indictment alleges that this loan was obtained to "enable[] O'DONNELL and AMEX Home Mortgage to be repaid the sum of \$37,392.16 which had been supplied by O'DONNELL." *Id.* In connection with the loan application, O'Donnell also allegedly "inflated the loan applicant's income and assets" and "provided bogus bank account statements." *Id.* at ¶ 10d.

Count One¹ of the indictment states that O'Donnell "executed and attempted to execute a scheme and artifice to defraud Countrywide Bank, FSB, a federally insured financial institution..." in violation of 18 U.S.C. § 1344. *Id.* at ¶ 12.

Countrywide Bank, FSB, the bank that O'Donnell is alleged to have defrauded in violation of 18 U.S.C. § 1344, is not the bank O'Donnell actually dealt with. Instead, O'Donnell transacted with an entity related to Countrywide Bank, FSB, Countrywide Home Loans, Inc. *See* Loan Origination Document, attached hereto as Exhibit A. Countrywide Home Loans, Inc. is not FDIC-insured.

¹ This is a one-count indictment.

ARGUMENT

The indictment states that the defendant, Michael P. O'Donnell, defrauded an FDIC insured bank, Countrywide Bank, FSB (hereinafter, "Countrywide"), as required for prosecution under 18 U.S.C. § 1344. As argued *infra*, the loan origination documents attached hereto as Exhibit A make clear, on their face, that the entity O'Donnell actually interacted with and received the loan from is Countrywide Home Loans (hereinafter, "Home Loans"). Home Loans, the entity the loan actually originated from, is not FDIC-insured. Therefore, the government's indictment fails as a matter of law and Count One must be dismissed.

A. Motion to Dismiss Standard

An indictment "must be a plain, concise, and definite written statement of the essential facts constituting the offense charged." Fed. R. Crim. P. 7(c)(1). A district court has the power, however, to dismiss an indictment prior to trial if there is "a defect in the indictment or information." *See* Fed. R. Crim. P. 12(b)(3)(B). An indictment is insufficient if it fails to "specif[y] the elements of the offense charged [and] fairly apprises the defendant of the charge against which he must defend." *United States v. Savarese*, 686 F.3d 1, 6 (1st Cir. 2012). An indictment that tracks the language of the underlying statute is usually sufficient to meet this standard, provided that the excerpted statutory language sets out all elements of the offense without material uncertainty. *United States v. Troy*, 618 F.3d 27, 34 (1st Cir. 2010).

B. Facts Beyond the Scope of the Indictment

Normally, an indictment's allegations are assumed to be true, and "courts routinely rebuff

efforts to use a motion to dismiss as a way to test the sufficiency of the evidence behind an indictment's allegations." *United States v. Guerrier*, 669 F.3d 1, 3–4 (1st Cir. 2011). However, the First Circuit has held that courts may consider facts beyond the scope of the complaint "for documents the authenticity of which are not disputed by the parties." *Watterson v. Page*, 987 F.2d 1, 4 (1st Cir. 1993). The analysis a court must do in the civil-12(b)(6) context is nearly identical to the type of analysis a court must do in the criminal-12(b)(3)(B) context. The court in *United States v. Pitt-Des Moines, Inc.*, 970 F.Supp. 1346, 1349 (N.D.Ill.1997) put it accordingly:

A motion to dismiss an indictment is more similar to a civil Rule 12(b)(6) motion, which tests the sufficiency of the underlying complaint (here the indictment). Thus, as with a rule 12(b)(6) motion to dismiss, the court accepts as true all factual allegations in the indictment. *Additionally, all uncontested allegations to which the parties had an opportunity to respond are taken as true.*

970 F.Supp. at 1349 (internal citations omitted) (emphasis added). If the court can consider facts beyond dispute in the civil-12(b)(6) context, there is no reason why a court ought not be able to consider them likewise in the criminal-12(b)(3)(B) context, where the nature and purpose of the analyses is identical. Here, the face of the loan origination documents attached hereto make clear that O'Donnell was not dealing with Countrywide, but instead Home Loans, a bank not insured with the FDIC.

C. Application of 18 U.S.C. § 1344

I. Elements of § 1344

The elements of § 1344 are “well established: (1) the defendant must engage in a scheme or artifice to defraud, or must make false statements or misrepresentations to obtain money from (2) a financial institution and (3) must do so knowingly.” *United States v. Colon-Rodriguez*, 696 F.3d 102, 106 (1st Cir. 2012). The second prong, that the defrauded bank is a “financial institution” as used in Title 18, is derived from 18 U.S.C. § 20’s definition of a financial institution as “an insured depository institution (as defined in section 3(c)(2) of the Federal Deposit Insurance Act).” *United States v. Ayewoh*, 627 F.3d 914, 917 (1st Cir. 2010).² Section 3(c)(2) of the Federal Deposit Insurance Act, in turn, defines an “insured depository institution” as “any bank or savings association the deposits of which are insured by the FDIC] pursuant to the Federal Deposit Insurance Act.” *Id.*, quoting 12 U.S.C. § 1813(c)(2). The purpose of § 1344, therefore, is to “protect the federal government’s interest as an insurer of financial institutions.” *United States v. Laljie*, 184 F.3d 180, 189 (2d Cir. 1999). That the defrauded bank is federally insured is thus a “substantive element of the crime.” *Ayewoh*, 627 F.3d at 917. Not only this, but the First Circuit has held that the defrauded bank’s FDIC-insured status is a “jurisdictional prerequisite” to enforcement of § 1344. *United States v. Brandon*, 17 F.3d 409, 424 (1st Cir. 1994).

² 18 U.S.C. § 20 defines “financial institution” in numerous ways not relevant here.

II. This Court Should Dismiss Count One
Because the Bank From Which
O'Donnell Actually Received the Loan
Was Not FDIC-Insured.

The closest case on point in the First Circuit addressing this issue is *United States v. Walsh*, 75 F.3d 1 (1st Cir. 1996). In *Walsh*, the defendant was convicted under § 1344 for “carr[ying] out a scheme to defraud Dime Savings Bank of New York (“Dime-NY”).” *Id.* at 3. There, the defendant dealt directly with Dime-NY’s wholly-owned subsidiaries, Dime Real Estate Services of Massachusetts, Inc. (“Dime-MA”). *Id.* Dime-NY was federally insured; Dime-MA was not. *Id.* The court rejected the defendant’s argument “that the evidence failed to show that the victim was a federally insured financial institution” because “Dime-NY was a federally insured bank, but Dime-MA--the immediate maker of the loans--was not.” *Id.* at 9. Noting that it “confine[s its holding] to the present facts” the Court upheld the conviction, finding that the defrauded bank (Dime-MA) was a “wholly-owned subsidiary” and “alter-ego of Dime-NY.” *Id.* Moreover, the court also found that Dime-NY essentially controlled the basic operations of Dime-MA and any loan issued by Dime-MA was “immediately assigned to Dime-NY.” *Id.* As a result, the court held that “the mortgage fraud perpetrated against Dime-MA was effectively a fraud against Dime-NY.” *Id.*

The facts in the present case are substantially different than in *Walsh*. Instead, this case is much more similar to *United States v. Bortnick*, Crim. No. 03-CR-0414 (E.D.P.A. October 17, 2004)³ which analyzed, and ultimately distinguished, *Walsh*. In

³ This case has been attached as Exhibit B.

Bortnick, the indictment alleged that “Congress Financial Corporation [the defrauded bank] . . . was a wholly-owned subsidiary of First Union National Bank, which was a financial institution, the deposits of which were insured by the Federal Deposit Insurance Corporation.” *Id.* at *6. The indictment further stated that the defendant “execute[d] a scheme to defraud Congress and First Union National Bank, and to obtain monies owned by and under the care, custody, and control of Congress and First Union National Bank.” *Id.* After “[t]aking both statements in the Indictment with respect to First Union as true, the Court [found] that the United States has not sufficiently alleged a bank fraud claim against Defendant.” *Id.* The court held that simply stating in the indictment that the defrauded company was a wholly-owned subsidiary of an FDIC-insured company is insufficient to establish a nexus between the fraud and the FDIC-insured monies. *Id.* at *6-7. The court then went on to distinguish *Walsh* because the government in *Walsh* had alleged and proved a connection between the monies held by the defrauded bank and the FDIC-insured parent bank. *Id.* Case law in other circuits supports the view espoused by *Bortnick* that more than a mere parent and wholly-owned subsidiary relationship is required. *United States v. Bennett*, 621 F.3d 1131, 1135-37 (9th Cir. 2010) (conviction for a violation of § 1344 overturned where the government only proved that the defrauded bank (Equicredit) was a wholly-owned subsidiary of an FDIC-insured bank (Bank of America)); *United States v. White*, 882 F.2d 250, 251-52 (7th Cir. 1989) (Posner, J.) (indictment dismissed where the defendant made false statements to a wholly-owned subsidiary of an FDIC-insured bank because the statements to the subsidiary was not intended to influence the FDIC-insured parent).

In this case, the government alleged in the indictment that O'Donnell simply defrauded Countrywide. In none of the loan origination documents is Countrywide listed; instead Home Loans is the only entity listed on any of the forms. There is, therefore, even less here than in the *Bortnick* case. In the *Bortnick* case, the government, at the very least, correctly alleged which entity the defendant actually dealt with. Unlike *Walsh*, there is no indication in the indictment, whatsoever, that the entity O'Donnell actually dealt has any form of relationship between itself and Countrywide. This appears to be implicit in the indictment which fails to reference Home Loans in any way and only lists the parent company. *Bortnick*, *Bennett*, and *White* make clear that such a relationship, in and of itself, is insufficient for purposes of § 1344. It does not prove a connection between the funds of one and the funds of the other. Simply put, the indictment fails to allege a connection between the entity O'Donnell actually dealt with (an entity not insured with the FDIC) and Countrywide. Moreover, it fails to apprise O'Donnell of the nature of the charges against him, namely that it incorrectly indicates which entity O'Donnell actually had dealings with.

CONCLUSION

The indictment states that the defendant, Michael P. O'Donnell, defrauded an FDIC insured bank, Countrywide Bank, FSB, as required for prosecution under 18 U.S.C. § 1344. This Court may look beyond the scope of the indictment and consider facts beyond dispute, namely that the entity that actually issued the loan was Countrywide Home Loans, an entity not insured with the FDIC. Therefore, the government's indictment must fail and Count One must be dismissed.

Date: March 28, 2014

Respectfully submitted,

MICHAEL P. O'DONNELL

By and through his attorney,

/s/ Jeffrey A. Denner

Jeffrey A. Denner, BBO#120520

Adamo L. Lanza, BBO# 689190

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CERTIFICATE OF SERVICE

I, Jeffrey A. Denner, hereby certify that on this the 28th day of March 2014, I caused a true copy of the foregoing *Defendant's Motion to Dismiss and Incorporated Memorandum of Law* to be served upon all necessary parties by virtue of electronically filing the same via the CM/ECF system.

/s/ Jeffrey A. Denner

Jeffrey A. Denner

EXHIBIT A

SOVEREIGN BANK
FUNDS TRANSFER NOTIFICATION
04-25-2007

IOLTA/MCGONAGLE & MCGONAGLE PC
MASS IOLTA
125 MAIN ST
READING, MA 01867

To: IOLTA/MCGONAGLE & MCGONAGLE PC

This funds transfer was received on 04/25/2007, for
\$43,749.00

The funds have been CREDITED to account
#*****5354

Sender:

Name : BK OF NYC

ABA# : 021000018

Reference # : FTS0701243561000

Received from : COUNTRYWIDE HOME
LOANS

By Order Of : COUNTRYWIDE HOME LOANS

Fed Reference # :

20070425C1QAE01X00020804250800FT01

Additional Funds Transfer Information:

Beneficiary: MCGONAGLE MCGONAGLE

Beneficiary Bank:

Originator Info: COUNTRYWIDE HOME LOANS

Originator Bank: COUNTRYWIDE HOME LOANS

Originator Bank Info: LORENZA

TORIBIO(166084081) MCGONAGLE ALLISON 781
942 3770

Bank to Bank and all other FRB info fields:

Lawyers Title
Insurance Corporation
NATIONAL HEADQUARTERS
RICHMOND, VIRGINIA

LOAN POLICY

SCHEDULE A

CASE NUMBER

L.TORIBIO2

DATE OF POLICY

April 25, 2007 11:42 AM

LOAN

\$44,000.00

OWNER'S

POLICY NUMBER

K56-0053886

LOAN

OWNER'S

1. Name of Insured: Countrywide Home Loans, Inc.
ISAOA/ATIMA
2. The estate or interest referred to herein is at Date
of Policy vested in: Lorenza Toribio, Marleny Abreau
a/k/a Marleny Abreu
3. The estate or interest in the land described in this
Schedule and which is encumbered by the insured
mortgage is: FEE SIMPLE
4. The insured mortgage, and assignment thereof, if
any, are described as follows: Mortgage from Lorenza
Toribio, Marleny Abreau a/k/a Marleny Abreu To
Countrywide Home Loans, Inc. ISAOA/ATIMA dated
April 20, 2007 in the face amount of \$44,000.00,
recorded on April 25, 2007 in the Essex County

Registry of Deeds as Instrument No. or Book 26771,
Page 514.

5. The land referred to in this policy is described as
follows: 40 Harbor Street, Salem, Massachusetts
01970

SEE EXHIBIT A FOR LEGAL DESCRIPTION ATTACHED
HERETO AND MADE A PART HEREOF

/s/
Authorized Officer or Agent

McGonagle & McGonagle, PC
125 Main Street
Reading, Massachusetts 01867

COUNTRYWIDE FEE SHEET

59 HAWKWOOD DRIVE, SUITE 215
DUNSTON, MA 01923

For Closing Dept., 978-752-3100 or 800-846-4337 Fax 978-752-3816

BROKER FEE SHEET

BROKER: AMEX HOME PHONE: (978) 750-9977

PROPERTY ADDRESS: 40 HIGGINS STREET

CITY/STATE/ZIP: SALFORD, MA 01970

MORTGAGE AMOUNT: \$44,000 PURCHASE REFUND: \$4,000 CLOSING DATE: 10/1/07

UNLESS SPECIFIED, ALL FEES ARE IN DOLLARS AND CENTS

CLOSING ATTORNEY: ALISON HIGGINS PHONE: (978) 750-3720

TELEPHONE AND ADDRESS: 125 MAIN STREET, DUNSTON, MA 01927

CONTACT PERSON: WENDY LAW @ H.S.N. LAM

RECORDING FEE: 2% OREGON FEE: 850

DOCUMENT PREPARATION: 300

COURTESY FEE: 0

APPRaisal RE-REGISTRATION: 0

MISC: 0

APPRaisal FEE: 0

CLIENT REPORT: 15

DOC. & CLOSING: 0

DOC. & CLOSING: 0

DOES BORROWER WANT TO RECORD? YES/NO: 0

RECORDING FEE: 0

TOTAL AMOUNT OF CLOSING COSTS TO BE PAID BY BORROWER: 0

TOTAL AMOUNT OF CLOSING COSTS FROM CLOSING: 0

COUNTRYWIDE FEE: 0

CHERRY REPORT FEE: 0

TAX SERVICE FEE: 0

FLUOROCARBONATION: 0

APPRaisal FEE: 0

COORDINATE FEE: 0

BROKER FEE: 0

TAX SERVICE WAIVER: 0

RECORDING FEE: 0

NOT AVAILABLE: 0

RECORDING FEE: 0

RECORDING FEE: 0

RECORDING FEE: 0

RECORDING FEE: 0

RECORDING FEE: 0

RECORDING FEE: 0

RECORDING FEE: 0

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RECORDING FEE: 0

RECORDING FEE: 0

RECORDING FEE: 0

Countrywide
Document Return Checklist
RETURN THIS COVER LETTER WITH THE CLOSED LOAN
TO:
AMERICA'S WHOLESALE LENDER
99 ROSEWOOD DRIVE, Suite 225
DANVERS, MA 01923

Borrower: Toribio

Documents must be returned to the address listed above, and in the following order:

- ° CLOSING INSTRUCTIONS
- ° NOTE (Original signed Note and 1 Attorney Certified Copy)
- ° ADDENDUM to NOTE (if applicable) {Original signed Addendum and 1 Attorney Certified Copy}
- ° NOTE ALLONGE (if applicable) {Original signed Allonge and 1 Attorney Certified Copy}
- ° MORTGAGE {2 Attorney Certified Copies}
- ° MORTGAGE RIDERS (if applicable) {2 Attorney certified Copies}
- ° SIGNATURE/NAME AFFIDAVIT {Original signed affidavit and 1 Attorney Certified Copies}
- ° SPECIFIC POWER OF ATTORNEY (If applicable)
- ° FINAL HUD-1
- ° FINAL TRUTH-IN-LENDING & ITEMIZATION OF AMOUNT FINANCED
- ° NOTICE OF RIGHT TO CANCEL (If applicable)
- ° LOAN APPLICATION DISCLOSURE
- ° ACKNOWLEDGMENT
- ° BORROWER PROPERTY CONDITION CERTIFICATION

AMERICAN WHOLESALE LENDER
STATEMENT OF DEDUCTIONS FROM LOAN AMOUNT

BORROWERS NAME Talita LOAN NUMBER 16608458
BROKER Amel Dione
LOAN AMOUNT 44,055.00

DEDUCTIONS

DISCOUNT POINTS () to: _____
TAX SERVICE FEE to: Countryside Tax Services _____
FLOOD CHECK FEE to: Landscape Flood 26.00
UNDERWRITING FEE to: LENDER (PRINT THE WORD "LENDER") _____
PROPERTY VALUATION FEE to: _____
APPRAISAL WAIVER FEE to: _____
APPLICATION FEE to: Lender 225.00
INTEREST _____ DAYS@ _____ N/A

IMPOUNDS

HAZARD _____ MONTHS@ _____
TAXES _____ MONTHS@ _____
PMI _____ MONTHS@ _____
FLOOD _____ MONTHS@ _____

AGGREGATE ANALYSIS ADJUSTMENT

ESCROW BALANCE TRANSFER

Other: _____ to: _____
Other: _____ to: _____

BROKER FEES (Made payable to the Mortgage Broker)
(These fees are charged to the borrower on the HUD)

APPRAISAL FEE: 495.00 POC Payable to: The Craig Companies
CREDIT REPORT FEE: 18.00 Payable to: Landscape Credit
ORIGINATION FEE: _____
COURIER FEE: _____
PROCESSING FEE: _____
Other: Broker Fee 880.00
Other: Broker Fee 300.00
Other: _____

CLOSING COSTS PAID BY BROKER: \$ _____ (to be disclosed as POC by lender on HUD)

***Broker Fee/Commission**

*Amount to be disclosed in the 00th section of the HUD-1, including item 901 and 902, as Broker Fee/Commission (if by lender POC) + 0

TOTAL AMOUNT TO BE WISHED 43249.00

NOTE RATE 11.625 PAI _____
BROKER COST _____ (Due at time of closing - collect from broker; if not collected then request check)

TOTAL AMOUNT OF CHECK DUE BROKER 1192.00



Countrywide
AMERICA'S WHOLESALE LENDER
99 Rosewood Drive #225
Danvers, MA 01923

CLOSING ATTORNEY CHECKLIST

Office Numbers: (800) 846-8337 • (978) 767-3100
Closing Fax Numbers: (877) 285-8018

Closing Department Contact; Extensions:
Jame Cataldo, Closing Supervisor: 1707
Diane Crocin: 1716 Patty Martinelli: 1736
Linda Angeloni: 1730

Closing Date: 4/20/07 Scheduling Confirmation # _____
Borrowers Name: Lorenza Toribio and Marlene Abreu
Closing Attorney: McGonagle + McGonagle Phone # 781-471-3776
Firm Name/Address: 25 Wynn St, Reading, MA 01867 Fax # 781-471-3772
Contact Person: Alison
Dynamic Docs Registered Email Address: mcgonlaw@msn.com
(to register with DynamicDocs please visit www.dynamicdocs.com)

1. ☒ Closing Protection Letter from Title Co., if you have not closed a loan with this office in the last two months. Countrywide requires Fidelity Bond Coverage in the amount of \$1,000,000.00 and an E&O policy from a rating agency approved by Countrywide. (Check as a certificate holder for all NOI and YL success).

2. ☒ Wiring Instructions on Company Letterhead, if you have not closed a loan with this office in the last two months.

3. ☒ Annual Taxes: 3887.63 Taxes are paid: annual (circle one) quarterly

4. ☒ Taxes now due: 5/1/07 in the amount of \$ 296.20

5. ☐ "Habit Closing Confirmation Acknowledgment" Form (if applicable)

Attorney Fees (Please List ALL Fees)

Sentiment/Closing Fee	\$ <u>400</u>	Abstract/Title Search	\$ _____
Title Exam	\$ <u>35</u>	Title Insurance	\$ <u>110</u>
Doc Prep	\$ _____	Recording Fee	\$ _____
Survey Fee	\$ <u>75</u>	Courier Fee <u>Relay</u>	\$ <u>25</u>
Other	\$ _____	Other	\$ _____
Other	\$ _____	Other	\$ _____

TOTAL ATTORNEY FEES \$ 645

Mortgagee Title Clause

Countrywide Home Loans, Inc.
It's successors and/or assigns, ATIMA
1800 Tapa Canyon Rd SW-79
Sunny Valley, CA 93063

Insurance Clause

Countrywide Home Loans, Inc.
It's successors and/or assigns, ATIMA
P.O. Box 161206, FTWX - 22
Fort Worth, TX 76166

Closing Protective Letter

Countrywide Home Loans
It's successors and/or assigns, ATIMA
99 Rosewood Drive, Suite 225
Danvers, MA 01923

Once loan is closed, and you have faxed over this closing sheet and necessary documents, please CALL the CLOSING DEPT. and speak with someone that is authorized to release. Also, to better serve you, please allow 48 hours prior to the closing to arrive.

Heloc Closing Cost AcknowledgmentAttn: Allison From: Brian

Listed below is Countrywide's "Allowable HELOC fees." **ADDITIONAL FEES ARE NOT ALLOWED. Please fill in your Heloc fees and fax back to 977-285-9019.** Final closing documents will not be emailed until this fax has been received. Thank you.

Borrower: Tordis Loan # 122084881

Closing/ Escrow Fee: 400 (for not allowable in the state of VT)

Abstract/ Title Search: 75

Title Exam: _____

Title Binder: _____

Doc prep Title: _____ (for not allowable in the states of VT, ME, NJ, or MA)

Notary - Third Party: _____

Attorney/ Settlement Fee: _____

Title Insurance: 110 (not required on plug-back if does the loan amount under \$100,000.00. However, please disclose if you are charging this fee)

Courier: 75 (not allowable in the states of VT, MA, or ME)

Recording: _____

Survey: 75 (for not allowable in the state of VT)

Wire Fee: _____

Doc Signing Fee: _____

Electronic Doc Fee: _____

Grant Deed Fee: _____

Loan Tie-in Fee: _____

Other: _____

Other: _____

*All Heloc Broker Fee Descriptions on Heloc Equity Credit Line Agreement and Disclosure, must be disclosed as items on Good Book-1. Example: broker fee disclosed on Heloc agreement and disclosure as "Broker Loan Fee", then same fee must be disclosed as "Broker Loan Fee" on Good Book-1.

** ALL FEES DISCLOSED MUST MATCH THE HUD - 1 EXACTLY. RAISED/ADDITIONAL FEES ARE NOT ALLOWED!

Completed By: Shawn M Date: 4/20/07



Countrywide

Closing Instruction Certification

Closing Agent to review and initial the following instructions #1-8.

1. All dated documents to reflect the "Anticipated Closing Date" on page 1 of the Closing Instructions.

Closing Agent Initials: an

2. Notary section of Mortgage to be filled out completely. Be sure to include borrower(s) name(s), date, and county. Notary's name must be printed or stamped under Notary's Signature.

Closing Agent Initials: an

3. Any non-borrower vested on title, must sign the *Mortgage, Final Truth-in-Lending, Itemization of Amount Financed, and Notice of Right to Cancel* (if applicable.)

Closing Agent Initials: an

4. No revisions or changes to any closing document without pre-approval from your Countrywide Funder. Borrower(s) to initial any approved revisions or changes.

Closing Agent Initials: an

5. In the event the loan does NOT close, or the borrower rescinds, your Countrywide Funder MUST be notified IMMEDIATELY to prevent unnecessary funding. For borrowers rescinding, please fax the signed NRTC to 877-285-8018.

Closing Agent Initials: an

6. Borrower(s) MUST sign the "Notice of Right to Cancel" for all Owner Occupied Purchase Helecs.

Closing Agent Initials: an

7. Closing Agent to review the "Countrywide Document Return Checklist."

Closing Agent Initials: an

8. Closing Agent to review and sign the "Countrywide HUD-1 Certification" form.

Closing Agent Initials: an

Closing Agent:

Name: an

Signature: Allison McGinnis

I hereby acknowledge and certify that the instructions listed above have been adhered to. I understand that failure to comply with these instructions will result in removal from the "Countrywide Home Loans Approved Closing Agents List."

 **Countrywide**
HUD-1 Certification Form
Closing Agent to review and initial the following instructions #1-4.

1. Settlement charges MUST reflect specific payee.
Examples: Appraisal Fee to reflect "paid to Smith Appraisal Co." and Credit Report Fee to reflect "paid to Landsa & Credit."

Closing Agent initials: Ar

2. Broker rebate must be disclosed as "Broker Premium paid by Lender," and must reflect proper payee.
Example: Broker Premium \$2,100.00 to ABC Mortgage Co., pd by Lender.

Closing Agent initials: Ar

3. All broker credits to be placed on page 2 of the HUD-1.

Closing Agent initials: Ar

(#4 pertains to Helms only)

4. Settlement charges to be itemized and must NOT exceed fees disclosed on pages 3-5 of the "Home Equity Credit Line Agreement and Disclosure."

Closing Agent initials: Ar

Closing Agent:

Name: Allen McLean Signature: Ar

I hereby acknowledge and certify that the instructions listed above have been adhered to. I understand that failure to comply with these instructions will result in removal from the "Countrywide Home Loans Approved Closing Agents List."

EXHIBIT B

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

UNITED STATES,

Plaintiff,

v.

GENE BORTNICK,

Defendant.

Criminal Action No. 03-CR-0414

MEMORANDUM AND ORDER

Presently before the Court is the Motion to Dismiss Count One for Failure to State a Criminal Offense filed by Defendant Gene Bortnick on October 17, 2004 (Doc. No. 88). For the reasons that follow, Defendant's Motion is GRANTED.

I. STANDARD OF LAW

Rule 7(c)(1) of the Federal Rules of Criminal Procedure states that "[t]he indictment . . . shall be a plain, concise and definite written statement of the essential facts constituting the offense charged." Fed. R. Crim. P. 7(c)(1). The indictment "shall state the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated." *Id.* A valid indictment must contain all the elements of the crime alleged. United States v. Spinner, 180 F.3d 514 (3d. Cir. 1999). The indictment must contain specific facts that satisfy all the elements of the alleged violation; a recitation "in general terms the essential elements of the offense" is insufficient. United States v. Panarella, 277 F.3d 678, 684-85 (3d Cir. 2002). Moreover, the district court

may review the facts in the indictment to see whether, as a matter of law, they reflect a proper interpretation of criminal activity under the relevant criminal statute. Id. In considering a motion to dismiss an indictment, the Court must accept as true all factual allegations set forth in the indictment. United States v. Besmajian, 910 F.2d 1153, 1154 (3d Cir. 1990). Although Rule 47 of the Federal Rules of Criminal Procedure permits affidavits in support of motions generally, a district court may not consider evidence outside the indictment when the indictment's sufficiency is challenged. Fed. R. Crim. P. 47 advisory committee's note 3; Wright, Fed. Prac. & Proc. § 194, 364-67; United States v. Ginzburg, 338 F.2d 12, 17 (3d Cir. 1964) (upholding district court's striking of affidavit and exhibits in support of a motion to dismiss and stating that the court's analysis was "correctly limited . . . to the face of the indictment"). Such a rule prevents a motion for dismissal from being converted into a determination of factual issues, a task which is properly reserved for the jury.

II. DISCUSSION

Count One of the Second Superseding Indictment ("Indictment") alleges that Defendant violated 18 U.S.C. § 1344, the Bank Fraud Statute, which states that:

Whoever knowingly executes, or attempts to execute, a scheme or artifice

- (1) to defraud a financial institution; or
- (2) to obtain any of the moneys, funds, credits, assets, securities, or other property

owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises; shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. § 1344. Defendant's Motion to Dismiss Count One turns on the United States' alleged failure to assert that Defendant defrauded a financial institution, as statutorily defined. "Financial institution" is defined at 18 U.S.C. § 20 and includes, among other things, a bank insured by the Federal Deposit Insurance Corporation ("FDIC"). 18 U.S.C. § 20(1). The purpose of § 1344 then, is to "protect the federal government's interest as an insurer of financial institutions." *United States v. Laljie*, 184 F.3d 180, 189 (2d Cir. 1999). Thus, to survive a motion to dismiss for failing to state a criminal offense, an indictment under § 1344 must contain proof that the victim is a federally-insured financial institution. In addition to being an essential element of a criminal charge under § 1344, proof of FDIC insurance is the basis for federal jurisdiction in bank fraud cases. *United States v. Schultz*, 17 F.3d 723, 725 (5th Cir. 1994).

Both parties agree that Congress Financial Corporation ("Congress"), the entity to which Defendant allegedly made fraudulent statements, is not a federally-insured financial institution. Government's Opp. at 2; Def's. Mot. to Dismiss at 1. Congress, however, is a wholly-owned subsidiary of First Union National Bank ("First Union"), which is a financial institution. *United States v. McGlothlin*,

2002 WL 717080, *2 (3d Cir. 2002) (taking judicial notice that First Union is a "financial institution" under 18 U.S.C. § 1344). Defendant reads Count One to be premised on the theory that Congress was the "sole victim" of the bank fraud scheme and states that there are no factual allegations present in the indictment that Defendant engaged in any fraudulent activity with respect to First Union. Def's. Mot. to Dismiss at 1-2. Defendant thus contends that the United States has not alleged facts that satisfy all the elements necessary for an indictment under § 1344. Id. at 2.

For its part, the United States claims that Congress' status as a non-financial institution should not mandate dismissal because the money or funds obtained by Defendant through his allegedly fraudulent scheme were actually owned or under the custody and control of First Union and because the close business and monetary relationship between Congress and First Union leads to the conclusion that a fraud on Congress is a fraud on First Union. Government's Opp. At 3. In support of these contentions, the government offers the affidavit of Andrew Robin, the Executive Vice President of Congress. In his affidavit, Mr. Robin states that Congress is a wholly-owned subsidiary of First Union; that the two entities file consolidated financial statements; that First Union provides Congress with its operating capital; and that First Union determines what kind of loan products Congress will offer. Government's Opp., Ex. A, Robin Aff. at ¶ 5-11. In its Memorandum of Law in Opposition to Defendant's Motion to Dismiss and at the November 1, 2004 hearing on that Motion, the United States relied almost solely on the facts contained in the affidavit of

Mr. Robin. Though this information would have been useful to the grand jury in fashioning its indictment, well-established federal procedure and Third Circuit case law discussed above deem it improper for this Court to consider factual allegations in an affidavit when considering the instant motion to dismiss.

As legal support for its position, the Government alleges in its brief that United States v. Walsh, 75 F.3d 1 (1st Cir. 1996) is directly on point, as a case in which the First Circuit held that the Bank Fraud Statute does not require the immediate victim of the fraud to be a financial institution. In Walsh, the defendant was convicted under § 1344 for offenses related to a scheme to fraudulently obtain mortgages from a wholly-owned subsidiary of Dime Savings Bank of New York. The subsidiary was not federally insured. Noting that it limited its holding to the facts in that case, the Court upheld the conviction, finding that the subsidiary was essentially the alter ego of the federally-insured parent and that holding defendant liable for defrauding that institution best served the purposes underlying § 1344. Id. at 9. The First Circuit cited the following facts as relevant to its decision in Walsh: 1) that the subsidiary was wholly-owned, 2) that the parent provided all the subsidiary's operating capital, 3) that the parent dictated what loan products the subsidiary would offer, and 4) that the parent was assigned and serviced all mortgages entered into by the subsidiary. Id.

The Government also cites United States v. Pelullo, 964 F.2d 193 (3d Cir. 1992), as support for its contention that a fraud on Congress is a fraud upon its parent, First Union. In Pelullo, the Third Circuit was confronted with whether a defendant convicted of wire fraud under 18 U.S.C. § 1343 was subject to the

extended 10 year statute of limitations provided for in 18 U.S.C. § 3293(2). The extended statute of limitations in § 3293(2) is only applicable to wire fraud offenses that "affect a financial institution." 18 U.S.C. § 3293(2). The defendant claimed that the ten year statute of limitations was inapplicable, as the party to the loan at issue was not a financial institution, but rather a wholly-owned subsidiary of one. Pelullo, 964 F.2d, at 214. The Third Circuit found that the ten year statute of limitations did apply, stating that "the statute . . . broadly applies to any act of wire fraud 'that affects a financial institution'" and noting that "[defendant's] argument would have more force if the statute provided for an extended limitations period where the financial institution was the *object* of fraud." Id. at 216.

The Court agrees with the Government that Walsh is on point in this instance, but cannot concur that Pelullo provides any guidance in this circumstance. While the Third Circuit held in Pelullo that the showing of a parent-subsidary relationship between a financial institution and a defrauded entity may be sufficient to trigger the extended statute of limitations under the wire fraud statute, this Court does not believe that its holding in that case is binding on the question of whether the showing of such a relationship is sufficient to support an indictment for bank fraud. The extended statute of limitations requirement in the wire fraud statute is written more broadly than are the essential elements of the bank fraud statute. The former requires only that the defendant's activity "affect" a financial institution, while the latter requires that the defendant fraudulently obtain the monies or other property of a financial institution. The financial institution

element of the bank fraud statute is much closer to requiring a showing that the federally-insured entity was the "*object* of fraud."

As the statements in Mr. Robin's affidavit are outside the scope of the Court's inquiry, the question for this Court is whether the indictment itself contains factual allegations, such as the ones cited in Walsh, sufficient to satisfy the "financial institution" requirement of § 1344. The factual references to First Union in Count One of the Indictment are as follows:

1. Paragraph 6 of Count One states that "Congress Financial Corporation . . . was a wholly-owned subsidiary of First Union National Bank, which was a financial institution, the deposits of which were insured by the Federal Deposit Insurance Corporation." Second Superceding Indictment Count 1, ¶ 6.
2. Paragraph 10 of Count One states that "defendant Gene Bortnick knowingly executed and attempted to execute a scheme to defraud Congress and First Union National Bank, and to obtain monies owned by and under the care, custody, and control of Congress and First Union National Bank" Second Superceding Indictment Count 1, ¶ 10.

The remainder of Count One details a variety of allegedly fraudulent activities engaged in by Defendant with respect to Congress.

Taking both statements in the Indictment with respect to First Union as true, the Court finds that the United States has not sufficiently alleged a bank fraud claim against Defendant. To begin, the reference to First Union in paragraph 10 is a

recitation of the elements of the offense, which does not satisfy the United States' burden of alleging specific facts demonstrating harm to a financial institution. As for paragraph 6, it establishes only that Congress is a wholly-owned subsidiary of First Union. As discussed above, the Third Circuit's holding in Pellulo does not require this Court to find that this fact is sufficient to support the financial institution element of § 1344. While this Court might conclude that First Union was naturally affected by defendant's alleged fraud on one of its wholly-owned subsidiaries, it cannot leap to the conclusion that defendant's alleged fraud deprived First Union of its monies or other property without more information than the bare assertion that a parent-subsidary relationship existed between the two.

Moreover, applying the principles of Walsh, the Court finds that the factual allegations of the indictment are insufficient to establish that Congress is the equivalent of a financial institution under the bank fraud statute. Unlike in Walsh, the indictment establishes no connection between First Union's federally-insured funds and those extended to Defendant by Congress.

The indictment contains no factual allegations that would support an indictment of Defendant for fraudulent activities directed at First Union, the only financial institution mentioned in Count One. The indictment does contain factual allegations that would support an indictment of Defendant for fraudulent activities directed at Congress. However, this Court can locate no binding case law that would support a finding that the United States' assertion that Congress is a subsidiary of First Union is a specific enough factual basis to satisfy the "financial

institution" requirement of § 1344. At the very least, the United States would need to allege facts establishing some connection between Defendant's activities and the federally-insured funds. As it has not done so, Defendant's Motion to Dismiss is granted for failure to state criminal offense.

An appropriate Order follows.

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

UNITED STATES,

Plaintiff,

v.

GENE BORTNICK,

Defendant.

Criminal Action No. 03-CR-0414

ORDER

AND NOW, this 29th day of November, 2004,
it is hereby ORDERED that the Motion to Dismiss
Count One for Failure to State a Criminal Offense
filed by Defendant Gene Bortnick on October 17, 2004
(Doc. No. 88), is GRANTED.

BY THE COURT:

Legrome D. Davis, J.

APPENDIX D

07/23/2014

Full docket text for document 51:

Judge Douglas P. Woodlock: ELECTRONIC ORDER entered denying 47 Motion to Dismiss as to Michael P. O'Donnell (1); finding as moot 50 Motion for hearing as to Michael P. O'Donnell (1). Count One of the Indictment alleges on its face a crime within the jurisdiction of this court. Motion to Dismiss practice is not the proper vehicle to test the sufficiency of the evidence supporting the allegation. (Woodlock, Douglas) (Entered: 07/23/2014)

APPENDIX E

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

UNITED STATES OF AMERICA

v.

MICHAEL P. O'DONNELL

**BEFORE THE HONORABLE DOUGLAS P.
WOODLOCK**

**UNITED STATES DISTRICT JUDGE
MOTION HEARING**

July 10, 2015

**CRIMINAL ACTION
13-10262-DPW-1**

APPEARANCES:

**UNITED STATES ATTORNEY'S OFFICE, (By
AUSA Mark J. Balthazard and AUSA Veronica M.
Lei), 1 Courthouse Way, Suite 9200, Boston,
Massachusetts 02210, on behalf of the United States
of America**

**DENNER PELLEGRINO, LLP, (By Jeffrey A.
Denner, Esq.), Four Longfellow Place, Suite 3501,
35th Floor, Boston, Massachusetts 02114, on behalf of
the Defendant**

**DASILVA LAW GROUP, (By Joseph G. Keller, Jr.,
Esq.), 4 Longfellow Place, 35th Floor, Boston,
Massachusetts 02114, on behalf of the Defendant**

**Courtroom No. 1
1 Courthouse Way
Boston, Massachusetts 02210**

James P. Gibbons, RPR, RMR
Official Court Reporter
1 Courthouse Way, Suite 7205
Boston, Massachusetts 02210
jmsgibbons@yahoo.com

PROCEEDINGS

THE CLERK: All rise for this Honorable Court.

This is United States of America versus Michael P.

O'Donnell, Criminal Action No. 13-10262.

Court is open. You may be seated.

THE COURT: I have this motion for a nonjury trial, but it seems it's not altogether completed, and I have a jury coming in on Monday. And I am not continuing this case any further.

So what is going to happen? What contingencies do we have here that should give me pause about whether or not I am bringing a jury in.

I read this and it says -- and I'm reading now the government's response, "If the Court accepts a waiver" -- and I would accept a waiver if it's knowing and voluntary -- "the parties are in the process of negotiating the details of a stipulation."

Well, there can't be a waiver until there's a stipulation.

MR. DENNER: We have a stipulation, your Honor.

THE COURT: You have the stipulation?

MR. DENNER: We have agreed on the stipulation. It has not been signed yet, but it is completely agreed upon. It can be signed right now.

THE COURT: All right.

And the parties are satisfied that that's going to be enough to deal with the case?

MR. DENNER: The defense is, your Honor.

THE COURT: Okay.

MS. LEI: Well, the government obviously does want the stipulation read into the record and exhibits admitted so that we have a fulsome record going into next week.

THE COURT: Of course, but there is an agreement as to the stipulation?

MS. LEI: There is a stipulation of agreed-upon facts, yes.

THE COURT: And there are attached exhibits or what?

MS. LEI: There are exhibits referenced, and we have the exhibits here ready to offer into evidence.

THE COURT: Well, I think what I would like to do is I would like to take a look at a copy of this stipulation. If it's going to be entered into by the parties, it's got to be signed. And then we'll take this up in another ten minutes or so if it's that close to being resolved, and then I will inquire of Mr. O'Donnell.

MS. LEI: Just to warn you, your Honor, we made a few changes this morning, but it's in final form. It just -- if we're going to docket it, I would want to edit it and give it to defense. But we can do that in

the next few minutes. I can give this to you to read, and when we reconvene, we will have a final copy.

THE COURT: But I want a clean copy. I don't want this with initials all around the thing.

MS. LEI: Right.

THE COURT: So you will pass me a copy of it. You'll get a clean copy, and then we'll proceed from there with respect to the stipulation and waiver, okay?

MS. LEI: Yes, your Honor.

THE COURT: Pass it to Mr. Lovett.

THE CLERK: All rise.

MS. LEI: Sure, your Honor.

(Recess.)

THE CLERK: All rise.

This Honorable Court is back in session. You may be seated.

THE COURT: Well, I've been quickly looking through the stipulation, and I have some questions, perhaps issues, with it.

The first is I think that the stipulation has to stand alone. There is a stipulation that admits to the allegations contained in the indictment, except for the allegation that the lender charged was Countrywide Bank. That incorporates by reference the indictment.

I don't know if the parties want to incorporate by reference the indictment or not. I would have thought that the Trial Stipulation would stand alone and not have to make reference to the indictment itself.

Second, just quickly going through and using page 2, it states that "L.T. would testify"... and then talks about that.

That's the language of an Alford plea. It doesn't dispute that she testified that way. I don't know whether he's stipulating to that.

The way in which I would expect this to be referenced is "L.T. has a grade-school education, does not speak English," that sort of thing, rather than what she testifies to.

The short of it is I think it's got shortcomings, and so I would like to understand what the parties have in mind for it.

My view, I think, is rather than making a Rube Goldberg machine with cross-references to matters that are not attached to the Trial Stipulation and to avoid some suggestion that there could be, but isn't raised, some dispute with respect to testimony, for instance of L.T. here, that it should state explicitly, if there is a stipulation, that what L.T. would testify to is, in fact, the truth. And that, of course, goes to Caruso as well.

Caruso will testify that he included the name and alias of John Carter.

I mean, I assume that the stipulation is that he did, but this is an inchoate stipulation as far as I'm concerned. Until it is cleaned up, I'm not going to accept it.

And it has to be cleaned up now, meaning this morning. We have a jury coming in, and the jury is going to come in if this isn't cleaned up this morning.

So do you have questions about my approach to this?

I mean, for instance, there are cross-references, and Ms. Lei has indicated that you want the exhibits that are referenced, but are they cross-referenced? Are they part of the stipulation itself? I mean, that's the problem with the drafting of the stipulation, and, of course, the last-minute quality of this.

But are there questions you have with me about what I want in this stipulation?

MS. LEI: I don't think so, your Honor. I can revise this so that it is a stand-alone document. I think I understand your concerns.

THE COURT: I mean, I look at this and think that -- I haven't cross-referenced the indictment, but it seems to me that it covers all of the allegations in the indictment. Maybe it doesn't, but it seems to. But I don't want a cross-reference to the indictment here. That simply raises some additional issues.

And for these purposes I am going to read the stipulation to Mr. O'Donnell to be sure that he agrees with everything that's in the stipulation. Of course it will be signed, but it will be read into the record as part of the colloquy to determine whether or not Mr. O'Donnell knowingly and voluntarily is waiving his right to a jury trial on all the issues in the case.

MS. LEI: And we would like that as well.

THE COURT: So how long to get it straightened and signed off on?

MS. LEI: We can come back in a half-hour, if that's enough time.

THE COURT: Okay. So we'll go through it, and I'll assume that you've captured my concerns and addressed them, and I will start with -- I'm sorry.

(Counsel conferred.)

MS. LEI: Maybe 45 minutes so we can take a break and confer.

THE COURT: I will be generous. It will be 10:30.

MS. LEI: Thank you.

THE COURT: All right.

THE CLERK: All rise.

(Recess.)

THE CLERK: All rise.

This Honorable Court is back in session. You may be seated.

THE COURT: Well, I have had handed to me a revised Defendant's Trial Stipulation, which seems to be in order for me, and I am prepared to make an inquiry of the defendant with respect to waiver of jury trial.

But I want to know a little bit more as well about the schedule that the parties have in mind here. So, first, I guess from the government, what do you see happening?

MS. LEI: Sure, your Honor.

We expect that the bench trial would only last a day, probably we could finish it from 9:00 to 1:00, which is your usual scheduled hours.

Our preference would be to have it occur on Thursday, because the witness who we are calling is

flying from California, and she's already booked a flight, and so she's ready to fly in on Wednesday and testify on Thursday. So that would be our preference. And then we'll have one other witness who's local who would be easy enough to move to Thursday. He was going to be ready on Monday.

So what's the defendant's case then?

MR. DENNER: Your Honor, we would have somewhere between zero and two witnesses, probably one witness, probably not for a particular -- probably for an hour. You recall that we are talking about a Mr. Fendly.

THE COURT: Right.

MR. DENNER: And we still intend to call him, not for the purposes of -- subject, of course, to your decisions -- not for the purposes of the culture of Countrywide, but for explaining some of the exhibits that we have and talking about the issue of the federal connection and federal nexus.

THE COURT: Okay.

Well, I think that I want to start on Wednesday and go to Thursday. Friday will be out. I can't sit on Friday. I can't sit on Monday. So I want to be sure I get this taken care of, so you'll get your witness in here --

MS. LEI: Okay, we will contact her.

THE COURT: -- for Wednesday, all right?

So let me ask Mr. Lovett to swear Mr. O'Donnell, and I will ask him some questions.

MICHAEL P. O'DONNELL, sworn.

THE COURT: You may be seated, Mr. O'Donnell.

Mr. O'Donnell, as you know from the conversations that we've been having, the question before me is whether or not your apparent decision to waive your right to a jury trial is a knowing and voluntary act.

In order for me to decide whether that's the case, I have to ask you some questions. Some of those questions are personal in nature. You'll understand I am not trying to delve into your personal life.

I am also going to recite what is the Trial Stipulation, that is, the things you're agreeing to in this case, bearing in mind that there is an open issue that apparently you want to litigate in the case.

So let me start by asking you how old a man you are.

THE DEFENDANT: Fifty-three.

THE COURT: How far did you get in school?

THE DEFENDANT: Some college, mostly college.

THE COURT: How many years of college?

THE DEFENDANT: Four years, but I never finished my degree.

THE COURT: What was the course of study that you were taking?

THE DEFENDANT: Business.

THE COURT: Where was that?

THE DEFENDANT: North Adams State College. It's now Mass. College of Liberal Arts.

THE COURT: And what have you been doing for a living for the past ten years or so?

THE DEFENDANT: Owned a mortgage -- I was in the mortgage business since out of college, '84, so almost 30 years.

THE COURT: Have you had any difficulty understanding what this case is about, what the government is accusing you of?

THE DEFENDANT: No.

THE COURT: Have you had an adequate opportunity to discuss this case with your attorney, Mr. Denner?

THE DEFENDANT: I have.

THE COURT: Are you satisfied you received from him the kind of legal advice that you need to make your own determination about whether or not to waive your right to a jury trial?

THE DEFENDANT: I am.

THE COURT: Now, you understand that this is as subtle and difficult a strategic judgment as a defendant can make.

Do you understand that?

THE DEFENDANT: I do.

THE COURT: And that it's to some degree unusual?

THE DEFENDANT: I understand.

THE COURT: There are facts or there are statistics that come out at various times about the

percentage of cases that go jury-waived, but it's generally very low.

Do you understand that?

THE DEFENDANT: I do.

THE COURT: So that means that most defendants are not choosing to go jury-waived.

Do you understand that?

THE DEFENDANT: I do.

THE COURT: I just looked at the calendar and realized that I am 11 days short of being on the bench 29 years. I have done it once. The defendant has asked for it once in that time period. And you should understand that that one time I found the defendant guilty. You understand, as a consequence, that this is a very difficult decision to make, for which you can't be sure that there is going to be an outcome that's favorable to you.

THE DEFENDANT: I understand.

THE COURT: And you have discussed this fully with Mr. Denner; is that right?

THE DEFENDANT: I have in detail.

THE COURT: Can you tell me if you've ever had any problems with substance abuse, either drugs or alcohol?

THE DEFENDANT: No drugs.

I have had alcohol issues in the past.

THE COURT: Can you explain them in a general sort of way?

THE DEFENDANT: I have been cited for drunk driving a few times, more than a few times,

quite a few times. It's been, I think, ten years since I've had that problem.

THE COURT: Do you still drink?

THE DEFENDANT: I do, but not to the extent I was back then.

THE COURT: Do you think that your drinking has any effect on your ability to make a clear judgment in a matter such as this?

THE DEFENDANT: I do not.

THE COURT: Are you satisfied that you're in a position to make that kind of judgment?

THE DEFENDANT: I am.

THE COURT: Have you ever had any problem -- not so much a "problem," but have you ever had occasion to consult with a mental health professional, like a psychiatrist, a psychologist, a psychiatric social worker, or anyone like that?

THE DEFENDANT: No.

THE COURT: Are you taking any prescription drugs?

THE DEFENDANT: I am for sleeping. It's Ambien, just like -- that's it.

And high-cholesterol medication.

THE COURT: A statin?

THE DEFENDANT: Yes, Simvastatin.

THE COURT: Is any of that interfering with your ability to make a clear judgment now about pleading guilty [sic]?

THE DEFENDANT: No.

THE COURT: Are you seeing a physician for any kind of physical problem?

THE DEFENDANT: Yes.

THE COURT: Just generally, what is it?

THE DEFENDANT: I see an oncologist and a surgeon and radiologist.

THE COURT: And is that an active concern about cancer?

THE DEFENDANT: It's always a concern, but my treatment has gone well, and I've been -- I haven't had a recurrence in two years, which is a very good sign.

THE COURT: And the nature of the cancer?

THE DEFENDANT: It was neck and throat.

THE COURT: Neck and throat?

THE DEFENDANT: Neck and throat.

THE COURT: Now, you understand that you have the right under our Constitution to have a jury decide this case. A jury is 12 individuals. They have to be unanimous in making their decision in the case, and you're choice, if you go jury-waived, is to have one person make the choice.

Do you understand that?

THE DEFENDANT: I do.

THE COURT: People who play the odds probably think that with 12 individuals there is a better chance that you're going to have a lack of unanimity than there is with one individual.

You understand that?

THE DEFENDANT: I do.

THE COURT: One of the reasons that lawyers and defendants, I think, go to trial before a jury is that it's possible to develop potential errors in the case, errors that could lead to a reversal on appeal. And those errors can occur even if the question is not clear, if the case has not been presented fairly to the jury. You're giving up the right to have that potential for a reversal on appeal as part of the strategies that you pursue in the case.

You understand that?

THE DEFENDANT: I do.

THE COURT: Now, if I approve this, and you decided that I am going to decide the case, the ultimate issue in the case, but the discrete legal issue in the case as well.

You understand that?

THE DEFENDANT: I do.

THE COURT: Why are you doing it?

THE DEFENDANT: I believe that you are in the best position to understand the documents and what happened here.

THE COURT: Okay.

Are you afraid that the jury is going to misunderstand and look at the facts and circumstances of this case and let that misunderstanding spill over into treatment of the legal issue?

THE DEFENDANT: I believe it's a very technical issue that needs to be explained in detail, and I'm afraid that a jury with lack of experience in

that specific nature will have a difficult time understanding the actual facts.

THE COURT: Okay.

Now, I've asked this several times, but I will ask it again.

Have you fully discussed this with your attorneys?

THE DEFENDANT: Yes, I have.

THE COURT: Are you satisfied you know enough about what the potential legal issues are, what the jury effects might be, to decide that you want to have a Judge, me, decide this case?

THE DEFENDANT: I am.

THE COURT: I told the parties at the outset that I wanted a defendant's stipulation that was self-contained, that involved all the facts that you're prepared to agree are proved in this case, and if I accept this stipulation, that means they are proved. You don't get to dispute them.

You understand that?

THE DEFENDANT: I do.

THE COURT: Now, Ms. Lei has brought back a somewhat revised version of this Defendant's Trial Stipulation.

Have you discussed it fully with your attorneys?

THE DEFENDANT: I have.

THE COURT: And are you prepared to sign that Trial Stipulation?

THE DEFENDANT: I am.

THE COURT: So what I am going to do is I am going to read this to you, and I am going to ask you whether or not you agree with it, and then, if that's the case, I will accept a signed version of it, signed by you, signed by your attorney.

Understand?

THE DEFENDANT: I do.

THE COURT: Do you have a copy in front of you?

THE DEFENDANT: Right in front of me, yes.

THE COURT: So let's go through it.

It reads: "The defendant Michael P. O'Donnell stipulates and admits that he (1) engaged in a scheme or artifice to defraud or obtain money by means of materially false statements or misrepresentations; and, (2) did so knowingly. He further stipulates and admits to the following:

O'Donnell was a self-employed loan originator operating through his mortgage loan originator business AMEX Home Mortgage Corporation, located in Middleton, Massachusetts. As a loan originator, O'Donnell completed mortgage loan applications based on information purportedly supplied by individuals seeking to obtain loans for the purchase or refinance of real estate, submitted these applications to mortgage companies, which then funded the loans, if approved. In or about October 2006 through April 2007, O'Donnell engaged in a scheme to defraud mortgage lenders in connection with the refinancing of a three-family dwelling located at 50[sic] Harbor Street in Salem, Massachusetts."

MS. LEI: It's "40," your Honor.

THE COURT: Excuse me.

"40 Harbor Street in Salem, Massachusetts," and the reference is in the future to "the Harbor Street Property."

"In 2005, L.T. purchased the Harbor Street Property and has lived in one of its units since that time. The deed was in the names of L.T. and M.A., her daughter. In late 2006, L.T. sought to refinance her mortgage to reduce her monthly payments. In or about February and March 2007, O'Donnell knowingly submitted a loan application containing material, false information about L.T.'s income, employment and assets to Homecomings Financial Network, Inc" -- which will be referred to as "Homecomings" hereafter -- "located in New Jersey. In conjunction with the materially false representations in that application, O'Donnell: (1) provided bogus bank account statements," and here there's a reference to Exhibit 2.13, is that it?

MS. LEI: Correct, your Honor.

THE COURT: And what we're doing is there will be attached to this stipulation these documents. This is going to be a self-contained agreement, all right?

THE DEFENDANT: Yes.

THE COURT: But you're agreeing that you provided bogus account statements, and they are found in Exhibit 2.13?

THE DEFENDANT: Yes.

THE COURT: "(2) provided bogus letters from tax preparer/accountant John Caruso, (also

known as John Carter) falsely representing that Caruso had prepared L.T.'s tax returns," and here the reference is to Exhibits 2.14 and 2.15 "and, (3) arranged for Caruso to provide fraudulent verbal verification of L.T.'s employment. The loan application package also falsely reflected that L.T. would pay over \$31,000 of her own money as part of the refinancing, which was a material fact in Homecomings's risk analysis and decision to approve the loan.

"L.T. has a grade school education and does not speak or read English. She never completed the Uniform Residential Loan Application dated October 19, 2006 for a \$352,000 loan, which O'Donnell knowingly submitted to Homecomings," and here the reference is to Exhibit 2.05. "L.T.'s supposed signature on the loan application dated October 19, 2006 is a forgery, although the signature on the loan application dated March 7, 2007," which is Exhibit 2.06, "is a true signature.

"Moreover, the employment, income and asset information that O'Donnell provided for L.T. in the loan application is false. Specifically, instead of earning over \$10,000 per month as the falsified applications claimed, L.T., in reality, earned about \$1,200 a month at that time. L.T. never had \$50,000, or even nearly that much, on deposit in a bank account, and she never provided any income or asset information to O'Donnell. Moreover, O'Donnell fabricated the Bank of America account statements and then submitted them to Homecomings.

Further, L.T. never hired John Carter or John Caruso to prepare her tax returns and does not know anyone by those names. Caruso, in turn, had an

arrangement with O'Donnell going back several years in which O'Donnell engaged Caruso to provide false letters, tax documents and verbal verifications of employment to lenders on loans O'Donnell sought on behalf of his clients. O'Donnell's arrangement with Caruso included his use of the alias John Carter. Caruso knew that if a lender called his office asking to speak to John Carter, then the lender was referring to a fraudulent loan, and Caruso provided the requested employment verification. Finally, Caruso never prepared tax returns or anything else for L.T. and did not know her.

Because L.T. in fact did not have over \$31,000 to put towards the refinancing, O'Donnell paid the money using his AMEX Home Mortgage bank account. Based on the fraudulent representations in the loan application and the HUD-1 settlement statement, and the \$37,392.16 that O'Donnell provided at closing, Homecomings funded a \$352,000 loan, secured by the Harbor Street Property, to L.T. O'Donnell received \$14,698 in various broker fees as a result of this loan, which L.T. never approved.

To recoup his \$37,392.16 that he had put into the first transaction, O'Donnell submitted an application on behalf of L.T. for a second mortgage loan in the amount of \$44,000. O'Donnell submitted the application and other documentation to Countrywide, where Countrywide Home Loans employees underwrote and processed the loan application. In conjunction with this second loan application, O'Donnell knowingly submitted the same false information and documentation as he had to Homecomings, i.e.: (1) a loan application in which he falsely inflated L.T.'s income and assets, (2) bogus Bank of America account statements, and (3) a bogus

letter from Caruso falsely advising that he had prepared L.T.'s tax returns. O'Donnell also arranged for Caruso to provide a fraudulent verbal verification of L.T.'s employment.

"Regarding the documents submitted to Countrywide on her behalf, L.T. never completed the Uniform Residential Loan Application dated October 19, 2006 for a \$44,000 loan." The reference here is to Exhibit 1.07. "L.T.'s supposed signature on the loan application dated October 19, 2006, is a forgery, although the signature on the loan application dated October 20, 2007," which is Exhibit 1.06, "is a true signature.

Countrywide's approval of L.T.'s application was conditioned upon satisfactory completion of various conditions, including borrower-written explanations of previous credit inquiries and late credit line payments. Countrywide also requested, among other information, a letter from a certified public accountant stating that L.T. has been self-employed for two years. O'Donnell received the list of conditions from Countrywide on or about March 26, 2007." Here the reference is to Exhibit 1.12. "O'Donnell, in turn, fabricated responses from L.T. to answer Countrywide's questions about credit inquiries and late credit line payments. He then, again, forged L.T.'s signature and forwarded these responses to Countrywide." The reference is to Exhibit 1.15. "In response to Countrywide's request for a CPA letter, O'Donnell also provided a copy of the bogus letter from Caruso, falsely advising that he had prepared L.T.'s tax returns and verifying that L.T. was supposedly self-employed at the time. L.T., however, never created or signed the documents that O'Donnell provided to Countrywide," [Exhibit 1.12.]

"nor did she authorize O'Donnell to provide such information on her behalf to Countywide.

"The false information concerning L.T.'s income, assets and employment was material to Countrywide's decision to approve the \$44,000 loan application. Indeed, if Countrywide had known that the income, asset and employment information provided for L.T. was not true, Countrywide would not have approved the loan application that O'Donnell submitted. The \$44,000 Countrywide loan closed on or about April 20, 2007, and O'Donnell received \$37,392 directly from the proceeds by a check payable to AMEX Home Mortgage, along with an additional \$1,198 in fees.

"O'Donnell admits and stipulates to the admission of the attached documents marked as Exhibit 1 - 9, 11 and all subparts thereof. He further admits and stipulates to the attached Stipulations, which previously were filed with the Court as Docket Numbers 86 - 93," and in the final form all of these documents will be attached to the stipulation.

So do you agree to all of that?

I'm sorry, Ms. Lei, did you have something you wanted to add?

MS. LEI: Sure, your Honor. I just wanted to point out that the attached Exhibits 1 - 9 and 11 are up on the table.

MR. DENNER: Can I have one second?

THE COURT: Sure.

(Whereupon, the defendant and his attorney confer.)

THE DEFENDANT: Yes, your Honor.

THE COURT: Okay.

So what this means is that these are facts. You agree to the facts. The facts, these facts, are going to be part of the determination that I make in this case, and these facts are established beyond a reasonable doubt.

You understand that?

THE DEFENDANT: I do.

THE COURT: So do we have a signed version of the Defendant's Stipulation?

MR. DENNER: May we sign it right now, your Honor?

THE COURT: Yes, please.

MR. DENNER: If I might approach, your Honor?

THE COURT: Yes.

(Document handed to the Court.)

THE COURT: Now, in addition, it's necessary for me to have a signed stipulation of Waiver of Trial By Jury, and I take it there is a copy of that?

MR. DENNER: With your permission, your Honor, we will sign that as well.

THE COURT: Yes.

(Pause in proceedings.)

MS. LEE: May I approach, your Honor?

THE COURT: Yes, please.

(Document handed to the Court.)

THE COURT: So I have had handed up to me a signed copy of the Waiver of Trial By Jury signed by Mr. O'Donnell and Mr. Denner, and by Ms. Lei on behalf of the government.

Mr. Denner, I want to ask you to be sure that you have discussed fully with your client the advantages and disadvantages of proceeding without a jury trial but jury-waived?

MR. DENNER: Yes, sir.

THE COURT: Do you have any doubt about the ability of this defendant knowingly and voluntarily to waive his right to a jury trial?

MR. DENNER: I do not.

THE COURT: Has anything come to your attention that would suggest that the defendant may not be competent to waive a jury trial?

MR. DENNER: No, your Honor.

THE COURT: Thank you.

And, Ms. Lei, has anything come to your attention that suggests that the defendant may not be competent or did not knowingly and intelligently waive his jury-trial right?

MS. LEI: No, your Honor.

THE COURT: Based on the discussion that we've had this morning, I am satisfied that the defendant has knowingly, voluntarily, and intelligently waived the right to a jury trial, and, as a consequence, I am going to approve the waiver, which I'm signing now.

(Pause in proceedings.)

THE COURT: So the next question, although I have indicated what I want to do in terms of schedule, is to be sure that I have the case law that the parties want me to be thinking about at this point.

I assume, going through the submissions that the parties have made, that the parties want me to be familiar with United States v. Brandon, which is 17 F.3d 409, a 1994 case of the First Circuit; United States v. Edelkind, 467 F.3d 791, a First Circuit case from 2006; and Loughrin -L-O-U-G-H-R-I-N v. United States, a Supreme Court case from the 2013 term, at 134 S.Ct. 2384.

Are there any other cases that you would like me to make myself familiar with?

MR. DENNER: No, sir. I think that is our position.

THE COURT: Anything else from the government?

MS. LEI: We understand this is in a different district, but just a reference, US v. McCloskey-Diaz --

THE COURT: Hold on just a second.

MS. LEI: It's cited in the Proposed Jury Instruction No. 18 that we submitted, Document 112. It's a District of Puerto Rico case, and it's 824 --

THE COURT: This is in the supplemental instruction?

MS. LEI: That's correct. It's in the footnote.

THE COURT: 824?

MS. LEI: F.Supp.2d 269.

THE COURT: Okay. All right.

So I will try to be as familiar as I can with those cases which, it seems to me, shape the legal issue and, hence, the factual issue in the case.

So the government has indicated, as I understand it, that we will have Ms. Jenkins here, and Reade Morrison, I don't know, male or female?

MS. LEI: Male.

THE COURT: Mr. Morrison was the Countrywide underwriter?

MS. LEI: Correct.

THE COURT: And those will be the government's live witnesses?

MS. LEI: Correct.

THE COURT: Okay.

And, Mr. Denner, again, who will you be calling?

MR. DENNER: We would be calling Neill Fendly, and we may or may not be calling the defendant.

THE COURT: All right.

So I anticipate anyway that the evidence can be completed on Wednesday, but as I indicated, my schedule is such that I want to be sure that we get the evidence completed next week.

I am not sure that it requires extensive additional time, but I think what I would prefer to do is, if the parties wish to, permit you an opportunity to submit a brief memoranda after the evidence is

completed and have, effectively, closing argument the following week.

Does that then make -- if we did it on Tuesday, the 21st, nine o'clock, which was going to be trial time anyway?

So if you submit your memorandum by noon on the 20th, that will give me a chance to review it, and why don't we make it ten o'clock on the 21st, and it will be my intention to rule from the bench.

All right?

MR. DENNER: Yes, your Honor, that's fine.

MR. BALTHAZARD: I'm sorry, your Honor. I was looking for my calendar.

The date for the hearing?

THE COURT: 21st at ten o'clock, which --

MS. LEI: And the memo is due on the 20th.

THE COURT: On the 20th by noon.

MR. BALTHAZARD: Okay.

THE COURT: This is not an extensive brief, but something that focuses me on anything that the parties think will be helpful to me as I think this through.

MS. LEI: We are expecting to do short openings as well.

THE COURT: Okay.

MS. LEI: Okay.

THE COURT: Emphasis on "short" or "brief," I should say.

MS. LEI: Your Honor, would you like us to retain custody of the exhibits?

THE COURT: Yes, I would.

We'll hold onto the Waiver of Trial By Jury and the narrative, Defendant's Trial Stipulation, but when things are concluded, it will become the record.

MR. BALTHAZARD: Thank you.

THE COURT: But the Defendant's Trial Stipulation in its narrative form and the Waiver of Trial By Jury will be entered on the docket now. I'll pass them back to Mr. Lovett for this purpose.

All right. So I will see you on Wednesday, nine o'clock.

We will be in recess.

THE CLERK: All rise.

(Proceedings adjourned.)

CERTIFICATE

I, James P. Gibbons, Official Court Reporter for the United States District Court for the District of Massachusetts, do hereby certify that the foregoing pages are a true and accurate transcription of my shorthand notes taken in the aforementioned matter to the best of my skill and ability.

/s/James P. Gibbons

October 29, 2015

James P. Gibbons

JAMES P. GIBBONS, CSR, RPR, RMR

Official Court Reporter

1 Courthouse Way, Suite 7205

Boston, Massachusetts 02210

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APPENDIX F

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA

v.

MICHAEL P. O'DONNELL,

Defendant

Criminal No. 13-10262-DPW

WAIVER OF TRIAL BY JURY

I, MICHAEL P. O'DONNELL, was fully informed of my right to trial by jury in this Case. I hereby waive that right, and request the district court (Woodlock, J., presiding) to try all issues without a jury. I also waive my right to special findings.

Defendant's Signature: /s/ Michael P. O'Donnell
MICHAEL P. O'DONNELL

Date: 7/10/15

Approved: /s/ Jeffrey A. Denner
JEFFREY A. DENNER

Date: 7/10/15

The United States of America consents to the defendant's waiver of a jury trial.

/s/ Mark J. Balthazard
MARK J. BALTHAZARD
VERONICA M. LEI
Assistant U.S. Attorneys

Date: 7/10/15

APPENDIX G

ORDER:

I find that the defendant has knowingly, voluntarily, and intelligently waived the right to a jury trial, and I hereby approve the waiver.

/s/
United States District Judge

Dated: July 10, 2015

APPENDIX H

AO 245B (Rev. 10/15) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

District of Massachusetts

UNITED STATES OF AMERICA

v.

MICHAEL P. O'DONNELL

JUDGMENT IN A CRIMINAL CASE

Case Number: 1: 13 CR 10262 - 001 - DPW

USM Number: 95516-038

James L. Sultan

Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.

☒ was found guilty on count(s) 1
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 USC § 1344	Attempted Bank Fraud	04/20/17	1

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

12/14/2015

Date of Imposition of Sentence

Douglas P. Woodlock

Signature of Judge

Douglas P. Woodlock

United States District Judge

Date and Title of Judge

November 17, 2015

15-16

DEFENDANT: MICHAEL P. O'DONNELL
CASE NUMBER: 1:13 CR 10262 - 001 - DPW

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: 36 month(s)

☒ The court makes the following recommendations to the Bureau of Prisons:

1. That the defendant be designated to serve his sentence at SCP Devens.
2. That the defendant participate in a program for substance abuse as directed by the Bureau of Prisons.

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

- ☐ at _____ a.m. ☐ p.m. on _____
- ☐ as notified by the United States Marshal.

☒ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

- ☒ before 2 p.m. on 1/25/2016
- ☐ as notified by the United States Marshal.
- ☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
a _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: MICHAEL P. O'DONNELL

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SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: 2 year(s)

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

- ☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)
- ☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)
- ☐ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)
- ☐ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. (Check, if applicable.)
- ☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

- 1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 2) the defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;
- 3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 4) the defendant shall support his or her dependents and meet other family responsibilities;
- 5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
- 7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
- 8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
- 10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
- 11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
- 13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: MICHAEL P. O'DONNELL
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CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	\$ 100.00	\$ 150,000.00	\$

☐ The determination of restitution is deferred until _____. An Amended Judgment in a Criminal Case (AO 245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(f), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage

TOTALS	\$ 0.00	\$ 0.00
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☐ Restitution amount ordered pursuant to plea agreement: \$ _____

☐ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(d). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(e).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 102A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1995.

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ADDITIONAL SUPERVISED RELEASE TERMS

1. The defendant is prohibited from possessing a firearm, destructive device, or other dangerous weapon.
2. The defendant is to pay the balance of any fine imposed according to a court-ordered repayment schedule.
3. The defendant is prohibited from incurring new credit charges or opening additional lines of credit without the approval of the Probation Office while any financial obligations remain outstanding.
4. The defendant is to provide the Probation Office access to any requested financial information, which may be shared with the Financial Litigation Unit of the U.S. Attorney's Office.
5. The defendant is to participate in a program for substance abuse as directed by the United States Probation Office, which program may include testing, not to exceed 104 drug tests per year, to determine whether the defendant has reverted to the use of alcohol or drugs. The defendant shall be required to contribute to the costs of services for such treatment based on the ability to pay or availability of third party payment.