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OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT (MARCH 13, 2020)

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JESSICA ARONG O'BRIEN,

Defendant-Appellant.

No. 19-1004

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 17-cr-00239-1—Thomas M. Durkin, Judge.

Before: WOOD, Chief Judge, and FLAUM and RIPPLE, Circuit Judges.

FLAUM, Circuit Judge.

A jury found Jessica A. O'Brien guilty of both bank fraud and mail fraud affecting a financial institution based on her participation in a 2004-to-2007 mortgage fraud scheme. She appeals her convictions, arguing that the charges against her were duplicitous and that under a properly pled indictment the statute of limitations would have barred three of the four alleged offenses. She also argues that the district court should not have admitted evidence offered to prove those time-barred offenses and that there was insufficient evidence to support the jury's guilty verdict.

We affirm. The government appropriately acted within its discretion to allege an overarching scheme to commit both bank fraud and mail fraud affecting a financial institution. Each count included an execution of the fraudulent scheme within the applicable ten-year statute of limitations, and the jury's guilty verdict rested upon properly admitted and sufficient evidence of the charged offenses.

I. Background

On April 11, 2017, a grand jury returned a two-count indictment charging O'Brien with mail fraud in violation of 18 U.S.C. § 1341 (Count I) and bank fraud in violation of 18 U.S.C. § 1344 (Count II). Both counts alleged a 2004-to-2007 scheme in which O'Brien misrepresented her income and liabilities to cause lenders to issue and refinance loans related to two investment properties O'Brien owned on the south side of Chicago: one at 625 West 46th Street (the "46th Street property"), and another at 823 West 54th Street (the "54th Street property"). During the alleged scheme, O'Brien was a licensed attorney with a background and experience in the real estate industry, including as a registered loan originator, mortgage consultant, licensed real estate broker, and owner of O'Brien Realty LLC, a licensed Illinois real estate company.

The indictment alleged that the scheme was comprised of four transactions: (1) in 2004, O'Brien "fraudulently obtained mortgage loan proceeds to purchase" the 46th Street property by submitting mortgage documents with false statements regarding her income and liabilities; (2) in 2005, O'Brien, with co-defendant Maria Bartko as the loan originator, "fraudulently refinanced [O'Brien's] mortgage loans" on the 46th Street and 54th Street properties by submitting applications with false statements regarding O'Brien's income and employment; (3) in 2006, O'Brien "fraudulently obtained a commercial line of credit" by submitting an application with false statements about her realty company's revenue and profit "and used those loan proceeds to maintain the 46th Street and 54th Street properties"; and (4) in 2007, O'Brien and Bartko "agreed that O'Brien would sell the 46th Street and 54th Street properties to Bartko" using "Buyer A," Christopher Kwan, as "a straw buyer whom O'Brien and Bartko knew would be fraudulently qualified for mortgage loans." The indictment also alleged that O'Brien and Bartko knew "that false information would be submitted to lenders, including Citibank, N.A., to qualify [Kwan] for the mortgage loans." Some of her misrepresentations were made on HUD-1 forms (as the name suggests, furnished by the U.S. Department of Housing and Urban Development), which detail the costs and fees associated with a mortgage loan and are used in closing a property sale. *See United States v. Bouchard*, 828 F.3d 116, 121 n.2 (2d Cir. 2016).

Within each count, the indictment charged only one execution of the scheme: In Count I, the indictment alleged that on April 16, 2007, O'Brien and Bartko mailed a payoff check relating to the purchase of the 46th Street property; and in Count II, the indictment alleged that also on April 16, 2007, O'Brien caused Citibank, N.A. ("Citibank"), a financial institution, to provide $73,000 to fund a mortgage for Kwan's purchase of the 46th Street property. The indictment described the 2004, 2005, and 2006 transactions as part of an overarching scheme rather than as separate executions of mail or bank fraud.

At trial, the government presented evidence that O'Brien had falsely represented her income and liabilities and made other misrepresentations and omissions when buying, refinancing, and maintaining the 46th Street and 54th Street properties. After the jury found O'Brien guilty on both counts and the district court denied O'Brien's post-trial motions, O'Brien appealed.

II. Discussion

O'Brien argues that the district court erred by denying (1) her motions to dismiss the indictment based on duplicity and the statute of limitations, and (2) her motions for judgment of acquittal and a new trial based on the insufficiency of the evidence.

A. Duplicity and Statute of Limitations

We review de novo the district court's denial of O'Brien's motions to dismiss the indictment on grounds of duplicity and the statute of limitations. *See United States v. McGowan*, 590 F.3d 446, 456 (7th Cir. 2009) (statute of limitations); *see also United States v. Pansier*, 576 F.3d 726, 734 (7th Cir. 2009) (duplicity).

1. Duplicity

The district court did not err in denying O'Brien's motion to dismiss based on duplicity because each count of the indictment, "'fairly interpreted[,]' alleges a 'continuing course of conduct, during a discrete period of time.'" *United States v. Davis*, 471 F.3d 783, 790–91

(7th Cir. 2006) (quoting *United States v. Berardi*, 675 F.2d 894, 898 (7th Cir. 1982)). A count is duplicitous if it "charges two or more distinct offenses within" the count. *United States v. Miller*, 883 F.3d 998, 1003 (7th Cir. 2018) (citation omitted). A count is not duplicitous, however, if it charges the commission of a single offense through different means, Fed. R. Crim. P. 7(c)(1), or if it charges acts that "comprise a continuing course of conduct that constitutes a single offense," *Miller*, 883 F.3d at 1003 (citation omitted).

The mail and bank fraud statutes prohibit schemes to defraud, *see* 18 U.S.C. §§ 1341 & 1344, which can include a "broad range of conduct," *United States v. Doherty*, 969 F.2d 425, 429 (7th Cir. 1992). "Schemes to defraud . . . often are multi-faceted and therefore the various means used in committing the offense may be joined without duplicity." *United States v. Zeidman*, 540 F.2d 314, 318 (7th Cir. 1976). Under the mail and bank fraud statutes, "for each count of conviction, there must be an execution" of the scheme to defraud, but "the law does not require the converse: each execution need not give rise to a charge in the indictment." *United States v. Hammen*, 977 F.2d 379, 383 (7th Cir. 1992). The government has the discretion to "allege only one execution of an ongoing scheme that was executed numerous times." *Id.*

The indictment alleged a single scheme to defraud lenders that consisted of four related transactions in which O'Brien used lies and concealment to obtain money from lenders for the 46th Street and 54th Street properties and for her own personal gain. Specifically, the indictment alleged that O'Brien lied to lenders to: (1) buy the 46th Street property in 2004; (2) refinance loans on the 46th Street and 54th Street properties in 2005; (3) obtain a loan to maintain the 46th Street and 54th Street properties in 2006; and (4) sell the 46th Street and 54th Street properties in 2007.

O'Brien insists that "the quartet of isolated and disconnected transactions involving different times, people, types of transactions, different lenders and different alleged false material statements gives rise to the clear conclusion that there was no single continuous scheme to defraud." For example, O'Brien asserts that the government contended that she falsely certified that the 46th Street property was her primary residence, but the indictment made no similar allegations regarding her 54th Street purchase. She also emphasizes that the four transactions involved different parties, and that neither Citibank nor its wholly-owned subsidiary and mortgage lending arm, CitiMortgage, was involved in three of the transactions. O'Brien therefore contends that "[t]he four alleged transactions are so different and distinct that the only commonality is 'financial gain' or something equally general."

The relevant transactions, however, all involved: (1) at least one of a pair of investment properties on Chicago's south side (the 46th Street and 54th Street properties); (2) O'Brien; (3) lies in loan documents; (4) the same class of victims (lenders); and (5) the same goal of obtaining financing related to the two properties for personal enrichment. The government acted appropriately within its discretion to charge the transactions as different means for carrying out an overarching scheme to defraud. *Cf. Davis*, 471 F.3d at 791 (holding there was no duplicity where indictment charged "ongoing and continuous course of conduct, accomplished through three different methods," repeated numerous times over the years, all involving the same defendant); *United States v. Prieto*, 812 F.3d 6, 10, 12 (1st Cir. 2016) (finding no duplicity where indictment alleged three-year mortgage rescue program scheme involving 86 transactions with 30 mortgage lenders, in which defendant engaged in sham transfers of properties to straw purchasers who quitclaimed properties to defendant's organization, and noting that schemes to defraud "may harm different groups of victims at different times" (citing *United States v. Buchmeier*, 255 F.3d 415, 421 (7th Cir. 2001))).

2. Statute of Limitations

The district court also did not err in denying O'Brien's motion to dismiss based on the statute of limitations because the indictment alleged that each count was executed on April 16, 2007, which fell within the applicable ten-year statute of limitations. We determine the applicable statute of limitations, and whether the charges were timely brought, based on the face of the indictment. *See United States v. White*, 610 F.3d 956, 958 (7th Cir. 2010) ("An indictment is reviewed on its face, regardless of the strength or weakness of the government's case."). The statute of limitations for bank fraud is ten years. 18 U.S.C. § 3293(1). The statute of limitations for mail fraud is generally five years, *id.* § 3282(a), but a ten-year statute of limitations applies for fraud that "affects a financial institution," *id.* § 3293(2).

The indictment plainly alleged that the scheme to defraud affected Citibank, which O'Brien does not dispute qualified as a financial institution. The mail fraud count (Count I) alleged that Citibank required mortgage loan applicants to provide truthful information, which was material to its approval and funding of loans, and that O'Brien knew "that false information would be submitted to lenders, including Citibank, N.A., to qualify [Kwan] for the [2007] loans." The bank fraud count (Count II) similarly charged an offense that affected a financial institution, as we explain below. A ten-year statute of limitations therefore applied to both counts. The ten-year period started to run from the date of the alleged executions, April 16, 2007. The grand jury returned the indictment on April 11, 2017, before the ten-year period expired.

B. Sufficiency of the Evidence

The district court did not err in denying O'Brien's motions for a judgment of acquittal or a new trial because there was sufficient evidence to support O'Brien's convictions for mail fraud affecting a financial institution under 18 U.S.C. §§ 1341 & 3293(2) (Count I) and for bank fraud under 18 U.S.C. § 1344(2) (Count II). We review de novo the denial of a motion for a judgment of acquittal, which "should be granted only when the evidence is insufficient to sustain the conviction." *United States v. James*, 464 F.3d 699, 705 (7th Cir. 2006). The evidence is sufficient if "any rational trier of fact could have found the essential elements of a crime beyond a reasonable doubt." *United States v. Kelerchian*, 937 F.3d 895, 907 (7th Cir. 2019) (citation omitted). We "overturn a verdict only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt." *Id.* (citation omitted). We review for an abuse of discretion the denial of a motion for a new trial, which should be granted "only if the evidence preponderates heavily against the verdict, such that it would be a miscarriage of justice to let the verdict stand." *United States v. Swan*, 486 F.3d 260, 266 (7th Cir. 2007) (internal quotations marks, brackets, and citation omitted).

1. Mail Fraud Affecting a Financial Institution (Count I)

To convict O'Brien of mail fraud under 18 U.S.C. § 1341, the government had to prove beyond a reasonable doubt that O'Brien: (1) participated in a scheme to defraud; (2) intended to defraud; and (3) used the mails in furtherance of the scheme. *United States v. Seward*, 272 F.3d 831, 835 (7th Cir. 2001). Because the government relied on the ten-year statute of limitations applicable to mail fraud that "affects a financial institution," *see* 18 U.S.C. § 3293(2), it was also required to establish that the fraud affected a financial institution, which can be established by a showing that the fraud exposed the financial institution to "a new or increased risk of loss," *United States v. Serpico*, 320 F.3d 691, 694–95 (7th Cir. 2003). The government needed to show that O'Brien intended for her scheme to defraud "someone," but "a financial institution [did] not need to be the intended victim." *United States v. Marr*, 760 F.3d 733, 744 (7th Cir. 2014); *see also United States v. Pelullo*, 964 F.2d 193, 216 (3d Cir. 1992) (noting that 18 U.S.C. § 3293(2) applies to a "broader class of crimes" than those "where the financial institution is the object of the fraud").

Viewing the evidence in a light most favorable to the prosecution, O'Brien devised a scheme to defraud and made numerous false statements in furtherance of the scheme, including by inflating her income and concealing her biggest liability to obtain a loan to buy the 46th Street property in 2004; inflating the income from her realty company to refinance the loans on the

46th Street and 54th Street properties in 2005; inflating revenue and profits for her realty company to obtain a loan to maintain the 46th Street and 54th Street properties in 2006; and selling the 46th Street and 54th Street properties in 2007 to a straw buyer, while making kickback payments to the true buyer without disclosing the identity of the buyer or the kickback payments to the lender.

The evidence further demonstrated that O'Brien fraudulently caused Citibank to provide Kwan the funding for two loans in connection with the 2007 purchase of the 46th Street property: one loan in the amount of $73,000 and another in the amount of $292,000. O'Brien's misrepresentations in connection with these transactions were established by, among other things, the false and fraudulent loan applications O'Brien submitted; documents related to the purchase and sale of the properties; the false HUD-1 forms; evidence of O'Brien's and her realty company's actual income; and testimony of Citibank vice president Judy Taylor. Citibank was not only exposed to an increased risk of loss; it suffered an actual loss as a result of the 2007 loans because it had to foreclose on the 46th Street property and ultimately sold the property at a "significant loss."[1]

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1 O'Brien appears to suggest that, even though her husband was not a co-borrower on one of the loans, her husband's income should have been counted when calculating her income to qualify for the loan. O'Brien has pointed to no authority explaining why the law compels such a result or otherwise explained how this circumstance undermines confidence in the jury's conclusion that she harbored the requisite fraudulent intent. O'Brien also contends that a witness from Chase testified that "it was possible that the Chase branch loan officer may have made mistakes when she entered O'Brien's LLC loan information" in connection

The parties agree that—during the time relevant to this case—Citibank qualified as a financial institution, but its wholly-owned subsidiary, CitiMortgage, did not.[2] O'Brien maintains that CitiMortgage, not Citibank, was the lender for the $73,000 loan in April 2007.[3] She also concedes, however, that "countless exhibits presented by the government and defense offered conflicting testimony/exhibits regarding whether [CitiMortgage] or Citi[bank] funded" the $73,000 loan, and that related exhibits "cut both ways." This is precisely the kind of conflicting evidence that is within the jury's province to resolve.

This is not a case like *United States v. Bennett*, where "the government relied solely on [the mortgage lender]'s status as a wholly-owned subsidiary [of a financial institution], and presented no evidence indicating what kind of parent-subsidiary relationship actually existed." 621 F.3d 1131, 1139 (9th Cir. 2010). Nor is this a case like *United States v. Banyan*, where the government did not "make any effort at trial to prove that the loans were funded by the mortgage companies' parent corporations, which were banks." 933 F.3d 548, 551 (6th Cir. 2019).

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with one of the loans. Such a speculative possibility, however, does not provide grounds for overturning the jury's verdict.

2 *See Bouchard*, 828 F.3d at 124 ("Prior to 2009, the term 'financial institution' was defined to include insured depository institutions of the FDIC, but not mortgage lenders."); *see also* 18 U.S.C. § 20(1) (amended in May 2009 to include non-FDIC mortgage lenders in definition of "financial institution").

3 O'Brien does not appear to contest that the $292,000 for the other April 2007 loan came from Citibank.

Here, the government presented substantial evidence beyond Citibank's parent-subsidiary relationship with CitiMortgage to support the conclusion that Citibank funded the $73,000 and $292,000 loans. Citibank vice president Taylor, for example, testified that the $73,000 loan was a Citibank product and that "all of the money used to fund both the $292,000 and the $73,000 loan came from a Citibank account." Several documents additionally identified Citibank as the lender on the $73,000 loan, such as the note, mortgage, HUD-1 settlement statement, truth-in-lending disclosure, affiliated business arrangement disclosure, and homeowner's insurance documents. O'Brien's signature on some of those documents is assurance enough that she saw them; the evidence of her link to other documents is not as direct.

The evidence on Count I was therefore sufficient to establish that O'Brien devised and participated in a fraudulent scheme, that she intended to defraud CitiMortgage, and that the fraud affected Citibank. *Cf. United States v. Mullins*, 613 F.3d 1273, 1278–79 (10th Cir. 2010) (affirming application of ten-year statute of limitations for fraud affecting a financial institution where jury heard evidence "explaining how fraudulent information on a loan application increases the risk of loss to the lender and its parent bank"); *United States v. Bouyea*, 152 F.3d 192, 195 (2d Cir. 1998) (per curiam) (holding there was sufficient evidence that financial institution was affected where employee of wholly-owned subsidiary testified that subsidiary borrowed money for transaction at issue from parent financial institution); *Pelullo*, 964 F.2d at 215–16 (disposing of defendant's assumption that "a fraud perpetrated against a financial institution's wholly owned subsidiary cannot affect the parent"). O'Brien does not contest the sufficiency of the evidence regarding the April 16, 2007 mailing in furtherance of the scheme. The mail fraud conviction is sound.

2. Bank Fraud (Count II)

The evidence was also sufficient to convict O'Brien of bank fraud under 18 U.S.C. § 1344(2). Section 1344 provides that a defendant may be found guilty of bank fraud if she:

> 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.

Count II of the indictment charged O'Brien with violating § 1344, which the government was permitted to prove under subsection (1) or (2). *See United States v. LeDonne*, 21 F.3d 1418, 1427 (7th Cir. 1994) (reasoning that the government may charge both sections of § 1344 in same count). While the government must prove that the defendant had the specific intent to defraud a financial institution under § 1344(1), proof of such intent is not required under § 1344(2). *Loughrin v. United States*, 573 U.S. 351, 356–57 (2014) ("[N]othing in [§ 1344(2)] additionally demands that a defendant have a specific intent to deceive a bank. And indeed, imposing that requirement would prevent

§ 1344(2) from applying to a host of cases falling within its clear terms.").

Rather, to obtain a conviction under § 1344(2), the government may demonstrate that the defendant knowingly "deceiv[ed] a non-bank custodian into giving up bank property that it holds." *Id.* at 357. In *Loughrin*, the Supreme Court held that "the text of § 1344(2) preclude[d]" the defendant's argument that "his intent to deceive ran only to Target," a nonfinancial institution, "and not to any of the banks on which his altered checks were drawn." *Id.* at 356. The Court reasoned that applying § 1344(2) only "in the (presumably rare) circumstance in which the fraudster's intent to deceive extended beyond the custodian to the bank itself . . . would . . . function as an extra-textual limit on the clause's compass." *Id.* at 357. The defendant nevertheless "must at least know that the property belongs to or is under the custody or control of a bank." *Bouchard*, 828 F.3d at 126. Hence, to overturn the bank fraud conviction, O'Brien must convince us that no rational jury could infer that she knowingly deceived CitiMortgage into giving up Citibank funds.

We conclude that a rational jury could find—based on O'Brien's experience in the real estate industry and with Citibank in particular, as well as her intimate involvement in the fraudulent scheme and the 2007 transactions—that O'Brien knew that the funds for the April 2007 loans originated from Citibank. In *Bouchard*, the Second Circuit overturned a mortgage fraud conviction under § 1344(2) because the government had not established that the defendant knew that the funds fraudulently obtained from the mortgage lenders belonged to or were under the custody or control of a bank. 828 F.3d at 126–27. The Second Circuit noted that "the Government might have been able to prove that [the defendant] knew that money from mortgage lenders came from banks by virtue of his knowledge of the industry" but "failed to make this argument or proffer evidence of [the defendant]'s extensive knowledge of the real estate and mortgage lending industry as a reason to convict him at trial." *Id.* at 127. The government provided precisely such evidence here.

O'Brien had an extensive background and experience in the real estate industry, including as a registered loan originator, mortgage consultant, licensed real estate broker, and owner of O'Brien Realty LLC, a licensed Illinois real estate company. She had prior experience working with Citibank in particular. Moreover, when Citibank vice president Taylor was asked about "a typical day at Citi back in 2007," she explained that "Citibank would provide funds to CitiMortgage" to fund loans in a similar way that it funded the April 2007 loans. Pairing O'Brien's extensive expertise in the real estate and mortgage lending industry with the fact that Citibank funded the April 2007 loans as it would in the ordinary course of its business supports the inference that O'Brien knew the funding would originate from Citibank.

Such an inference is buttressed by evidence of O'Brien's intimate involvement in the fraudulent scheme and especially her involvement in the April 2007 transactions. O'Brien acted as both the seller and seller's attorney, was present for the closings, was closely involved with the sale, and prepared the closing statements. The HUD-1 form O'Brien signed listed Kwan's $73,000 loan, and the HUD-1 form for that loan expressly identified Citibank as the lender. One might not normally expect a seller in an arms-length real estate transaction to have access to information to which the buyer has access, but this was no arms-length transaction. O'Brien and Kwan were co-participants in a scheme to defraud in which O'Brien and Bartko used Kwan as a straw purchaser. O'Brien, Kwan, and Bartko had signed notarized "Acknowledgement & Agreements" forms (undisclosed in the HUD file and to the lender) that identified both Kwan and Bartko as buyers. O'Brien also made undisclosed payments to both Kwan and Bartko, including a $4,000 check to Kwan dated the day of the 46th Street closing, which Kwan endorsed over to Bartko.

Hence, the jury could reasonably have connected O'Brien's background and experience with the other evidence regarding the relationship between Citibank and CitiMortgage, as well as the identification of Citibank as the lender on loan documents and O'Brien's participation in the fraudulent scheme (and in the 2007 transactions in particular), to conclude that O'Brien knew the funds originated from Citibank. *Cf. United States v. Rabuffo*, 716 F. App'x 888, 898–99 (11th Cir. 2017) (affirming § 1344 conviction where it was reasonable to infer that defendant "knew the fraudulent loan applications would place SunTrust Bank at a risk of harm" based on defendant's background as "experienced real estate developer," defendant's involvement in scheme, similarity of names between SunTrust Bank and its wholly-owned subsidiary (Sun-Trust Mortgage), and defendant's previous interactions with SunTrust Bank).

The defendant in *Loughrin* violated § 1344(2) "because he made false statements, in the form of forged and altered checks, that a merchant would, in the ordinary course of business, forward to a bank for payment." 573 U.S. at 366. Similarly, O'Brien's fraudulent misrepresentations were "the mechanism naturally inducing a . . . custodian of bank property . . . to part with money in its control." *Id.* at 363.[4] Her bank fraud conviction must stand.

3. Materiality

O'Brien raises a new argument on appeal that "there were no mail or bank fraud material misrepresentations because Citi[bank]'s loss risk was extraordinarily *de minimis*." According to O'Brien, Citibank's risk of loss due to this scheme represented only a small fraction of the $550 million "that [CitiMortgage] (and its subsidiaries) received . . . on a daily basis to fund its mortgage loan docket." O'Brien did not raise this argument in the district court and has therefore forfeited it, so our review is for plain error. *See United States v. Walsh*, 723 F.3d 802, 807 (7th Cir. 2013). In any event, there was no error, plain or otherwise.

Materiality requires only the tendency or capability of influencing the victim; there is no requirement that the misrepresentations must have actually influenced the decision-maker or that the decision-maker in fact relied on the misrepresentations. *See United States v. Roberts*, 534 F.3d 560, 571 (7th Cir. 2008). O'Brien has pointed to no authority supporting her novel argument that fraudulent misstatements are material only if

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[4] Because there was sufficient evidence to sustain the bank fraud conviction under § 1344(2), we need not reach the question of whether we could also sustain O'Brien's conviction under § 1344(1).

they affect more than a de minimis proportion of a victim's funds.

Here, the jury heard evidence that if O'Brien had disclosed O'Brien Realty LLC's true financial status, her application for a commercial loan would have been denied. The jury also heard that, had O'Brien disclosed to Citibank that Kwan was a straw buyer and Bartko the true buyer, it would have raised a "red flag" and affected Citibank's risk analysis. The misstatements were therefore material. *Cf. United States v. Reynolds*, 189 F.3d 521, 525–26 (7th Cir. 1999) (affirming conviction and finding sufficient evidence of materiality "[b]ecause [defendant]'s false statements regarding his financial condition could clearly influence a bank deciding whether to approve a loan (even if they did not in fact influence the decision)").

C. Admissibility of Evidence

Finally, the district court did not abuse its discretion in admitting evidence relating to the 2004, 2005, and 2006 transactions as direct evidence of the fraudulent scheme alleged. *See United States v. Quiroz*, 874 F.3d 562, 569 (7th Cir. 2017) (reviewing evidentiary rulings for abuse of discretion). "[T]he fact that only one or two executions fell within the Statute of Limitations does not detract from the entire pattern of loans' being a scheme, and renders [the defendant] no less culpable for the entire scheme." *United States v. Longfellow*, 43 F.3d 318, 325 (7th Cir. 1994). We need not conduct a Federal Rule of Evidence 404(b) analysis because "if the evidence is admitted as direct evidence of the charged offense, Rule 404(b) is not applicable." *United States v. Adams*, 628 F.3d 407, 414 (7th Cir. 2010).

O'Brien tacks on that the district court should not have admitted the May 2007 quit claim deeds because those deeds are outside of the statute of limitations. Those deeds, however, are dated within the applicable ten-year statute of limitations, which began to run in April 2007. In any event, the district court appropriately admitted those deeds as direct evidence demonstrating that Kwan (the straw buyer) quit claimed the properties to Bartko (the true buyer) shortly after the closings. They are admissible even though they are dated after the executions of the scheme to defraud. *See United States v. Ajayi*, 808 F.3d 1113, 1120 (7th Cir. 2015) (stating that the government may introduce uncharged acts of bank fraud after execution of scheme to support its case). The district court did not err in admitting the contested evidence.

III. Conclusion

For the foregoing reasons, we AFFIRM O'Brien's convictions.

MEMORANDUM OPINION & ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS (SEPTEMBER 4, 2018)

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

JESSICA ARONG O'BRIEN,

Defendant.

No. 17 CR 239-1

Before: Honorable Thomas M. DURKIN,
United States District Judge.

A jury convicted defendant Jessica Arong O'Brien of mail fraud affecting a financial institution in violation of 18 U.S.C. § 1341 (Count I) and bank fraud in violation of 18 U.S.C. § 1344 (Count II). Before the Court are O'Brien's consolidated post-trial motions for a judgment of acquittal or, alternatively, for a new trial [277].[1] Also before the Court are several motions

[1] O'Brien filed over 100 pages of briefing on her post-trial motions, much of which repeats arguments already dealt with in

made by O'Brien during trial that the Court took under advisement: O'Brien's motion for judgment of acquittal filed at the close of the government's case [225], and O'Brien's oral motions for a directed verdict at the close of the evidence and following the jury charge (*see* R. 230). For the reasons explained below, the Court denies O'Brien's motions.

I. Motion for Judgment of Acquittal

A. Standard

Federal Rule of Criminal Procedure 29(a) provides that "the court on the defendant's motion must enter a judgment of acquittal on any offense for which the evidence is insufficient to sustain a conviction." "In challenging the sufficiency of the evidence, [a defendant] bears a heavy, indeed, nearly insurmountable, burden." *United States v. Warren*, 593 F.3d 540, 546 (7th Cir. 2010). The reviewing court will view the "evidence in the light most favorable to the prosecution," and the defendant "must convince [the court] that even after viewing the evidence in the light most favorable to the prosecution, no rational trier of fact could have found h[er] guilty beyond a reasonable doubt."' *Warren*, 593 F.3d at 546. In other words, a court will "set aside a jury's guilty verdict only if the record contains no evidence, regardless of how it is weighed, from which a jury could have returned a conviction." *United States v. Presbitero*, 569 F.3d 691, 704 (7th Cir. 2009).

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the Court's opinions on O'Brien's five pre-trial motions to dismiss and to strike (R. 45; R. 131; R. 139; R. 141; R. 214). The Court nevertheless addresses those arguments again here.

Thus, under Rule 29, courts "do not reassess the weight of the evidence or second-guess the trier of fact's credibility determinations." *United States v. Arthur*, 582 F.3d 713, 717 (7th Cir. 2009). This strict standard is a recognition that "[s]orting the facts and inferences is a task for the jury." *Warren*, 593 F.3d at 547. At the same time, "[a] Rule 29 motion calls on the court to distinguish between reasonable inferences and speculation." *United States v. Jones*, 713 F.3d 336, 340 (7th Cir. 2013). "[W]here the evidence as to an element of a crime is equally consistent with a theory of innocence as a theory of guilt, that evidence necessarily fails to establish guilt beyond a reasonable doubt." *United States v. Harris*, 942 F.2d 1125, 1129-30 (7th Cir. 1991).

B. Application[2]

O'Brien's motion for judgment of acquittal makes numerous arguments. To begin, she challenges two aspects of the "scheme to defraud" element of both Counts I and II: (1) the sufficiency of the evidence to support the jury's finding of a scheme, and (2) whether the scheme alleged in the indictment materially and prejudicially varied from the scheme proven at trial. O'Brien also makes two arguments related to the "affect[ing] a financial institution" element that the government needed to prove in order for Count I (mail fraud) to fall within the ten-year statute of limitations under 18 U.S.C. § 3293(2) and therefore be timely: (1)

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[2] O'Brien's newly retained counsel asks the Court to "keep in mind" when deciding the motion for acquittal what he characterizes as numerous errors on the part of O'Brien's trial counsel. R. 277 at 6 n.5. As O'Brien's new counsel recognizes, however, "now is not the time to raise an ineffective assistance claim." *Id.*

she challenges the sufficiency of the government's proof that the scheme affected a financial institution; and (2) she challenges whether "affect[ing] a financial institution" is unconstitutionally vague. Finally, O'Brien maintains that the evidence on Count II (bank fraud) was insufficient to show intent on the part of O'Brien or that O'Brien caused the execution for which the jury convicted her.

1. "Scheme to Defraud" Element of Both Counts

a. Sufficiency of the Evidence

O'Brien first argues that the Court should acquit her on both counts because no rational jury could have concluded that she engaged in a scheme to defraud—an element of both mail fraud under 18 U.S.C. § 1341 and bank fraud under 18 U.S.C. § 1344. "As its ordinary meaning suggests, the term 'scheme to defraud' describes a broad range of conduct." *United States v. Doherty*, 969 F.2d 425, 429 (7th Cir. 1992). A scheme is generally understood to be a "'continuing course of conduct, during a discrete period of time.'" *United States v. Davis*, 471 F.3d 783, 790 (7th Cir. 2006) (quoting *United States v. Berardi*, 675 F.2d 894, 898 (7th Cir. 1982)).

O'Brien's argument on this issue largely rehashes points made in her pretrial motion to dismiss the indictment on duplicity grounds. In its ruling denying that motion, this Court explained in detail why the conduct alleged in the indictment constituted a scheme. R. 116. The Court assumes general familiarity with that opinion but reiterates key points here, along with the relevant background.

The indictment against O'Brien and her co-defendant Maria Bartko (who pleaded guilty prior to trial (*see* R. 197, 205)), alleged a scheme comprised of four sets of transactions: (1) in 2004, O'Brien "fraudulently obtained mortgage loan proceeds to purchase an investment property located at 625 West 46th Street" in Chicago, Illinois ("the 46th Street property") by submitting mortgage documents with false statements regarding her income and liabilities ("the 2004 transactions"); (2) in 2005, O'Brien, with Bartko as the loan originator, "fraudulently refinanced her mortgage loans on the 46th Street property and on a second investment property located at 823 West 54th Street," also in Chicago, Illinois ("the 54th Street property") by submitting applications with false statements regarding O'Brien's income and employment ("the 2005 transactions"); (3) in 2006, O'Brien "fraudulently obtained a commercial line of credit" by submitting an application with false statements about her realty company's revenue and profit "and used those loan proceeds to maintain the 46th Street and 54th Street properties" ("the 2006 transactions"); and (4) in 2007, O'Brien and Bartko "agreed that O'Brien would sell the 46th Street and 54th Street properties to Bartko" using "a straw buyer whom O'Brien and Bartko knew would be fraudulently qualified for mortgage loans" ("the 2007 transactions"). R. 1 at 4-7.

In its order denying O'Brien's motion to dismiss on duplicity grounds, the Court found that "the common elements between the transactions alleged [in the indictment] [we]re: (1) they all involved at least one of a pair of investment properties in Chicago's south side; (2) they all involved O'Brien; (3) they all involved lies in loan documents; (4) they all involved the same class of victims (lenders); and (5) they all involved the same goals (obtaining financing related to the two investment properties and personal enrichment)." R. 116 at 9-10. Additionally, all the transactions occurred over a period of time (three years) that courts have found sufficiently discrete to be part of a single scheme. *Id.* at 17-18.

At trial, the Court instructed the jury that the government had to prove "a scheme to defraud" beyond a reasonable doubt with respect to each count. R. 229 at 21-22. Consistent with this Court's holdings on the duplicity motion, the government described the scheme at closing as follows: "From 2004 to 2007, the scheme was to get money from lenders through lies and concealment, all related to those two investment properties." Tr. 1196.[3] The government explained that O'Brien was at the "center of this scheme to defraud." Tr. 1197. The jury convicted O'Brien, thus finding the scheme element satisfied beyond a reasonable doubt.

Substantial evidence supported the jury's conclusion, including:

- Evidence that in 2004, O'Brien reported an inaccurate income and concealed her biggest liability in a loan application to purchase the 46th Street property. *E.g.*, Government Exhibit ("GX") 46th St. Purchase 2 (O'Brien's 2004 loan application claiming $6,800/month in gross income and failing to disclose liability for O'Brien and her husband's South Park property); GX ILCOMP 2 (O'Brien reported only $11,500 in wages for 2004); *see* Tr. 215-28

[3] "Tr." refers to the consecutively-paginated trial transcript, the eight volumes of which are available on the docket at R. 255-62.

(testimony of Angela Miller from the Illinois Department of Revenue explaining that O'Brien was on unpaid leave from her job at the Department of Revenue from November 2003 until October 2004); GX South Park 2 (April 2004 mortgage listing O'Brien and her husband as borrowers on South Park property); GX 46th St. Refinance 2 (showing O'Brien owed over $249,000 on loan for South Park property as of 2005).

- Evidence that in 2005, O'Brien represented her income from her realty company ("O'Brien Realty") inaccurately on loan applications to earn more than $100,000 in cash out refinances on her loans on the 46th Street and 54th Street properties, with Maria Bartko as the loan interviewer. *E.g.*, GX 46th St. Refinance 2 (2005 loan application for 46th Street refinance claiming $20,000 in base monthly employment income from O'Brien Realty; showing Maria Bartko as interviewer); GX 54th St. Refinance 2 (2005 loan application for 54th Street refinance claiming $20,000 in base monthly employment income from O'Brien Realty; showing Maria Bartko as interviewer); GX Tax 3 (2005 Form 1040X showing $21,000 in gross yearly receipts for O'Brien Realty); GX 46th St. Refinance 1 (showing $32,7000 cash going to O'Brien as borrower); GX 54th St. Refinance 1 (showing $67,900 cash going to O'Brien as borrower).
- Evidence that in 2006, O'Brien misrepresented O'Brien Realty's revenue, profits, and liabilities to obtain a commercial line of credit and commercial loan used to pay mortgages and

expenses for the 46th Street and 54th Street properties. *E.g.*, GX Chase 5 (O'Brien claiming $150,000 in 2005 annual sales for O'Brien Realty); GX Chase 6 (O'Brien claiming $100,000 in 2005 profits for O'Brien Realty); GX Tax 3 (2005 Form 1040X reflecting $21,000 in gross receipts for O'Brien Realty); GX Summary 5 (showing advances on the 2006 line of credit used to make mortgage payments on the 46th Street and 54th Street properties); GX O'Brien 39 (O'Brien's bank records reflecting advances on the 2006 line of credit, with a handwritten circle around numerous advances and with the following handwritten note appearing to be a description of all the circled advances: "823 W. 54th Street rehab–labor").

- Evidence that in 2007, O'Brien purported to sell the 46th Street and 54th Street properties to a straw buyer named Christopher Kwan, when Bartko was the true buyer, and O'Brien paid Bartko money to buy them. *E.g.*, GX Acknowledgment 1 & 2 (notarized documents titled "Acknowledgment & Agreements Between Christopher Kwan/Maria Bartko ('Buyers') and Jessica O'Brien ('Seller')," which indicate O'Brien's knowledge of Bartko as a buyer ("the acknowledgments")); GX 46th St. Sale 17 ($36,000 check from O'Brien to Bartko with 46th Street address handwritten on top, dated the day before the closing and posting seven days after closing); GX 54th St. Sale 9 ($4,000 check dated the day of the 46th Street closing from O'Brien to Kwan, which Kwan endorsed over to Bartko); GX 46th St. Sale 1 (HUD-14 identifying Kwan as the buyer for 46th Street property and not acknowledging Bartko as a buyer or any payment to Bartko); GX 54th St. Sale 8 ($37,836 check from O'Brien to Bartko with 54th Street address handwritten on top, dated the day before the closing and posting six days after closing); GX 54th St. Sale 1 (HUD 1[4] identifying Kwan as the buyer for 54th Street property and not acknowledging Bartko as a buyer or any payment to Bartko); GX CCRD 1 and 2 (Kwan's quit claim deeds transferring properties to Bartko soon after closing). O'Brien obtained over $200,000 in proceeds from these closings. *See* GX 46th St. Sale 1 (over $57,000 in cash to O'Brien as seller of 46th Street property); GX 54th St. Sale 1 (over $165,000 in cash to O'Brien as seller of 54th Street property).

A rational juror easily could have found based on this evidence that between 2004 and 2007, O'Brien engaged in a scheme to defraud lenders through lies in loan documents, all related to her two investment properties. The evidence supported that O'Brien submitted false loan documents to purchase the properties, to refinance the properties, to obtain a commercial line of credit in part to cover expenses for the properties, and to sell the properties.

O'Brien's motion for acquittal does not argue that the government failed to present evidence of the

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4 "A HUD-1 form is a Housing and Urban Development settlement form used in closing a property sale that details the costs and fees associated with a mortgage loan." *United States v. Bouchard*, 828 F.3d 116, 121 n.2 (2d Cir. 2016).

alleged scheme. Instead, she makes a series of arguments about why the evidence presented did not constitute a scheme as a matter of law, or why additional evidence was necessary to establish a scheme as a matter of law, most of which the Court already addressed and rejected in deciding O'Brien's duplicity motion. O'Brien also makes arguments regarding the 2007 transactions that improperly ask the Court to "reassess the weight of the evidence." *Arthur*, 582 F.3d at 717.

First, O'Brien emphasizes that the four transactions "were separated in time; involved different kinds of alleged false statements; involved different types of transactions; and involved different lenders." R. 277 at 13. But the evidence at trial on these issues tracked the conduct alleged in the indictment. And the Court already found that the indictment alleged a scheme despite these differences. R. 116 at 9-17.

Second, O'Brien says there could be no scheme without evidence that O'Brien "intended, planned, or . . . foresaw the subsequent transactions when she purchased the 46th Street property in August 2004." R. 277 at 13; *see also* R. 288 at 10. As the Court explained in ruling on O'Brien's duplicity motion, however, the fact "'that the whole scheme was not planned out in advance'" is not "'significant'" in determining whether a scheme existed—a scheme can be an "'imperfectly conceived plan to defraud which becomes more and more sophisticated'" over time. R. 116 at 17 (quoting *Owens v. United States*, 221 F.2d 351, 354 (5th Cir. 1995)).

Third, O'Brien argues that her presence in each of the transactions alone is not enough to establish a scheme, citing *United States v. Mealy*, 851 F.2d 890, 896 (7th Cir. 1988). R. 277 at 17-18. For starters, *Mealy* addressed the standard for a "wheel conspiracy." 851 F.2d at 896. It did not address what constitutes a scheme. A scheme can be "unified by the presence of the defendant . . . in each alleged act of fraud." *United States v. Brown*, 894 F. Supp. 1150, 1155 (N.D. Ill. 1995) (finding "the conspiracy cases cited by defendants," including a case addressing the standard for a wheel conspiracy, "inapplicable to the government's instant allegation of a common scheme of bank fraud"). Moreover, as described above and as the Court found in its duplicity ruling (R. 116 at 9-17), O'Brien's presence was far from the only factor uniting the transactions.

Fourth, O'Brien maintains that "[t]he government's decision not to call Bartko to testify as to any of the transactions . . . precluded the jury from finding she had any role in any part of the alleged scheme." R. 277 at 14; *see also* R. 288 at 6. But the government was not required to introduce certain types of evidence—namely, Bartko's testimony—to establish that Bartko played a role in the scheme. The government introduced significant documentary evidence showing Bartko's role, including: (1) the 2005 loan applications identifying Bartko as the "interviewer" (GX 46th St. Refinance 2; GX 54th St. Refinance 2); (2) the two checks for more than $70,000 from O'Brien to Bartko listing the two property addresses on them and dated the day before the 2007 closings (GX 46th St Sale 17; GX 54th St. Sale 8); (3) the $4,000 check dated the day of the 2007 closings from O'Brien to Kwan, which Kwan endorsed over to Bartko (GX 54th St. Sale 9); (4) the acknowledgments identifying Bartko as a buyer (GX Acknowledgments 1 and 2); and (5) Kwan's quit claim deeds transferring the properties to Bartko after the 2007 closings (GX CCRD 1 and 2). The jury reasonably concluded based on this evidence that Bartko participated in the scheme.

Fifth, O'Brien emphasizes that the government did not present evidence showing Bartko's involvement in the 2004 and 2006 transactions. As this Court explained in its duplicity ruling, Bartko did not need to know about the 2004 and 2006 transactions for them to be part of a single scheme. R. 116 at 11-12 (citing *United States v. Hollnagel*, 2011 WL 3664885, at *11 (N.D. Ill. Aug. 19, 2011) (rejecting argument that because the indictment did not allege that each defendant "participated in each of the misrepresentations and transactions, the [indictment] must allege separate schemes and therefore fails for duplicity," because in a scheme (unlike in a conspiracy), each participant "need not know about the existence and activities of the other co-schemers"); *Brown*, 894 F. Supp. at 1155 (scheme was "unified by the presence of the defendant Brown in each alleged act of fraud"; the fact "that many of the alleged co-schemers were unaware of the existence of a larger scheme" "is irrelevant to an allegation of a common scheme")). The jury did not need to conclude that Bartko participated in each transaction to find a scheme.

Sixth, O'Brien argues that the 2006 commercial line of credit transactions were dissimilar and disconnected from the 2004, 2005, and 2007 transactions. The Court explained in its duplicity ruling that if the line of credit was used to maintain or cover expenses for the investment properties, it was sufficiently related to be part of the scheme. R. 116 at 10-11. O'Brien acknowledges that the government introduced a summary chart and testimony by Special Agent Donald Kaiser supporting that at least two of the advances on the commercial line of credit were related to the properties: "a payment for the 46th Street property in the amount of $2,457.91 on January 5, 2007, and a mortgage payment for the 54th Street property in the amount of $1,689.96, also on January 5, 2007." R. 277 at 15 (citing GX Summary 5); Tr. 930. The government also introduced O'Brien's bank records reflecting advances on the 2006 loan, with a handwritten circle around numerous advances and with the following handwritten note appearing to be a description of all the circled advances: "823 W. 54th Street rehab–labor." GX O'Brien 39. A rational juror could conclude based on this evidence that the 2006 transactions were part of the scheme.

Seventh, O'Brien emphasizes that Citibank was not involved in the 2004, 2005, and 2006 transactions; it was involved only in 2007. But there is no requirement that the same victim be involved in all of the transactions in a scheme. To the contrary, as this Court explained in its duplicity ruling, courts have found that schemes had an adequate nexus where they involved the same class of victims, as they did here (lenders). R. 116 at 9-10, 14 (collecting cases).[5]

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[5] The Court disagrees with O'Brien that the government's references to a scheme to defraud "lenders" throughout the trial "treated lenders as the equivalents of financial institutions" and allowed the jury to convict based on "a scheme to defraud 'lenders.'" R. 288 at 12. The government accurately described the class of victims of the scheme it alleged as "lenders." And the jury instructions ensured that the jury specifically found: (1) that "[t]he scheme affected Citibank, N.A., a financial institution" for purposes of Count I; and (2) that O'Brien "knowingly executed the scheme" by causing "Citibank, N.A., a financial institution" to

Eighth, O'Brien argues that the 2007 transactions were nothing like the 2004, 2005, and 2006 transactions and so could not constitute part of the same scheme. According to O'Brien, nothing untoward happened in 2007. O'Brien emphasizes that according to the government's own witnesses, O'Brien did not have access to Kwan's 2007 loan packages, and Kwan's loans were originated by a company different than the company where O'Brien and Bartko worked together. R. 277 at 16. O'Brien therefore argues that "[t]here was zero evidence that Ms. O'Brien had anything to do with Kwan's loans." *Id.* O'Brien further claims there was no evidence that Kwan was a straw buyer and not a legitimate buyer.

These arguments ignore: (1) the HUD-1s for the purchases, which O'Brien signed and which identified Kwan as the buyer (GX 46th St. Sale 1; GX 54th St. Sale 1); (2) the acknowledgements signed by O'Brien, Bartko, and Kwan identifying Bartko as a buyer, contrary to the HUD-1s (Acknowledgment 1 & 2); (3) the checks O'Brien wrote to Bartko on the day before the closing with the addresses of the two properties written on top, which were not disclosed in the HUD-1s (GX 46th St. Sale 17; GX 54th St. Sale 8); and (4) Kwan's quit claim deeds transferring the properties to Bartko shortly after closing (GX CCRD 1 and 2). Based on this evidence, the jury could have reasonably

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fund a loan for purposes of Count II. R. 229 at 21-22 (emphasis added). The same reasoning applies to O'Brien's complaints about the government's shorthand references to "Citi" or the "Citi entities" during trial. The instructions made clear when an element needed to be proven with respect to Citibank specifically, and O'Brien's counsel highlighted these points and the differences between Citibank and CitiMortgage throughout trial.

inferred that Kwan was a straw buyer and Bartko was the true buyer. It also could have reasonably inferred O'Brien's knowledge of the full scope of the transactions, especially based on her checks to Bartko. The fact that neither Bartko nor Kwan testified does not render the jury's reliance on this evidence mere speculation, as O'Brien argues. Documentary evidence is not inherently less valid than testimonial evidence.

O'Brien's final challenge to the scheme element really amounts to improper re-argument of the evidence related to the 2007 transactions in the light most favorable to O'Brien. This is improper. As explained above, "[s]orting the facts and inferences is a task for the jury," *Warren,* 593 F.3d at 547, and the Court may not "reassess the weight of the evidence" on a motion for judgment of acquittal. *Arthur*, 582 F.3d at 717.[6] The government presented sufficient evidence of a scheme to support O'Brien's convictions on both counts.

b. Alleged Variance

O'Brien also says a material variance between the indictment allegations and the proof at trial related

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6 This same reasoning forecloses other points O'Brien makes about the 2007 evidence. She claims the checks from O'Brien to Bartko were not kickbacks, as the government characterized them during trial, because they were written on O'Brien's own account, "which is the antithesis of attempting to conceal payments." R. 277 at 17. O'Brien further argues that O'Brien may not have thought the checks needed to be disclosed on the HUD-1s because they were not deposited until after closing. *Id.* And she emphasizes that the acknowledgements were notarized at closing, meaning that Bartko's status as a buyer was disclosed. O'Brien made these arguments to the jury, and the jury rejected them. This was not unreasonable. The Court may not reweigh the evidence.

to the scheme element prejudiced her. Specifically, she maintains that the indictment alleged that O'Brien and Bartko engaged in a scheme to defraud that began in 2004 and continued until 2007, but the proof at trial established that Bartko was involved only between 2005 and 2007. R. 277 at 43.

A variance arises "when the facts proved at trial differ from those alleged in the indictment." *U.S. v. Scheuneman,* 712 F.3d 372, 378 (7th Cir. 2013). A variance constitutes error only if it "change[s] an essential or material element of the charge so as to cause prejudice to the defendant." *Id.* at 379. An essential or material element of the crime "is one whose specification with precise accuracy is necessary to establish the very illegality of the behavior and thus the court's jurisdiction." *United States v. Auerbach,* 913 F.2d 407, 411 (7th Cir. 1990).

O'Brien's variance argument fails on multiple grounds. For starters, it is questionable whether there was any variance between the indictment and the proof at trial. Although the indictment contains one sentence broadly characterizing the scheme as one "[b]eginning in or about 2004, and continuing at least in or about 2007" and involving "JESSICA ARONG O'BRIEN and MARIA BARTKO," the detailed allegations in the indictment allege Bartko's participation only in the 2005 and 2007 transactions. R. 1 ¶¶ 2, 4, 9, 15-22. The evidence at trial was consistent with those more detailed factual allegations, showing Bartko's involvement in the 2005 and 2007 transactions. *See* GX 46th St. Refinance 2; GX 54th St. Refinance 2; GX 45th St. Sale 17; GX 54th St. Sale 8; GX 54th St. Sale 9; Acknowledgments 1 and 2.

Moreover, even if there was a variance, the Seventh Circuit has rejected the argument that a variance as to the year the scheme began is material, so long as the evidence presented still establishes an illegal scheme. In *United States v. Andry*, 666 F. App'x 550 (7th Cir. 2016), the defendant argued that "there was a material variance" where "the indictment charged one scheme running from 2008 to 2012, but . . . the evidence at trial established multiple smaller schemes and that [defendant] was only involved in the scheme running from February 2010 to 2012." *Id.* at 552-53. The Court found this argument "foreclosed by [its] decision" in *United States v. White*, 737 F.3d 1121 (7th Cir. 2014), which held that "'it is permissible for the government to proceed on a subset of the allegations in the indictment, proving a conspiracy smaller than the one alleged, so long as that subset is also illegal.'" *Andry*, 666 F. App'x at 552-53 (quoting *White*, 737 F.3d at 1138).

Here, like in *White*, any variance as to when Bartko's involvement in the scheme began was not material or prejudicial because the "subset of the allegations" proven would still be "illegal." 737 F.3d at 1138. As this Court explained above and in its duplicity ruling, Bartko did not need to be involved in the 2004 transactions for the scheme element to be satisfied. *See* R. 116 at 11-12.

2. Statute of Limitations for Count I: Effect on Financial Institution

a. Sufficiency of the Evidence

O'Brien next argues that no rational jury could have found that the scheme affected a financial institution for purposes of Count I (mail fraud). Because the government relied on a ten-year statute of limitations to charge Count I when it did, the government had to establish that "the offense affect[ed] a financial institution." 18 U.S.C. § 3293(2). "Prior to 2009," when all the relevant events in this case took place, "the term 'financial institution' was defined to include insured depository institutions of the FDIC [Federal Deposit Insurance Corporation], but not mortgage lenders." *Bouchard*, 828 F.3d at 124 (citing 18 U.S.C. § 20 (2008)).

Pursuant to the pre-2009 definition of "financial institution," Citibank qualifies as a financial institution, but its loan servicing arm CitiMortgage, standing alone, does not. *See, e.g.*, Tr. 653-54. For this reason, the parties heavily contested Citibank's involvement in the 2007 transactions during pre-trial proceedings. If Citibank was not affected by the mail fraud charged in Count I, the default five-year statute of limitations would apply to that charge, and the statute of limitations would have expired well before the government indicted this case. *See* R. 201 at 3-4.

Based on evidentiary hearing testimony from Judy Taylor, a Citibank vice president, as well as supporting records documenting Citibank's funding of at least one of the 2007 loans (*see, e.g.*, R. 113 at 78-69, 105; R. 148-1, 148-2, 148-3, 148-4, 148-5, 148-6), the Court denied O'Brien's pre-trial motion to dismiss the indictment based on the statute of limitations. R. 201. The Court allowed O'Brien to continue to pursue discovery from the Citi entities on this issue up until right before trial, when the Citi entities produced further documents corroborating Taylor's testimony. *See* R. 203-1.

At trial, the government introduced through Taylor a number of exhibits illustrating the flow of the money from Citibank to CitiMortgage, funding both a $292,000 mortgage loan and a $73,000 home equity loan on the 46th Street property as part of the 2007 sales. Tr. 667-79. Taylor testified that Citibank suffered actual losses on the 2007 loans. Tr. 677-79. At the conclusion of trial, the Court instructed the jury that it needed to find for purposes of Count I that "[t]he scheme affected Citibank, N.A., a financial institution." R. 229 at 21. It further instructed the jury that "[f]or purposes of Count One, a scheme affects a financial institution if it exposes the financial institution to a new or increased risk of loss. A financial institution need not have actually suffered a loss in order to have been affected by the scheme." *Id.* at 31.

In her motion for judgment of acquittal, O'Brien maintains that no rational juror could have found an effect on Citibank as required for the ten-year statute of limitations in 18 U.S.C. § 3293(2) to apply. The Court disagrees.

The Seventh Circuit in *United States v. Serpico*, 320 F.3d 691, 694-95 (7th Cir. 2003), interpreted the term "affects a financial institution" in 18 U.S.C. § 3293(2) broadly, and affirmed use of the same jury instruction the Court gave in this case. *Serpico*, 320 F.3d at 694-95 (approving an instruction stating that a scheme affects a financial institution if it "exposed the financial institution[ ] to a new or increased risk of loss. A financial institution need not have actually suffered a loss in order to have been affected by the scheme."). Other circuits have likewise recognized the wide reach of 18 U.S.C. § 3293(2). The Third Circuit rejected the argument that "a fraud perpetrated against a financial institution's wholly owned subsidiary cannot affect the parent" under § 3293(2) as "a clearly untenable assumption." *United States v. Pelullo*, 964 F.2d 193, 215-16 (3d Cir. 1992); *accord United States v. Bouyea*, 152 F.3d 192, 195 (2d Cir. 1998) (citing *Pelullo* to "easily reject" the argument that defrauding a financial institution's subsidiary was insufficient as a matter of law to meet the "affect[ing] a financial institution" requirement in § 3293(2)).

The evidence at trial plainly supported the jury's finding that the scheme affected Citibank for purposes of Count I. Taylor testified not only that Citibank incurred a risk of loss, but that the 2007 loans resulted in an actual loss to Citibank. And Taylor testified not only that CitiMortgage was involved in funding the loans as Citibank's "wholly owned subsidiary" (Tr. 741), but that Citibank was the actual lender on one of the loans, and the funds for both loans came directly from Citibank. Specifically, Taylor testified that: (1) Citibank was the lender on the $73,000 loan for the 46th Street sale (Tr. 643); (2) CitiMortgage was the lender on the $292,000 loan for the 46th Street sale, but the money for that $292,000 loan came from Citibank (Tr. 643, 656-60); (3) Citibank had to foreclose on the 46th Street property at a "significant loss" to Citibank (Tr. 677); and (4) the $73,000 loan was a complete loss, and the proceeds from the foreclosure sale were insufficient to cover the remaining balance on the $292,000 loan (Tr. 677-79).

O'Brien claims that Taylor's testimony was inadmissible hearsay. It was not. Rather than offering out-of-court statements for their truth, Taylor testified about already admitted bank records based on her personal knowledge as a long-time Citibank employee.

O'Brien further argues that the bank records regarding the funding of the loans were "ridiculously confusing" because they "show hundreds of millions of dollars of transfers, thru all sorts of channels." R. 277 at 21 n.13. But Taylor walked the jury through these documents in her testimony, identifying the relevant parts for the jury. She explained that on the day of closing, the funds went from (a) a Citibank Treasury account (namely, "Citibank N.A. for USCGB Treasury"[7]) to (b) a CitiMortgage account to (c) another CitiMortgage account (a CitiMortgage Wholesale account) to (d) the settlement agent/title company. Tr. 658-60, 667-74. The same process took place for both the $292,000 loan and the $73,000 loan. Tr. 660.

O'Brien says this case is like *United States v. Irvin*, 682 F.3d 1254 (10th Cir. 2012), where the Tenth Circuit, in the course of upholding a conviction on a bank fraud count, explained in dicta that defendant "appear[ed]" to be "correct" that a mortgage loan was

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7 O'Brien points out that Taylor did not know specifically what the acronym "USCGB" stands for, and guessed it was "U.S. Consumer Banking Group Treasury." Tr. 740. But Taylor's uncertainty about this acronym is beside the point. She testified unequivocally that the money came from a Citibank account, which is supported by the fact that the account has "Citibank, N.A." in the name—*i.e.*, "Citibank N.A. for USCGB Treasury."

never owned by a parent financial institution, and instead "was strictly the property of" the mortgage corporation subsidiary. *Id.* at 1272. But in *Irvin*, the mortgage company subsidiary drew on a line of credit made available by the parent, bundled loans "into mortgage-backed securities within thirty to forty-five days of their origination," sold the loans "to investment banks on the secondary market," and then used the proceeds to repay its debts to the parent. *Id.* The parent "played no role" in the process. *Id.* Here, by contrast, the evidence supported direct involvement by Citibank, including supplying the funds on the day of the closing and taking the actual losses on the 46th Street loans in 2007.[8] In any event, *Irvin* addressed the bank fraud statute under 18 U.S.C. § 1344, not the level of proof required to show an effect on a financial institution for purposes of the ten-year statute of limitations for mail or wire fraud.

Finally, O'Brien argues there was no evidence that O'Brien knew her conduct affected a financial institution. But for purposes of Count I, the government did not need to prove that O'Brien knew her scheme affected a financial institution. In *United States v. Marr*, 760 F.3d 733 (7th Cir. 2014), the Seventh

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[8] This evidence also distinguishes this case from *United States v. Bennett*, 621 F.3d 1131 (9th Cir. 2010), another case cited by O'Brien. In *Bennett*, there was no evidence that the parent company owned or controlled the subsidiary's loan assets, and the Ninth Circuit explained that "a parent corporation does not own the assets of its wholly-owned subsidiary by virtue of that relationship alone." *Id.* at 1136-38. Here, the government did not rely on the subsidiary-parent relationship alone to prove that Citibank owned the assets—it introduced Taylor's testimony and documents supporting that the funding for the 2007 loans in fact came from the parent Citibank.

Circuit "join[ed] the reasoning of [its] sister circuits" in holding that the wire and mail fraud statutes "only require[ ] the government to prove that a defendant intended for his or her scheme to defraud someone, a financial institution does not need to be the intended victim." *Id.* at 743-44.[9] As such, the *Marr* court explained that "the government needed only to prove that Marr's scheme to defraud affected Palos Bank, not that Marr intended to defraud Palos Bank." *Id.* at 744. The "'object of the fraud is not an element of the offense.'" *Id.* (quoting *Pelullo*, 964 F.2d at 216). Nor does 18 U.S.C. § 3293(2), the ten-year statute of limitations for wire and mail fraud affecting a financial institution, refer to knowledge or in any way add an element requiring the defendant to know that a financial institution is affected. The evidence was more than sufficient for the jury to find an effect on a financial institution satisfying § 3293(2).

b. Alleged Vagueness

O'Brien also makes a vagueness challenge to the "affect[ing] a financial institution" language in § 3293(2). The Fifth Amendment's due process clause "gives rise to the general rule that prohibits the government from imposing sanctions under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *United States v.*

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9 Although the *Marr* court addressed the wire fraud statute, 18 U.S.C. § 1343, its holding applies equally to the mail fraud statute at issue in Count I, 18 U.S.C. § 1341. *See, e.g.*, *United States v. White*, 737 F.3d 1121, 1130 n.4 (7th Cir. 2013) ("cases construing the mail fraud statute (18 U.S.C. § 1341) are applicable to the wire fraud statute (18 U.S.C. § 1343)," and vice versa).

Coscia, 866 F.3d 782, 791 (7th Cir. 2017), *reh'g and suggestion for reh'g en banc denied* (Sept. 5, 2017), *cert. denied*, 138 S. Ct. 1989 (2018). "To satisfy due process, a penal statute [must] define the criminal offense [1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement." *Skilling v. Unites States*, 561 U.S. 358, 402-03 (2010).

Notably, O'Brien does not point to any case addressing or sustaining a vagueness challenge to the "affects" provision in § 3293(2). And courts including the Seventh Circuit have had little trouble interpreting the word "affects" in the statute. *See Serpico*, 320 F.3d at 694 (conduct "affects" a financial institution if it exposes that institution to an "increased risk of loss"); *see also, e.g., United States v. Mullins*, 613 F.3d 1273, 1278 (10th Cir. 2010) ("While Congress certainly could have extended the limitations period only when wire fraud 'causes a loss' to a financial institution, it chose instead to use the considerably broader term "affects.' And that means simply to 'make a material impression on; to act upon, influence, move, touch or have an effect on,' I Oxford English Dictionary 211 (2d ed. 1989), or perhaps more appositely to this case, 'to have a detrimental influence on,' Webster's Third New International Dictionary 35 (2002).").

The cases on which O'Brien relies in support of her argument do not find or suggest that the word "affects" in § 3293(2) is unconstitutionally vague. To the contrary, they interpret the word "affects" and set limits on its boundaries. *See United States v. Agne*, 214 F.3d 47, 52 (1st Cir. 2000) (explaining that there was no evidence of even a risk of loss to a financial institution in that case, and "at minimum there needs to be some impact on the financial institution to support a conviction"); *United States v. Ubakanma*, 215 F.3d 421, 426 (4th Cir. 2000) (explaining in a case where the government conceded lack of effect on a financial institution that "a wire fraud offense under section 1343 'affected' a financial institution only if the institution itself were victimized by the fraud, as opposed to the scheme's mere utilization of the financial institution in the transfer of funds").

In any event, "[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982). As the discussion above shows, the evidence at trial supported a finding by the jury not just of a risk of loss to Citibank or an effect on Citibank through its mortgage servicing arm CitiMortgage, but an actual loss to Citibank specifically. O'Brien's conduct thus clearly fell within the boundaries proscribed by courts for "affect[ing]" a financial institution, and her vagueness challenge necessarily fails.

3. Count II: Sufficiency of the Evidence

O'Brien next claims the jury had insufficient evidence to convict her on Count II. Count II charged O'Brien with both sections of the bank fraud statute. That statute provides:

> 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, or 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. The Seventh Circuit has confirmed that both sections of § 1344 may be charged in a single count, and it has explained that "proof of any one of those acts conjunctively charged may support a conviction." *United States v. LeDonne*, 21 F.3d 1418, 1427 (7th Cir. 1994).

a. Intent

O'Brien first claims lack of proof of intent. As the Supreme Court held in *Loughrin v. United States*, 134 S. Ct. 2384 (2014), proof of specific intent to defraud a financial institution is not required under § 1344(2), but it is required under § 1344(1). *Id.* at 2387-90. For this reason, O'Brien's threshold argument that she should be acquitted on Count II because "no rational jury could find that Ms. O'Brien specifically intended to defraud Citibank, N.A." (R. 277 at 27) is misplaced. The jury rationally could convict O'Brien under § 1344(2) without finding specific intent to defraud.

O'Brien claims that because Bartko and Kwan did not testify and because O'Brien did not sign the HUD-1 or the note for the $73,000 loan naming Citibank as the lender, there was insufficient evidence for the jury to find the requisite intent under either § 1344(1) or § 1344(2). The Court disagrees. A rational jury could have convicted O'Brien of bank fraud in Count II based under either prong of § 1344.

Section 1344(2). For purposes of § 1344(2), the government needed to prove a scheme to defraud with intent to obtain property owned by, or in the custody or control of, a financial institution by means of false or fraudulent pretenses, representations, or promises—it did not need to find specific intent to defraud a financial institution. *Loughrin*, 134 S. Ct. at 2389. A reasonable jury could have inferred O'Brien's intent to obtain property owned by or in the control of a financial institution based on evidence regarding the $73,000 loan naming Citibank (undisputedly a financial institution) as the lender. Although O'Brien did not sign the HUD-1 or the note for the $73,000 loan (GX 46th St. Sale 2; GX 46th St. Sale 7) and Kwan and Bartko did not testify, a reasonable jury could have inferred O'Brien's knowledge of that loan and its funding based on the documentary evidence. The HUD-1 that O'Brien did sign, for the $292,000 loan, also listed the $73,000 loan. GX 46th St. Sale 1. The loans closed on the same day, had the same closer, and O'Brien was present as the seller. Additionally, according to the HUD-1s, O'Brien acted as the seller's attorney for both the 46th and 54th Street sales and prepared corresponding closing statements. GX O'Brien 8 and 9.

O'Brien emphasizes that testimony supported that O'Brien would not have seen Kwan's loan documents themselves. Tr. 587, 732. But O'Brien's status as the seller's attorney and her signature on the HUD-1 listing the $73,000 loan, along with the acknowledgments and checks suggesting that O'Brien knew that Bartko was a buyer and paid Bartko money to buy the properties, allowed the jury to draw the inference that O'Brien had intimate knowledge of the 2007 transactions' nature, including the funding of the $73,000 loan by Citibank. Such an inference would support a finding that O'Brien intended to obtain property owned by or in the custody or control of Citibank.

The jury also could have found that O'Brien had intended to obtain property owned by or in the custody or control of Citibank based on the evidence regarding the $292,000 loan. It is true that the HUD-1 for the $292,000 loan identified CitiMortgage—not Citibank—as the lender (GX 46th St. Sale 1); the title commitment form said the same (Defense Exhibit 70). But Taylor testified that Citibank ultimately funded this loan. Tr. 643, 656-60, 677. The jury could have inferred O'Brien's familiarity with Citibank and CitiMortgage as its loan servicing arm based on the ample evidence at trial regarding O'Brien's background as a licensed loan originator, a licensed real estate broker, the owner of a licensed real estate company, and a licensed attorney. And the evidence showed that O'Brien had significant prior experience with Citibank in particular. Taylor testified that Citibank purchased O'Brien's loan on the 46th Street property as a successor lender and required O'Brien to sign an updated Uniform Residential Loan Application when it did. *See* GX 46th St. Purchase 1-10; Tr. 705-23. All of this evidence would have allowed a reasonable juror to infer that O'Brien understood that the fraudulently-obtained funds used to fund the $292,000 loan ultimately were owned by or in the custody or control of Citibank, and that she intended to obtain those funds.

O'Brien relies on the Second Circuit's decision in *Bouchard*, 828 F.3d 116, in support of her argument that the evidence was insufficient for the jury to infer that O'Brien intended to obtain Citibank property. In *Bouchard*, the Second Circuit found a lack of evidence satisfying § 1344(2) where the evidence showed that the defendant knew about the mortgage company's involvement, but not about the parent bank's involvement, and the offenses occurred before the 2009 amendments to the definition of "financial institution" to include mortgage companies. 828 F.3d at 126-27. But as the *Bouchard* court explained, "the Government might have been able to prove that Bouchard knew that money from mortgage lenders came from banks by virtue of his knowledge of the industry." *Id.* at 127. In that case, the government presented no such proof. *Id.* Additionally, *Bouchard* involved entities without an obvious corporate relationship: a mortgage broker named BNC that was owned by Lehman Brothers, a financial institution. *Id.* at 120.

Here, unlike in *Bouchard*, the government presented evidence of and emphasized throughout trial O'Brien's considerable knowledge of the industry. And this case involves entities with an obvious corporate relationship: Citibank and CitiMortgage.

The Eleventh Circuit recently distinguished *Bouchard* and affirmed a conviction under § 1344(2) in a case similar to this one. *See United States v. Rabuffo*, 716 F. App'x 888 (11th Cir. 2017). In *Rabuffo*, the defendant was charged under both clauses of § 1344, and the evidence at trial showed that the fraud scheme was aimed at SunTrust Mortgage. *Id.* at 897. Like here and in *Bouchard*, the loans in *Rabuffo* occurred before Congress amended the bank fraud statute to specify that the mortgage companies qualified as "financial institutions." *Id.* The Eleventh Circuit found the evidence sufficient to support the conviction where, like here but unlike in *Bouchard*, the evidence supported that the defendant was "experienced" in the real estate industry. *Id.* at 898. The court explained that "defendant's experience, involvement in the scheme, and interactions with SunTrust Bank presented sufficient evidence that he was aware that the scheme would affect SunTrust." *Id.* at 899. Moreover, because "the name[ ] of the wholly-owned subsidiar[y] at issue [SunTrust Mortgage] w[as] substantially similar to the[ ] parent financial institution [SunTrust Bank]," it was "reasonable to infer . . . that the [d]efendant[ ] w[as] aware that the fraudulently obtained funds were owned or were under the custody or control of the parent financial institution[ ]." *Id.*

Like in *Rabuffo*, a rational jury could have inferred based on O'Brien's involvement in the scheme, her industry knowledge, her experience with Citibank specifically, and the similarity in the Citibank and CitiMortgage names, that O'Brien knew that the funds for either the $73,000 loan, the $292,000 loan, or both, were owned by or in the custody or control of the parent financial institution Citibank. A rational jury therefore could have found the requisite intent by O'Brien to obtain that property under § 1344(2) through her involvement in the 2007 loans.

<u>Section 1344(1)</u>. A rational jury also could have found that O'Brien had the requisite specific intent to defraud a financial institution required under § 1344 (1). *See Loughrin*, 134 S. Ct. at 2387-90. "The 'scheme to defraud' clause of Section 1344(1) is to be interpreted broadly." *United States v. Brandon*, 298 F.3d 307, 311 (4th Cir. 2002). Evidence that the defendant intentionally exposed a financial institution to a risk of loss

is "one way of establishing intent to defraud" a financial institution for purposes of § 1344(1). *United States v. Hoglund*, 178 F.3d 410, 413 (6th Cir. 1999).

The same reasoning described above with respect to § 1344(2) could have led a reasonable jury to make the further inference that O'Brien specifically intended to expose a financial institution (Citibank) to a risk of loss under § 1344(1). The government's basic proof on both §§ 1344(1) and (2) was the same. *See also Loughrin*, 134 S. Ct. at 2390 n.4 ("the overlap between the two clauses [of Section 1344] is substantial").

Specifically, based on O'Brien's signature on the HUD-1 for the $292,000 loan disclosing the $73,000 loan and her close involvement in the transaction as seller and seller's attorney, the jury could infer that she knew Citibank was the lender on the $73,000 loan and specifically intended to expose Citibank to a risk of loss. Or, based on O'Brien's signature on the HUD-1 for the $292,000 loan, the jury could infer that O'Brien specifically intended to expose CitiMortgage to a risk of loss. And based on the evidence of O'Brien's knowledge of the industry and prior experience with Citibank, combined with the similarity in the names of Citibank and CitiMortgage, the jury could have inferred that O'Brien also specifically intended to expose Citibank to a risk of loss through that transaction. *See, e.g., United States v. Edelkind*, 467 F.3d 791, 797-98 (1st Cir. 2006) (§ 1344(1) applied to a scheme where the defendant fraudulently obtained a loan from an uninsured subsidiary of an insured bank in an "integrated transaction" where the bank was to purchase the loan after its issuance, even if the defendant did not know about the arrangement for the later purchase of the loan).

O'Brien again points to *Bouchard*, where the Second Circuit found insufficient evidence under § 1344 (1) because the fraud was directed at BNC, a wholly owned subsidiary of Lehman Brothers. 828 F.3d at 124-26. The Second Circuit explained that "a defendant cannot be convicted of violating § 1344(1) merely because he intends to defraud an entity, like BNC, that is not covered by the statute." *Id.* at 125. But in *Bouchard*, the government "concede[d] there was no evidence that [the defendant] specifically intended to defraud Lehman Brothers" or was aware of its role. *Id.* at 124. Here, by contrast, the evidence described above could have supported the inference that O'Brien knew about Citibank's role and thus specifically intended to cause a risk of loss to Citibank.

b. Causation of Execution

Relatedly, O'Brien argues there was insufficient evidence for a rational jury to find that O'Brien caused Citibank to fund the $73,000 loan. The Court instructed the jury that it had to find, for purposes of Count II, that O'Brien "on or about April 16, 2007, caus[ed] Citibank, N.A., a financial institution, to fund a mortgage loan in the amount of approximately $73,000 for the purchase of the 625 West 46th Street, Chicago, Illinois." R. 229 at 22. O'Brien says the fact that O'Brien did not sign the HUD-1 for the $73,000 loan means there was a failure of proof on this issue. As O'Brien acknowledges, however, "[t]he HUD-1 that Ms. O'Brien and Kwan <u>both</u> signed included <u>both</u> loan amounts of $292,000 and $73,000." R. 277 at 35 (emphasis in original). And Taylor testified that Citibank in fact funded the $73,000 loan as part of the 2007 purchase of the 46th Street property. Thus, there was sufficient evidence for the jury to infer that

O'Brien's sale of her 46th Street property caused Citibank to fund the $73,000 loan.

II. Motion for a New Trial

A. Standard

Federal Rule of Criminal Procedure 33 provides that, "[u]pon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." "[C]ourts have interpreted [Rule 33] to require a new trial in the interests of justice in a variety of situations in which the substantial rights of the defendant have been jeopardized by errors or omissions during trial." *United States v. Eberhart,* 388 F.3d 1043, 1048 (7th Cir. 2004), *overruled on other grounds,* 546 U.S. 12 (2005). "A jury verdict in a criminal case is not to be overturned lightly, and therefore a Rule 33 motion is not to be granted lightly." *Id.* The court may grant a new trial if the jury's "verdict is so contrary to the weight of the evidence that a new trial is required in the interest of justice." *United States v. Washington,* 184 F.3d 653, 657 (7th Cir. 1999). Put another way, "[t]he court should grant a motion for a new trial only if the evidence preponderate[s] heavily against the verdict, such that it would be a miscarriage of justice to let the verdict stand." *United States v. Swan,* 486 F.3d 260, 266 (7th Cir. 2007). "In order to receive a new trial based on erroneous instructions, a defendant must show both that the instruction did not adequately state the law and that the error was prejudicial to [her] because the jury was likely to be confused or misled." *United States v. White,* 443 F.3d 582, 587 (7th Cir. 2006).

B. Application[10]

O'Brien makes four basic arguments in her motion for a new trial. First, O'Brien says the instructions allowed the jury to convict her based on conduct outside the statute of limitations. Second, O'Brien maintains that all of the evidence regarding the 2004, 2005, and 2006 transactions was inadmissible propensity evidence under Federal Rule of Evidence 404(b). Third, O'Brien challenges the pattern instructions the Court gave with respect to the intent element of Count II. And fourth, O'Brien challenges the Court's decision to admit the quit claim deeds transferring the investment properties from Kwan to Bartko shortly after the 2007 closings.

1. Statute of Limitations and Scheme

O'Brien's motion for a new trial begins with a convoluted argument that primarily pertains to Count II (bank fraud). O'Brien focuses on the fact that bank fraud is complete upon each execution and is not a continuing offense. *E.g., United States v. Anderson*, 188 F.3d 886, 888 (7th Cir. 1999). She notes that any pre-2007 executions of bank fraud were therefore "completed offenses long before the [2007] sales." R. 277 at 46. She then emphasizes that the Court instructed the jury that it had to find at least one "materially false or fraudulent pretense, representation, or promise" charged in the indictment to convict her of bank fraud (and mail fraud as well), but that it did not need to find

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10 In addition to the specific grounds on which she moves for a new trial, O'Brien asks to preserve her pre-trial motions to dismiss the indictment denied by the Court (R. 45; R. 131; R. 139; R. 141; R. 214). R. 277 at 44. Those motions are preserved.

all of them. R. 229 at 21-22, 25, 32. O'Brien explains that the jury therefore could have convicted her of bank fraud by finding that she made a false statement in a 2004, 2005, or 2006 execution of bank fraud, and not necessarily the 2007 execution of bank fraud. O'Brien maintains that "the jury [instead] should have been instructed that it had to find a materially false or fraudulent pretense, representation, or promise occurred after April 11, 2007." R. 288 at 31. Otherwise, she says, "the indictment and instructions allowed Ms. O'Brien to be convicted for conduct that was barred by the statute of limitations." R. 277 at 51.

This argument can be broken down into several parts. First, there is the legal question of what conduct must fall within a statute of limitations in order to bring an entire scheme within the statute of limitations, and in particular a bank fraud scheme for which each execution is a complete crime. The Seventh Circuit answered this question in *United States v. Longfellow*, 43 F.3d 318, 319-25 (7th Cir. 1994), a case addressing an indictment charging multiple executions of bank fraud as part of a single scheme. The defendant in *Longfellow* made a series of improper loans to individuals so they could purchase the defendant's land. *Id.* at 319. Although all of the original loans occurred more than five years before the defendant was indicted, outside the limitations period, the defendant refinanced one of the loans within the limitations period, and the government charged that refinancing as an execution of the defendant's scheme to defraud. *Id.* at 322. The Seventh Circuit held that the charging of one execution within the statute of limitations brings the entire scheme within the statute of limitations. *Id.* at 322-24. The fact that "only one or two executions fell within the Statute of Limitations," did "not detract from the entire pattern of loans[ ] being a scheme, and render[ed defendant] no less culpable for that entire scheme." *Id.* at 322-25.[11]

The Seventh Circuit did not find it to be a problem in *Longfellow* that prior, complete executions of bank fraud outside the statute of limitations were charged as part of a single scheme. And for good reason. As the Court explained in its duplicity ruling, "'an act which can be viewed as an independent execution of a scheme' and thus charged as a separate count," as each execution of bank fraud could be, "does not *need* to be charged in a separate count." R. 116 at 5 (quoting *United States v. King*, 200 F.3d 1207, 1213 (9th Cir. 1999)); *see also United States v. Hammen*, 977 F.2d 379, 383 (7th Cir. 1992) (in the context of mail and bank fraud, explaining that although "for each count of conviction, there must be an execution," "the law does not require the converse: each execution need not give rise to a charge in the indictment"). In other words,

[11] O'Brien's attempts to distinguish *Longfellow* are misplaced. She says *Longfellow* involved the "same victim" "suffering through a unitary, continuing course of conduct," and this case did not. R. 288 at 30. But this Court already has explained above and in its duplicity ruling why the various transactions did not need to involve the same victim to be part of a single scheme. O'Brien further emphasizes that *Longfellow* explained that the execution falling within the statute of limitations had to be "a separate act that created a new risk" for the bank. 43 F.3d at 325. She says the 2004, 2005, and 2006 transactions did not place Citibank at a new risk of loss because they involved different lenders. But as *Longfellow* shows, what matters is that the execution falling within the statute of limitations was a separate act exposing Citibank to a new risk of loss. And again, Taylor's testimony supported that the 2007 executions not only placed Citibank at a risk of loss but caused Citibank to suffer an actual loss.

"[i]f several fraudulent executions are part of the same scheme, the government . . . has discretion to (a) charge each execution in a separate count or (b) 'allege only one execution of an ongoing scheme that was executed numerous times.'" R. 116 at 5 (quoting *Hammen*, 977 F.2d at 383). Thus, as this Court concluded in its duplicity ruling, the government properly charged only one "execution" of the scheme in each of Counts I and II—the 2007 executions with respect to the 46th Street loans. *Id.* at 4-6 (citing R. 1 at 9, 10). And the fact that these executions fell within the statute of limitations brings the entire scheme within the statute of limitations. *Id.*

O'Brien's reliance on *Anderson*, 188 F.3d 886, and *United States v. Yashar*, 166 F.3d 873, 880 (7th Cir. 2009), in support of her contrary argument is misplaced. In *Anderson*, the Seventh Circuit reversed a bank fraud conviction because the entire fraud was complete prior to the expiration of the statute of limitations; no "execution" occurred within the statute of limitations. 188 F.3d at 891. In *Yashar*, the Seventh Circuit explained that for a non-continuing offense, the limitations period begins to run when all elements of the offense are established; "if all elements of the crime were met" prior to the statute of limitations cut off, then the indictment would not be timely, but if "a necessary element of the offense" took place within the limitations period, the indictment would be timely. 166 F.3d at 878-80. Here, the indictment charged an execution of bank fraud—*i.e.*, a necessary element of the bank fraud scheme charged—within the statute of limitations.

The second question embedded in O'Brien's argument is whether the jury instructions accurately reflected the law just recited and ensured that the jury convicted O'Brien based on an execution falling within the statute of limitations. They did.

To ensure that the jury convicted O'Brien based on the 2007 executions falling within the statute of limitations, the Court added the execution language from the indictment to the pattern elements instructions for mail and bank fraud. *See* R. 229 at 21 (instructing the jury on Count I that it had to find that "for the purpose of carrying out the scheme or attempting to do so, the defendant caused the use of a commercial interstate carrier in the manner charged in Count One, specifically, on or about April 16, 2007, caused to be deposited, to be sent and delivered by commercial interstate carrier, an envelope containing a payoff check relating to the purchase of the property located at 625 West 46th Street, Chicago, Illinois"); R. 229 at 22 (instructing the jury on Count II that it had to find "[t]he defendant knowingly executed the scheme by, on or about April 16, 2007 causing Citibank, N.A., a financial institution, to fund a mortgage loan in the amount of approximately $73,000 for the purchase of 625 West 46th Street, Chicago, Illinois"). These instructions made sure that the jury did *not* convict O'Brien based on 2004, 2005, or 2006 executions of the alleged scheme, and therefore addressed her statute of limitations concerns. *See Sorich v. United States,* 709 F.3d 670, 677 (7th Cir. 2013) ("we presume that a jury follows its instructions").

The third question embedded in O'Brien's argument is whether the Court properly instructed the jury with respect to the bank fraud count under 18 U.S.C. § 1344 that:

> For purposes of Count Two . . . [i]n considering whether the government has proven a scheme to obtain moneys, funds, assets, or other property from a financial institution by means of false pretenses, representations, promises, or concealment of material facts, the government must prove at least one of the false pretenses, representations, promises, or concealment of material facts charged in the portion of the indictment describing the scheme beyond a reasonable doubt. However, the government is not required to prove all of them.

R. 229 at 32. This instruction is based verbatim on the Seventh Circuit's pattern instruction for "18 U.S.C. § 1344—Multiple False Statements Charged" (except that the Court added the words "beyond a reasonable doubt" at O'Brien's request). *See* Seventh Circuit Pattern Criminal Jury Instructions (2012), p. 414. The Seventh Circuit "presume[s] that the Pattern Criminal Jury Instructions for the Seventh Circuit correctly state the law." *Marr*, 760 F.3d at 744. And O'Brien has not cited any case supporting that this is an incorrect statement of the law. In other words, as long as the jury found a scheme and an execution of that scheme within the statute of limitations, it needed to find only one of the false statements charged as part of the scheme beyond a reasonable doubt. It did not need to find a false statement with respect to the execution falling within the statute of limitations specifically.

In sum, the entire bank fraud scheme in Count II (and the mail fraud scheme in Count I) fell within the statute of limitations as long as the jury found a scheme and an execution of the scheme within the statute of limitations. The jury instructions ensured that it did. And the Court properly instructed the jury, pursuant to the Seventh Circuit's pattern instruction, that it had to find only one false representation or promise alleged in the scheme beyond a reasonable doubt—not all of them and not any one of them in particular.

2. Rule 404(b) Evidence

O'Brien further argues that all of the evidence offered related to the 2004, 2005, and 2006 transactions was inadmissible propensity evidence under Federal Rule of Evidence 404(b). But as the Seventh Circuit explained in *United States v. Ferrell*, 816 F.3d 433 (7th Cir. 2015), "Rule 404(b) does not apply to direct evidence of the crime charged." *Id.* at 443 (citing *United States v. Adams*, 628 F.3d 407, 414 (7th Cir. 2010) ("[I]f the evidence is admitted as direct evidence of the charged offense, Rule 404(b) is not applicable. Specifically, evidence directly pertaining to the defendant's role in a charged conspiracy is not excluded by Rule 404(b).").

Here, evidence of the 2004, 2005, and 2006 transactions was not other acts evidence for purposes of Fed. R. Evid. 404(b). It was evidence of charged crimes—namely, evidence of the 2004, 2005, and 2006 transactions that the Court has already found were properly included as part of the scheme to defraud. There was therefore no need for the Court to undertake a Rule 404(b) analysis.

O'Brien says she was "prejudice[d]" by the fact that the Court never had to undertake a Rule 404(b) analysis. R. 288 at 32. She made the same argument in her duplicity motion to dismiss. *See* R. 116 at 22

(O'Brien argued that "the indictment prejudices her by allowing time-barred evidence to be admitted as probative of a scheme that this Court otherwise may not admit under . . . [Rule 404(b)]"). And this Court found that it was within the government's discretion to proceed the way it did. *Id.* at 3-23. The Court noted that other courts have admitted evidence of transactions outside the statute of limitations as scheme evidence. R. 116 at 22-23 (citing *United States v. Grossi*, 1995 WL 571417, at *4 (N.D. Ill. Sept. 25, 1995; *Hollnagel*, 2011 WL 3664885, at *12). A case on which O'Brien relies, *United States v. Wellman*, 830 F.2d 1453 (7th Cir. 1987), likewise explained that conduct outside the statute of limitations "was highly relevant to the existence of the very same scheme to defraud which the mailings in this case were alleged to have furthered." *Id.* at 1464. The *Wellman* court alternatively explained that the evidence went to the issue of intent, meaning that it would have been properly admitted under Rule 404(b) in any event. *Id.* The Court makes the same alternative finding here.

3. Intent Instructions for Count II

O'Brien next objects to the intent component of the Court's elements instruction on Count II for bank fraud. That instruction told the jury, in relevant part, that it had to find:

1. There was a scheme to defraud a financial institution or to obtain moneys and property owned by, or in the custody or control of, a financial institution by means of false or fraudulent pretenses, representations or promises as charged in Count Two of the indictment; and . . . .

3. The defendant acted with the intent to defraud; . . . .

R. 229 at 22. That instruction, including the intent element, was based verbatim on the Seventh Circuit pattern elements instruction for bank fraud under 18 U.S.C. § 1344. Seventh Circuit Pattern Criminal Jury Instructions (2012), p. 411 ("18 U.S.C. § 1344 Financial Institution Fraud–Elements"). Again, the Seventh Circuit "presume[s] that the Pattern Criminal Jury Instructions for the Seventh Circuit correctly state the law." *Marr*, 760 F.3d at 744.

O'Brien argues that the intent instruction did not properly account for *Loughrin*'s holding that the intent requirement is different under § 1344(1) than under § 1344(2)—*i.e.*, § 1344(1) requires specific intent to defraud a financial institution, but § 1344(2) does not. 134 S. Ct. 2384. The Court disagrees.

Jury instructions are reviewed "as a whole to determine whether they fairly and accurately summarize the law." *United States v. Grady*, 746 F.3d 846, 848 (7th Cir. 2014). And here, the combination of several intent-related instructions given by the Court on Count II—*i.e.*, the Seventh Circuit pattern elements instruction for bank fraud under 18 U.S.C. § 1344, combined with the Seventh Circuit pattern instruction for the "Scheme–Definition" under 18 U.S.C. § 1344—fairly and accurately summarized the law.

Although part 3 of the elements instruction described the third element of bank fraud more generally as "the defendant acted with the intent to defraud," part 1 told the jury that it had to find "a scheme to defraud a financial institution [*i.e.*, the language of § 1344(1)] <u>or</u> to obtain moneys and property owned by, or in the custody or control of, a financial institution by means of false or fraudulent pretenses, representations or promises [*i.e.*, the language of § 1344(2)]. R. 229 at 22 (emphasis added). And the "Scheme–Definition" instruction defined "scheme to defraud a financial institution" (*i.e.*, for purposes of § 1344(1)) with the requisite element of specific intent:

> For purposes of Count Two, . . . A scheme to defraud a financial institution means a plan or course of action intended to deceive or cheat that financial institution or to obtain money or property or to cause the potential loss of money or property by the financial institution.

Id. at 32; *see* Seventh Circuit Pattern Criminal Jury Instructions (2012), p. 413 ("18 U.S.C. § 1344 Scheme–Definition). The Committee Comment for this instruction explains that this paragraph "should be given in a case in which a scheme to defraud a bank [under § 1344(1)] is charged." *Id.* (committee comment). The "Scheme–Definition" instruction thus ensured that if the jury found a "scheme to defraud a financial institution" as required for § 1344(1), it also had to find the requisite specific intent.[12]

O'Brien notes that, based on *Loughrin*, the Seventh Circuit has proposed—but not yet adopted—new, separate bank fraud instructions for §§ 1344(1) and (2). *See* Proposed Revisions to Seventh Circuit Criminal

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12 O'Brien says the jury could have potentially disregarded everything prior to the "disjunctive 'or'" in this instruction and therefore not found the requisite intent. R. 288 at 34. But the Court presumes that the jury follows the plain language of jury instructions. *See Sorich*, 709 F.3d at 677.

Jury Instructions ("18 U.S.C. § 1344(1) Scheme to Defraud A Financial Institution–Elements"; "18 U.S.C. § 1344(1) Scheme to Defraud–Definition"; "18 U.S.C. § 1344(2) Obtaining Bank Property By False Or Fraudulent Pretenses–Elements"; "18 U.S.C. § 1344(2) Scheme to Defraud–Definition") (*available at* http://www.ca7.uscourts.gov/pattern-jury instructions/2016_proposed_changes_to_CrimCivil_Jury_Instructions.pdf). But as the Committee Comment explains, these separate instructions are designed to account for *Lougrin*'s "h[olding] that <u>the Government need not prove</u> that a defendant charged under 18 U.S.C. § 1344(2) intended to defraud the bank or financial institution." *Id.* ("18 U.S.C. § 1344(1) Scheme to Defraud A Financial Institution–Elements," committee comment) (emphasis added). It is for this reason that "the Committee has divided the previous unified instruction for § 1344 into two separate instructions." *Id.* In other words, the Committee has proposed revising the pattern instructions to make the government's <u>lesser</u> burden of proof under § 1344(2) clear.

The proposed revisions include a "18 U.S.C. § 1344 (1) Scheme to Defraud–Definition" instruction regarding intent that is identical to the instruction the Court gave, proscribing the requisite specific intent for "a scheme to defraud a financial institution" under § 1344(1). *Id.* ("18 U.S.C. § 1344(1) Scheme to Defraud–Definition"). Although the proposed pattern instructions separating out § 1344(1) and § 1344(2) may be clearer, they in no way support that the current, pattern instructions the Court gave misstated the law. If anything, the current instructions might have prejudiced the government, because the proposed separate instructions make clear that specific intent is not required under § 1344(2). In any event, the pattern instructions given did not prejudice O'Brien. *See White,* 443 F.3d at 587 (new trial appropriate only when instructions caused prejudice).

Finally, O'Brien takes issue with the government's statement to the jury at closing that the third element of bank fraud was "I think . . . identical" to the intent element of mail fraud, Tr. 1195, without clarifying the different intent levels required under § 1344(1) and § 1344(2). The government immediately thereafter emphasized that it was speaking in general terms. Tr. 1195 (clarifying that the intent and other elements of mail fraud "are generally consistent with Count II"). And the government's main point in this discussion was that its "proof [wa]s the same" and "overlap[ping]" on this and certain other elements of Counts I and II, so it planned "to discuss them together." *Id.* The government later clarified that "[t]he defendant acted with intent to defraud if the defendant acts knowingly and with intent to deceive or cheat the victim in order to cause a gain or money or property to the defendant." Tr. 1197 (emphasis added). Read in context, the government's discussion of intent in its closing statement did not prejudicially mislead the jury.

4. Admission of Quit Claim Deeds

Finally, O'Brien claims the Court erred in admitting into evidence the quit claim deeds transferring the properties from Kwan to Bartko shortly after the 2007 closings (GX CCRD 1 and 2). O'Brien argues that the deeds were hearsay, lacked foundation without a witness's testimony introducing them, and were irrelevant because there was no evidence O'Brien knew about them. The Court disagrees.

The deeds were not hearsay or offered without foundation. Deeds are "[s]tatements in documents affecting an interest in property" that "fall within an exception to the hearsay rule." *Doss v. Clearwater Title Co.*, 551 F.3d 634, 640 (7th Cir. 2008) (citing Fed. R. Civ. 803(15)). And the government obtained certified copies of the deeds from the Cook County Recorder of Deeds Office, which are self-authenticating. *See* Fed. R. Evid. 902 (certified copies of public records are self-authenticating; a witness is not needed).

And the deeds were relevant regardless of whether O'Brien knew about them. The indictment alleged, and the government offered proof at trial, that Bartko was the true buyer of O'Brien's properties in 2007, and Kwan was merely a straw buyer. The quit claim deeds supported this position by showing that the properties were deeded over from Kwan to Bartko very soon after the closings.

Finally, O'Brien says that because the Court admitted the quit claim deeds, O'Brien should have been allowed to introduce evidence that Kwan quit-claimed a property in Skokie to Bartko on another occasion. O'Brien sought to introduce this evidence to support an argument that Kwan and Bartko were involved in their own separate scheme. Unlike the quit claim deeds that the Court admitted, which pertained directly to the properties at issue, the quit claim deed O'Brien sought to introduce involved a different property not at issue in this case. It was therefore properly excluded as irrelevant.

Conclusion

For the foregoing reasons, the Court denies O'Brien's post-trial motions for a judgment of acquittal or, alternatively, for a new trial [277]. For the same reasons it denies her post-trial motion for a judgment for acquittal, the Court also denies O'Brien's motion for judgment of acquittal filed at the close of the government's case [225], as well as O'Brien's oral motions for a directed verdict at the close of the evidence and following the jury charge, which the Court took under advisement (*see* R. 230).

ENTERED:

/s/ Thomas M. Durkin
United States District Judge

Dated: September 4, 2018

DECISION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS (FEBRUARY 15, 2018)

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA

v.

JESSICA ARONG O'BRIEN

No. 17 CR 239-1

Before: Thomas M. DURKIN, Judge.

With respect to the charges set forth in the indictment, we the jury, find the defendant, JESSICA ARONG O'BRIEN:

Count One: ☒ Guilty

Count Two: ☒ Guilty

Signatures not legible
Foreperson

Dated: 2/15/2018

MEMORANDUM OPINION & ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS ON STATUTE OF LIMITATION (JANUARY 29, 2018)

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

JESSICA ARONG O'BRIEN,

Defendant.

No. 17 CR 239-1

Before: Honorable Thomas M. DURKIN,
United States District Judge.

Defendants Jessica Arong O'Brien and Maria Bartko are charged with engaging in a scheme to defraud that involved causing lenders to issue and refinance loans related to two investment properties that O'Brien owned on the south side of Chicago. The indictment charges O'Brien and Bartko with mail fraud in violation of 18 U.S.C. § 1341 in Count I, and it charges O'Brien with bank fraud in violation of 18 U.S.C. § 1344 in Count II. The indictment alleges that defendants' scheme was comprised of a series of transactions in 2004, 2005, 2006, and 2007. R. 1 at 4-7. Of particular relevance here, the indictment alleges that in 2007, Citibank, N.A. ("Citibank") funded a loan[1] in the amount of $73,000 for one of the investment properties sold by O'Brien to Bartko using a straw buyer. R. 1 at 10.

Before the Court are two motions: (1) O'Brien's motion to dismiss the indictment based on the statute of limitations and failure to state an offense (R. 139); and (2) O'Brien's motion to dismiss based on pre-indictment delay (R. 141). For the reasons explained below, the Court denies both motions.

I. Statute of Limitations and Failure to State an Offense

A. Standard

Federal Rule of Criminal Procedure 12(b)(3)(B) allows a party to raise by pretrial motion "a defect in the indictment or information, including . . . failure to state an offense." Rule 12(b)(1) more generally allows a party to "raise by pretrial motion any defense, objection, or request that the court can determine without a trial on the merits," including an argument based on the "statute of limitations." Fed. R. Crim. P. 12(b)(1) & (b)(1)-(2) advisory committee note.

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[1] The indictment refers to this as a "mortgage loan" (R. 1 at 10), but a Citibank representative in her testimony (R. 113 at 78-79, 85, 105) and the parties in some of their filings (R. 148 at 2, 14; R. 161 at 6) refer to it as a "home equity loan." This distinction is not relevant for purposes of this opinion, but the parties should clarify the type of loan at issue at trial.

Pursuant to Federal Rule of Criminal Procedure 7(c)(1), an "indictment or information must be a plain, concise, and definite written statement of the essential facts constituting the offense charged." The indictment need not "allege in detail the factual proof that will be relied on to support the charges." *United States v. Smith*, 230 F.3d 300, 306 (7th Cir. 2000). "An indictment is legally sufficient if it (1) states all the elements of the crime charged; (2) adequately informs the defendant of the nature of the charges so that [s]he may prepare a defense; and (3) allows the defendant to plead the judgment as a bar to any future prosecutions." *United States v. White*, 610 F.3d 956, 958 (7th Cir. 2010).

On a motion to dismiss, "[a]n indictment is reviewed on its face, regardless of the strength or weakness of the government's case." *Id.* This Court "assumes all facts in the indictment are true and must 'view all facts in the light most favorable to the government.'" *United States v. Segal*, 299 F. Supp. 2d 840, 844 (N.D. Ill. 2004) (quoting *United States v. Yashar*, 166 F.3d 873, 880 (7th Cir. 1999)).

B. Application

O'Brien moves to dismiss Count I of the indictment based on the statute of limitations and Count II for failure to state an offense. "To secure an indictment for mail . . . fraud" as alleged in Count I, "the government was required to show probable cause to believe that [O'Brien]: (i) participated in a scheme to defraud; (ii) acted with intent to defraud; and (iii) used the mail . . . in furtherance of the fraudulent scheme." *United States v. Vincent*, 416 F.3d 593, 601 (7th Cir. 2005). Mail fraud generally is governed by the default five-year limitations period for non-capital federal crimes set forth in 18 U.S.C. § 3282(a). But a ten-year statute of limitations applies to mail fraud that "affects a financial institution." 18 U.S.C. § 3293(2). The government relied on the ten-year statute of limitations in 18 U.S.C. § 3293(2) to indict O'Brien when it did.

A ten-year statute of limitations undisputedly applies to the bank fraud charge in Count II. *See* 18 U.S.C. § 3293(1). But like the statute providing a ten-year limitations period for mail fraud, the statute criminalizing bank fraud contains a "financial institution" requirement. To obtain an indictment for bank fraud, the government needed to establish probable cause to believe that O'Brien "knowingly execute[d], or attempt[ed] to execute, a scheme . . . (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." 18 U.S.C. § 1344.

O'Brien's arguments for dismissal focus on the "financial institution" requirement in the ten-year statute of limitations for mail fraud (18 U.S.C. § 3293 (2)) and the statute setting forth the elements of bank fraud (18 U.S.C. § 1344). "Financial institution" is defined to include "an insured depository institution (as defined in section 3(c)(2) of the Federal Deposit Insurance Act ['FDIA'])." 18 U.S.C. § 20. Section 3(c)(2) of the FDIA in turn provides that "[t]he term 'insured depository institution' means any bank or savings association the deposits of which are insured by the Corporation pursuant to this chapter." 12 U.S.C. § 1813 (c)(2).

Although the indictment describes a number of transactions comprising the alleged scheme, it only alleges that one of them (a) involved a financial institution (Citibank) and (b) occurred within the ten-year statute of limitations: the $73,000 loan the straw buyer obtained for the purchase of one of O'Brien's two investment properties in 2007. *See* R. 1. Because this is the only loan that potentially brings this case within the ten-year statute of limitations, it is the focus of O'Brien's motion.

O'Brien claims that, in fact, CitiMortgage funded the $73,000 loan—not Citibank. And CitiMortgage undisputedly did not qualify as a "financial institution" in 2007. *See, e.g.*, *United States v. Bouchard*, 828 F.3d 116, 124 (2d Cir. 2016) (prior to the Fraud Enforcement and Recovery Act of 2009, "financial institution[s]" did not include mortgage lenders, and the pre-2009 definition applies to conduct that occurred before 2009). O'Brien therefore maintains that the default five-year statute of limitations applies to the mail fraud charge in Count I, and that statute expired well before the government indicted this case. O'Brien further maintains that Count II fails to state an offense because the $73,000 loan alleged to be the subject of bank fraud was not funded by a financial institution.

For several reasons set forth below, this Court declines to dismiss the indictment on these bases.

1. Face of the Indictment

As explained above, the Court's review at this stage is limited. It must "assume[] all facts in the indictment are true," *Segal*, 299 F. Supp. 2d at 844, and review the indictment on its face, *White*, 610 F.3d at 958.

The indictment on its face alleges that the "scheme affected a financial institution"—namely, Citibank. R. 1 at 2-3. For purposes of Count I, the indictment specifically alleges that O'Brien and Bartko knew "that false information would be submitted to lenders, including Citibank, N.A., to qualify [the straw buyer] for the [2007] loans." *Id.* at 7. For purposes of Count II, the indictment specifically alleges that O'Brien "knowingly executed and attempted to execute the scheme to defraud by causing Citibank, N.A., a financial institution, to fund a mortgage loan in the amount of approximately $73,000" for one of the two investment properties sold in 2007. *Id.* at 10; *see also* R. 139 at 1 (O'Brien acknowledges that "[t]he Indictment *alleges* that Citibank . . . was the lender on the $73,000 loan"). The indictment also states that "Citibank N.A." was during the relevant time period a "financial institution[], the deposits of which were insured by the Federal Deposit Insurance Corporation." R. 1 at 2.

In other words, the indictment on its face plainly alleges that the mail fraud scheme described in Count I affected Citibank, a financial institution as defined by 18 U.S.C. § 20 and 12 U.S.C. § 1813(c)(2). Count I therefore alleges an offense affecting a financial institution governed by the ten-year statute of limitations. And the indictment on its face plainly alleges that Citibank funded the $73,000 loan described in Count II. Count II thus states the offense of defrauding a financial institution. Accordingly, the indictment is not legally insufficient.

2. Outside Evidence

O'Brien urges the Court to consider evidence outside the four corners of the indictment to decide her motion. *See* Ex. 139 (exhibits). O'Brien cites a Tenth Circuit case, *United States v. Hall*, 20 F.3d 1084, 1088 (10th Cir. 1994), for the proposition that courts may consider facts outside the indictment on a motion to dismiss. But the *Hall* court made clear that as a general matter, "[c]ourts should refrain from considering evidence outside the indictment when testing its legal sufficiency." 20 F.3d at 1087. It explained that only under "certain limited circumstances" could a district court "go beyond the allegations of the indictment and make predicate findings of fact." *Id.* at 1088. These circumstances are: "[1] where the operative facts are undisputed and [2] the government fails to object to the district court's consideration of those undisputed facts in making the determination regarding a submissible case." *Id.* "Under this scenario," the *Hall* court explained, "a pretrial dismissal is essentially a determination that, *as a matter of law*, the government is incapable of proving its case beyond a reasonable doubt." *Id.* (emphasis in original). The court emphasized "that such a scenario is not likely to recur," and it "caution[ed] both the trial courts and counsel that the procedure [t]here employed [wa]s indeed the rare exception." *Id.*

This case is not "the rare exception" described in *Hall. Id.* The facts are not "undisputed" (*id.*)—rather, the government heavily contests the facts stated by O'Brien. Nor has "the government fail[ed] to object to the district court's consideration of [outside] facts" (*id.*)—rather, the government strenuously objects to this Court's consideration of outside facts.

In any event, even if this Court were to consider facts beyond the face of the indictment, it would not change the Court's conclusion. O'Brien says the outside evidence conclusively reveals that CitiMortgage, not Citibank, funded the $73,000 loan. In fact, there is significant evidence supporting the government's position that Citibank was the lender on the $73,000 loan. The note, the mortgage, the HUD-1 settlement statement, the truth in lending disclosure, the affiliated business arrangement disclosure, and the evidence of homeowner's insurance all identify

Citibank as the lender. R. 148-1, 148-2, 148-3, 148-4, 148-5, 148-6. Moreover, at an evidentiary hearing before this Court on October 11, 2017, Judy Taylor, a Citibank vice president, testified: (1) that the "$73,000" were "Citibank funds," R. 113 at 78; (2) that "the [$73,000] home equity loan was a Citibank product," as the note and other documents demonstrated, *id.* at 105; and (3) that the loan was funded using "all Citi money," *id.* at 79. Taylor explained that although the wire transmitting the funds indicated that the funds came from a CitiMortgage account, that money would have been "requested from the Citibank cash account and transferred over to the [CitiMortgage] wholesale lending account," which "was zeroed out at the end of the day." *Id.* at 62-63, 77-79.

O'Brien points to other documents that she claims establish that CitiMortgage, and not Citibank, funded the $73,000 loan. These include a number of documents prior to closing identifying CitiMortgage or CitiMortgage and affiliates as the originator or lender (R. 139-3, 139-7, 139-9); documents from the day of closing identifying CitiMortgage as the lender and indicating that funds for the loan were drawn from a CitiMortgage account (R. 139-13, 139-14, 139-15, 139-16, 139-17, 139-18, 139-31, 139-32, 139-33); mortgage account statements from CitiMortgage and checks made out to CitiMortgage for the loan (R. 139-19, 139-20, 139-21); IRS tax records and credit reports for the alleged straw buyer identifying CitiMortgage as the lender (R. 139-27, 139-28, 139-29); and a letter from a CitiMortgage representative in response to a government subpoena stating that CitiMortgage took a loss of $73,000 on the loan (R. 139-23).

O'Brien acknowledges, however, that the note and the mortgage executed at closing identified Citibank as the lender for the $73,000 loan. R. 139 at 7. She concedes that "[s]ome of the underwriting approval paperwork did . . . reflect that Citibank would be the lender on the $73,000." R. 139 at 5. In light of this evidence and the other documents and testimony cited by the government, the issue of which entity funded the $73,000 loan is far from one that can be decided as a matter of law. Indeed, whereas O'Brien's motion claims to have affirmative proof that "in fact CitiMortgage <u>did</u> fund the $73,000 loan" (R. 139 at 20 (emphasis in original)), her supplemental and reply briefs implicitly acknowledge that the issue is not so clear cut by focusing on the <u>lack</u> of definitive proof as to which entity funded the loan. *See* R. 145 at 2 (supplemental brief discussing lack of "unequivocal[]" proof and "dispositive documentary evidence"); R. 161 at 6, 9 (reply brief discussing lack of "direct evidence" and "dispositive evidence").

O'Brien argues in her supplemental brief that pursuant to Citigroup's ten-year retention policy for certain records (R. 145-2, 145-3), documents may have been destroyed that would conclusively "evidenc[e] Citibank funding [the] $73,000 loan" or show "that CitiMortgage . . . funded the loan." R. 145 at 2. O'Brien criticizes the government for failing to "issue[]

a simple litigation/legal/regulatory hold" during its investigation to prevent the destruction of this evidence. R. 145 at 2.

O'Brien points to no criminal case dismissing an indictment or otherwise sanctioning the government (as O'Brien suggests, R. 145 at 8) based on failure to ensure that a litigation hold is put into place.[2] And, as O'Brien acknowledges, there is "nothing unlawful or improper" about a records retention policy. R. 141 at 12 (citing *Arthur Andersen LLP v. United States*, 544 U.S. 696, 704 (2005)). The fact that that certain documents may no longer exist due to the routine and lawful records retention policy of one of the alleged victims in this case does not mean that all other evidence should be ignored and O'Brien is entitled to judgment as "*as a matter of law.*" *Hall*, 20 F.3d at 1088 (emphasis in original).[3]

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[2] Litigation holds typically refer to an internal order an organization puts in place to "hold" and not destroy certain documents that otherwise would be destroyed pursuant to a routine document destruction policy. The government typically does not put a "litigation hold" in place—rather, the holder of the documents puts such a hold in place. The government's method of preventing document destruction is to issue a grand jury subpoena, which obligates the subpoenaed organization to take steps to retain and ultimately produce the subpoenaed documents. Here, as further discussed below, the government issued a grand jury subpoena seeking relevant documents from the Citi entities very early in its investigation.

[3] O'Brien's claims of prejudice resulting from missing documents are best addressed in the context of her motion to dismiss based on pre-indictment delay, which the Court addresses below.

Rather, as this Court explained at the October 11, 2017 evidentiary hearing, any missing documentation is

> a matter of proof that the government is going to have to overcome at trial. They may have to call [Taylor] as a witness at trial. But they have established a good-faith basis to at least at this stage establish that the money comes from a financial institution. . . . If you want to impeach . . . with the absence of records, that's a matter for trial proof.

R. 113 at 80. Indeed, weighing competing documentary evidence and determining the appropriate weight to give to Taylor's testimony (as well as any other Citibank representatives' testimony) are quintessential tasks for the jury.

In sum, even if the Court were to consider facts beyond the face of the indictment—which governing law says it cannot do in these circumstances—it still would find that O'Brien's motion presents jury issues that cannot be decided on a motion to dismiss.

3. Risk of Loss to Parent Company Sufficient for Count I

There is an additional reason why O'Brien's motion does not provide grounds for dismissal of Count I. Several courts of appeals have interpreted 18 U.S.C. § 3293(2)'s ten-year statute of limitations for wire or mail fraud "affect[ing] a financial institution" to encompass situations where a financial institution's subsidiary funded a loan. *See, e.g.*, *United States v. Mullins*, 613 F.3d 1273, 1278-80 (10th Cir. 2010); *United States v. Bouyea*, 152 F.3d 192, 195 (2d Cir.

1998); *United States v. Pelullo*, 964 F.2d 193, 214-16 (3d Cir. 1992). Under this interpretation, even if O'Brien is correct that CitiMortgage (Citibank's subsidiary) funded the $73,000 loan, the ten-year statute of limitations still would apply, and Count I would not be time-barred.

O'Brien maintains that the Seventh Circuit's decades-old decision in *United States v. White*, 882 F.2d 250 (7th Cir. 1989), indicates that the Seventh Circuit would take a different position than these other courts of appeals. This Court disagrees. *White* did not address the proper interpretation of the "affects a financial institution" language in 18 U.S.C. § 3293(2). Rather, it involved a challenge to a conviction under 18 U.S.C. § 1014, which prohibits "'knowingly'" making false statements "'for the purpose of influencing'" an FDIC-insured institution. *White*, 882 F.2d at 250 (quoting 18 U.S.C. § 1014). The Seventh Circuit in *White* held that 18 U.S.C. § 1014 did not extend to statements made to a wholly owned bank subsidiary, explaining that it could not assume "that Congress wanted to extend the statute's protection to [the bank's] affiliates, when so far as appears there is no (or only the most attenuated) federal stake in preventing fraud against affiliates of a federally insured bank." *Id.* at 253.

The Seventh Circuit has since distinguished *White* as a case where the indictment did not charge the defendant with an element of the crime—intent to influence a financial institution. *See United States v. Bianucci*, 416 F.3d 651, 656 (7th Cir. 2005). Rather, the indictment in *White* charged the defendant only with intent to influence a financial institution's subsidiary. *Id.* In *Bianucci*, on the other hand, the indictment charged the defendant "with making false statements [in documents submitted to a subsidiary] for the purpose of influencing the [financial institution] to advance funds to [the subsidiary]." *Id.* at 657. And "there [wa]s sufficient evidence to show that [the defendant] knew the bank was identified as the lender, and that, although [the subsidiary] may have been servicing the loan, the bank was advancing the money." *Id.* Unlike in *White*, the government in *Bianucci* "did not stake its case on proving that [the subsidiary] was an FDIC-insured entity." *Id.*

Like in *Bianucci* and unlike in *White*, the indictment in this case alleges all of the required elements of mail fraud affecting a financial institution—including facts that would support that the mail fraud affected Citibank, which the indictment alleges owned Citibank Domestic Investment Corp., which in turn owned CitiMortgage. R. 1 at 2. The government has not "stake[d] its case on proving that [CitiMortgage] was an FDIC-insured entity." *See Bianucci*, 416 F.3d at 647.

Moreover, knowingly making statements for the purpose of influencing a financial institution under 18 U.S.C. § 1014 is a substantively different requirement than affecting a financial institution under 18 U.S.C. § 3293(2). *Cf. Pelullo*, 964 F.2d at 216 (emphasizing that 18 U.S.C. § 3293(2) does not "provid[e] for an extended limitations period where the financial institution is the *object* of fraud"; rather, through the word "affected," "Congress chose to extend the statute of limitations to a broader class of crimes"). And more recent Seventh Circuit decisions than *White* indicate that it would follow its sister circuits in the context of interpreting 18 U.S.C. § 3293(2). For example, the Seventh Circuit in *United States v. Serpico*, 320 F.3d 691 (7th Cir. 2003), determined that a district court properly instructed the jury that an offense affects a financial institution for purposes of 18 U.S.C. § 3293(2) if it "expose[s] the financial institution[s] to a new or increased risk of loss. A financial institution need not have actually suffered a loss in order to have been affected by the scheme." *Id.* at 694. The court explained that "protection for financial institutions is much more effective if there's a cost to putting those institutions at risk, whether or not there is actual harm." *Id.* at 694-95. Relying on *Serpico*, the Seventh Circuit in *United States v. Marr*, 760 F.3d 733 (7th Cir. 2014), rejected a challenge to a jury instruction stating that "[a] scheme 'affected' a financial institution if it exposed the financial institution to a new or increased risk of loss." *Id.* at 743-44.

The Tenth Circuit in *Mullins* applied the same definition of "affected" adopted by the Seventh Circuit in *Serpico* and *Marr* to conclude that the ten-year statute of limitations applies even when a mortgage company subsidiary issued a loan, as long as the jury finds that the loan exposed the parent financial institution to a greater risk of loss. 613 F.3d at 1278-80. The *Mullins* court first determined that "a 'new or increased risk of loss' is plainly a material, detrimental effect on a financial institution, and falls squarely within the proper scope of [18 U.S.C. § 3293(2)]." *Id.* at 1278-79. Applying that interpretation, the court found that the jury reasonably could have concluded that "the loans [the subsidiaries] issued based on false information [defendant] helped supply exposed the companies to a greater risk of loss," and "that this risk of loss passed through to their parent financial institutions." *Id.* at 1280; *accord Pelullo*, 964 F.2d at 215 ("assum[ing] that a fraud perpetrated against a financial institution's wholly owned subsidiary cannot affect the parent" is "a clearly untenable assumption"). This Court sees no reason to believe that the Seventh Circuit would conclude differently in light of its identical interpretation of "affected" for purposes of 18 U.S.C. § 3293(2).

Thus, even if the jury agrees with O'Brien that CitiMortgage funded the $73,000 loan, that would not end the jury's inquiry as to Count I. The jury still could find, as the jury did in *Mullins*, that "the ten year statute of limitations applies" to Count I, 613 F.3d at 1280, because the false information O'Brien helped supply "exposed [CitiMortgage's parent Citibank] to a new or increased risk of loss." *See Serpico*, 320 F.3d at 694. Such a finding could be supported by Taylor's testimony that "if, in fact, there was a loss" from the $73,000 loan, "Citibank" "would take that loss." R. 113 at 82; *see also, e.g., Bouyea*, 152 F.3d at 195 (testimony by subsidiary's representative that parent financial institution "was affected by th[e] loss" "was sufficient to support the finding that a financial institution was affected by the wire fraud"); *Mullins*, 613 F.3d at 1280 (based on "the mechanisms the companies' officers described," the jury reasonably found that the "risk of loss passed through to the[] parent financial institutions, which would bear any loss the mortgage companies incurred"). This is another reason why the Court declines to dismiss Count I based on the statute of limitations.

II. Pre-Indictment Delay

A. Standard

Under Federal Rule of Criminal Procedure 48(b)(1), a district court may dismiss an indictment "if unnecessary delay occurs in . . . presenting a charge to a grand jury." "A defendant's primary safeguard against unreasonable prosecutorial delay is derived from the applicable statute of limitations." *United States v. McMutuary*, 217 F.3d 477, 481 (7th Cir. 2000). The "Fifth Amendment's due process clause plays a limited," additional "role in assuring that the government does not subject a defendant to oppressive delay." *United States v. Spears*, 159 F.3d 1081, 1084 (7th Cir. 1998).

To establish a due process violation based on pre-indictment delay, a defendant "must demonstrate that the delay caused actual and substantial prejudice to his right to a fair trial." *McMutuary*, 217 F.3d at 482. "A defendant's burden to show actual and substantial prejudice is an exacting one; the showing must rest upon more than mere speculative harm." *Id.* "The defendant's allegations . . . must be 'specific, concrete, and supported by evidence.'" *Id.* (quoting *United States v. Sowa*, 34 F.3d 447, 450 (7th Cir. 1994)). The Seventh Circuit has described this as a "monumental hurdle." *Sowa*, 34 F.3d at 451.

If the defendant succeeds in demonstrating actual and substantial prejudice, "the burden shifts to the government to 'show that the purpose of the delay was not to gain a tactical advantage over the defendant or for some other impermissible reason.'" *McMutuary*, 217 F.3d at 482 (quoting *Spears*, 159 F.3d at 1084-85). The government's "reasons are then balanced against the defendant's prejudice to determine whether the defendant has been denied due process." *Sowa*, 34 F.3d at 451. To constitute a due process violation, the "actual prejudice to the defendant . . . must be so substantial as to outweigh the preferable deference to legitimate prosecutorial priorities and bureaucratic realities." *United States v. Williams*, 738 F.2d 172, 175 n.2 (7th Cir. 1984).

B. Application

1. Actual and Substantial Prejudice

O'Brien's argument for actual and substantial prejudice is founded on the potentially relevant documents no longer available in light of Citigroup's ten-year records retention policy. O'Brien explains that the government's investigation in this case began at some point in 2015, at least a year and a half before Citigroup's records retention policy (or, more accurately, document destruction policy) kicked in for certain documents from April 2007 that may have been related to the $73,000 loan. O'Brien acknowledges that "one of the first things [the government] did" in its investigation was to issue a grand jury subpoena to CitiMortgage "request[ing] information regarding the loss" on the $73,000 loan. R. 166 at 7. Through that subpoena, "the Government [also] asked for documents tracking the elements required to prove a mail or wire fraud case." *Id.* As explained above, a grand jury subpoena of this nature is the government's primary method of preventing document destruction.

O'Brien nevertheless claims the government did not do enough to ensure the preservation of relevant records by the Citi entities in this case. O'Brien emphasizes that in response to the grand jury subpoena, a CitiMortgage representative sent a letter to the government in September 2015 explaining that it was producing non-privileged, responsive documents, and stating that "[t]he loan[] . . . result[ed] in a loss to CitiMortgage of . . . $73,000." R. 141-8. At that point, O'Brien maintains, the government was on notice that CitiMortgage may have been the lender on the $73,000 loan. O'Brien says the government should have realized that CitiMortgage was not a financial institution and taken additional steps beyond the grand jury subpoena to ensure that no records potentially relevant to that issue would be destroyed.

O'Brien points out that if the government had indicted the case several months sooner than it did (in mid-April 2017), O'Brien could have sought any relevant documents from April 2007 before Citigroup's retention policy came into play. Because she claims these records could conclusively establish that CitiMortgage—not Citibank—funded the $73,000 loan, which would support the arguments addressed in Section I of this opinion, O'Brien says that the delay caused actual and substantial prejudice.

Although the Court agrees with O'Brien that the timing of the expiration of Citigroup's ten-year records retention policy vis-à-vis the indictment is unfortunate, the Court finds that O'Brien has not satisfied the "monumental hurdle of proving prejudice" based on pre-indictment delay. *Sowa*, 34 F.3d at 451. Again, "[a] defendant's burden to show actual and substantial prejudice is an exacting one," requiring O'Brien to be "concrete" and "specific." *McMutuary*, 217 F.3d at 482. "[A] pre-indictment delay which causes evidence to be unavailable will not alone amount to actual prejudice." *Spears*, 159 F.3d at 1085. To satisfy her burden based on records "destroy[ed]" "in the regular course of . . . business," O'Brien must show "whose records would have been subpoenaed, what those records are likely to have shown, and how the records would have been helpful to the defense." *United States v. Canoy*, 38 F.3d 893, 902-03 (7th Cir. 1994).

O'Brien has not identified particular documents likely destroyed pursuant to Citigroup's records retention policy that are likely to have shown CitiMortgage to be the lender on the $73,000 loan and thus to help her defense. The specific documents

O'Brien complains are missing—and that appear to fall under the terms of the ten-year records retention policy (*see* R. 145-2)—are the "cash transaction reports, as well as due to and due from reconciliation of funds transfer documents" that were "*testified to by Ms. Taylor.*" R. 145 at 4 (emphasis added). In other words, what O'Brien claims to be missing are reconciliation documents supporting Taylor's testimony that although the wire transfer documents show that the funds for the $73,000 loan came from a CitiMortgage account, that money in fact would have been "requested from the Citibank cash account and transferred over to the [CitiMortgage] wholesale lending account," which "was zeroed out at the end of the day." R. 113 at 62-63; *see also* R. 166 at 5 (in describing the "specific and concrete documents that . . . should have existed in 2015 when the Government began its investigation" in her reply brief, O'Brien states that "[t]hese documents—evidence of *Citibank's* alleged funding of the $73,000 loan—no longer exist") (emphasis added). Again, to meet her burden, O'Brien had to show "how the records [missing] would have been helpful *to the defense.*" *See Canoy*, 38 F.3d at 902-03 (emphasis added) (explaining that defendant needed to show how missing "records would have implicated another individual").

O'Brien's more general, optimistic assertions that missing documents could prove once and for all that CitiMortgage was the lender on the $73,000 loan are "speculative" rather than "concrete" and "specific." *McMutuary*, 217 F.3d at 482.[4] Although it is possible that missing documents would provide impeachment of Taylor, that possibility is unlikely in light of Taylor's clear, detailed testimony and key documentary evidence—including the note and the

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4 Importantly, the ten-year records retention policy did not result in the destruction of wire transfer and accounting records for the $73,000 loan. Although the Citi entities originally believed that "they no longer ha[d] copies of the wire transfers related to the April 16, 2007 closing because such records ha[d] aged out of [the] ten-year document retention policy," R. 141-13, a further search revealed that this was not the case. As counsel for CitiMortgage and Citibank explained to O'Brien's counsel in a December 13, 2017 letter:

> Yesterday, the Citi Entities confirmed that, although the wire transfer records were marked for destruction pursuant to the document retention policy, the hard copy records had not yet been destroyed and were being held at an off-site facility. Copies of those documents are being produced herewith. . . . In addition, the Citi Entities have confirmed that accounting records related to the transactions on April 16, 2007 were produced by the Citi Entities along with the origination files and other documents. . . . The Citi Entities will identify a witness who can testify . . . regarding the matters set forth in this letter.

R. 139-34. Thus, the delay has not deprived O'Brien of wire transfer records and other accounting records for the $73,000 loan. It also has not deprived O'Brien of testimony from the Citi entities' representatives related to those records.

mortgage—corroborating that testimony and identifying Citibank as the lender for the $73,000 loan. In light of this evidence and testimony, it seems "likely" that any missing documents would support the government's case rather than O'Brien's. *See Canoy*, 38 F.3d at 902.

More broadly, as detailed above, there is substantial documentary and testimonial evidence regarding who funded the $73,000 loan for the jury to weigh at trial. This is not a case in which delay has resulted in a gaping dearth of evidence relevant to a key issue. For these reasons, the Court finds that O'Brien has not met the "exacting" standard of providing "concrete evidence showing material harm" to her case as a result of pre-indictment delay. *Id.* (quotation marks omitted).

2. Government's Explanation

Even if O'Brien had satisfied her burden, the Court would reach the same conclusion under the second prong of the due process inquiry based on the facts as they currently stand. Like in *McMutuary*, the Court finds that the government has "offered a credible explanation for the delayed filing of the indictment" that is not "outweighed by the prejudice claimed by" O'Brien. 217 F.3d at 482. The government explains that it initiated a grand jury investigation on or about the day after investigating agencies opened the mortgage fraud investigation underlying this case. The government represents that it then engaged in an efficient, ongoing grand jury investigation between August 2015 and the indictment in April 2017, which is (according to the government) a typical duration for a case of this nature. The government notes that during this time, it "met with defendant's counsel, provided defendant's counsel with a 'reverse proffer,' and gave defendant's counsel key documents as pre-charging discovery." R. 154 at 6 n.3; *see, e.g.*, *Canoy*, 38 F.3d at 903 (crediting government explanation "that the delay resulted from its investigatory process, grand jury proceedings, an exchange between the parties of discovery materials, and then by lengthy pre-indictment plea negotiations").

This is a far cry from the situation in *United States v. Sabath*, 990 F. Supp. 1007 (N.D. Ill. 1998), on which O'Brien relies. In *Sabath*, there was a "four-year-and-two-month delay" prior to the return of the indictment during which the government failed to "demonstrate any legitimate investigative activity," and that delay created "severe, actual prejudice" to the defendant in the form of three witnesses dying whose "testimony could well have been outcome-determinative." *Id.* at 1014-16; *see also id.* at 1008 (describing *Sabath* as a "highly unusual criminal case" in which "the government recklessly delayed in bringing highly circumstantial arson and related mail fraud charges against Defendant until . . . 1997—even though by the government's own admission the investigation was completed over four years earlier"). Here, unlike in *Sabath*, the government did not wait for years after completing its investigation to indict.

Nor has there been any showing that the investigatory "explanation offered by the government was pretextual." *McMutuary*, 217 F.3d at 482. To the contrary, the government's good faith is shown by the fact that, on the first day of its investigation, it issued a grand jury subpoena to CitiMortgage seeking "documentation of any loss realized (and the calculations of those losses) by CitiMortgage or Citibank on the [2007] mortgage loans as a result of foreclosure or short sale" and "documentation of the writing of loan proceeds." R. 154 at 12. O'Brien acknowledges that "one of the first things [the government] did was to request information regarding the loss," and that through its subpoena to CitiMortgage, "the Government asked for documents tracking the elements required to prove a mail or wire fraud case." R. 166 at 7. Given that the government sought key documents from CitiMortgage on the first day of its investigation, it is difficult to *see* how the government could have been trying to take advantage of the ten-year records retention policy or gain other tactical advantages through delay.

There is another important piece of the equation that the parties fail to address. The primary reason the government indicted this case just before the expiration of the ten-year statute of limitations and the expiration of the ten-year records retention policy was the significant delay between when the events in the indictment took place and when the government learned about them. That delay cannot be attributed to the government. *See, e.g., Aleman v. Honorable Judges of Circuit Court of Cook County*, 138 F.3d 302, 310 (7th Cir. 1998) (in the context of addressing a pre-indictment delay argument in a habeas petition, finding the "position of criticizing the State for not discovering" the crime "sooner" to be "odd and untenable"). This is not a case where the defendant was "arrested . . . but [wa]s not charged" until significantly later. *See United States v. Hunter*, 197 F.3d 862, 866 (7th Cir. 1999). Nor, as explained above, is it a case of unnecessary delay after "the government possessed all of the information necessary to support an indictment." *See*

United States v. Miner, 127 F.3d 610, 615 (7th Cir. 1997); *see also Sabath*, 990 F. Supp. at 1008.

With respect to the only delay that can be attributed to the government—the time between when the government began investigating and when it indicted O'Brien—as in *McMutuary*, the Court has no reason to believe that "[t]he cause of th[at] delay" was anything other than "investigatory in nature." 217 F.3d at 483. In such cases, there is no due process violation. *Id.*; *accord Sowa*, 34 F.3d at 451 ("if the cause of the delay is legitimately investigative in nature, a court will not find a due process violation").

Conclusion

For the reasons explained above, the Court denies: (1) O'Brien's motion to dismiss based on the statute of limitations and failure to state an offense (R. 139); and (2) O'Brien's motion to dismiss based on pre-indictment delay (R. 141).[5]

ENTERED:

/s/ Hon. Thomas M. Durkin
United States District Judge

Dated: January 29, 2018

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[5] The Court notes that O'Brien can always re-raise her pre-indictment delay argument in the event that "[e]vents of the trial . . . demonstrate actual prejudice." *See United States v. Marion*, 404 U.S. 307, 326 (1971). And O'Brien is of course free to make her arguments based on the "financial institution" requirement in the ten-year statute of limitations for mail fraud (18 U.S.C. § 3293(2)) and the bank fraud statute (18 U.S.C. § 1344) to the jury.

MEMORANDUM OPINION & ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS ON DUPLICITY (NOVEMBER 9, 2017)

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

JESSICA ARONG O'BRIEN and MARIA BARTKO,

Defendants.

No. 17 CR 239-1

Before: Honorable Thomas M. DURKIN,
United States District Judge.

Defendants Jessica Arong O'Brien and Maria Bartko are charged with engaging in a scheme to defraud lenders and obtain money and property from lenders through materially false pretenses and representations. The indictment alleges in Count I that defendants committed mail fraud in violation of 18 U.S.C. § 1341, and in Count II that defendants committed bank fraud in violation of 18 U.S.C. § 1344. The indictment also contains a forfeiture allegation.

Before the Court is defendant O'Brien's motion to dismiss Counts I and II of the indictment on duplicity grounds (R. 45). O'Brien argues that in both Counts I and II, the government has improperly joined four separate offenses into a single scheme to avoid the statute of limitations that would otherwise apply to bar the first three offenses. O'Brien claims the indictment is therefore duplicitous and prejudicial to her in a number of ways. Because this Court finds that the indictment fairly alleges a scheme and that potential prejudices can be effectively mitigated at trial, it denies O'Brien's motion to dismiss (R. 45).

Standard

"Challenging an indictment is not a means of testing the strength or weakness of the government's case, or the sufficiency of the government's evidence." *United States v. Moore,* 563 F.3d 583, 586 (7th Cir. 2009) (internal quotation marks omitted). Rather, a motion to dismiss seeks to correct a defect in the indictment, such as "duplicity." Fed. R. Crim. P. 12(b)(3)(B)(i).

"Duplicity is the joining of two or more offenses in a single count." *United States v. Hughes*, 310 F.3d 557, 560 (7th Cir. 2002) (quotation marks and citation omitted). "The overall vice of duplicity is that the jury cannot in a general verdict render its finding on each offense, making it difficult to determine whether a conviction rests on only one of the offenses or both." *United States v. Buchmeier*, 255 F.3d 415, 425 (7th Cir. 2001) (quotation marks and citation omitted). In addition to jury confusion, "a duplicitous indictment may expose a defendant to other adverse effects including improper notice of the charges against him, prejudice in shaping of evidentiary rulings, in sentencing, in limiting review on appeal, and in exposure to double jeopardy." *Id.* (quotation marks omitted).

An indictment is not duplicitous, however, if it charges a single offense carried out through different means. *United States v. Berardi,* 675 F.2d 894, 897 (7th Cir. 1982). Federal Rule of Criminal Procedure 7(c)(1) provides that "[a] count may allege that . . . the defendant committed [an offense] by one or more specified means." "The line between multiple offenses and multiple means to the commission of a single continuing offense is often a difficult one to draw," and "[t]he decision is left, at least initially, to the discretion of the prosecution." *United States v. Davis,* 471 F.3d 783, 791 (7th Cir. 2006) (quotation marks omitted). "Where the indictment 'fairly interpreted' alleges a 'continuing course of conduct, during a discrete period of time,' the indictment is not prejudicially duplicitous." *Id.* at 790-91 (quoting *Berardi,* 675 F.2d at 898). More generally, the Seventh Circuit has held that "an indictment is legally sufficient" for purposes of Rule 7(c)(1) "if (1) it states all the elements of the crime charged, (2) adequately informs the defendant of the nature of the charges against him, and (3) allows the defendant to assert the judgment as a bar to future prosecutions of the same offense." *United States v. Vaughn,* 722 F.3d 918, 925 (7th Cir. 2013).

Analysis

"Duplicity is not always fatal to an indictment." *United States v. Steurer,* 942 F. Supp. 1183, 1186 (N.D. Ill. 1996). Accordingly, this Court "first determine[s] whether the counts at issue are duplicitous," and then turns to the question of whether, in any event, "other measures can cure any prejudice that might exist." *Id.*

I. Duplicity of Indictment

Both Counts I and II of the indictment in this case allege a three-year scheme to defraud, causing lenders to issue and refinance loans related to two investment properties that O'Brien owned on the south side of Chicago. R. 1. The indictment alleges that this scheme was comprised of four transactions: (1) in 2004, O'Brien "fraudulently obtained mortgage loan proceeds to purchase an investment property located at 625 West 46th Street" by submitting mortgage documents with false statements regarding her income and liabilities; (2) in 2005, O'Brien, with Bartko as the loan originator, "fraudulently refinanced her mortgage loans on the 46th Street property and on a second investment property located at 823 West 54th Street" by submitting applications with false statements regarding O'Brien's income and employment; (3) in 2006, O'Brien "fraudulently obtained a commercial line of credit" by submitting an application with false statements about her realty company's revenue and profit "and used those loan proceeds to maintain the 46th Street and 54th Street properties"; and (4) in 2007, O'Brien and Bartko "agreed that O'Brien would sell the 46th Street and 54th Street properties to Bartko" using "a straw buyer whom O'Brien and Bartko knew would be fraudulently qualified for mortgage loans." *Id.* at 4-7. For each of Counts I and II, the indictment alleges only one "execut[ion]" of the scheme—a single fraudulent mailing during the 2007 transaction in Count I and a single fraudulent issuance of a mortgage loan by a lender during the 2007 transaction in Count II. *Id.* at 9-10.

O'Brien maintains that each of the four transactions alleged in the indictment to comprise a scheme constitutes a separate offense, and that the indictment thus improperly "join[s] . . . two or more offenses in a single count." *See Hughes*, 310 F.3d at 560. But the question of whether these transactions could have been charged as separate offenses is not dispositive of duplicity. "[T]wo or more acts, each one of which would constitute an offense standing alone, may be joined in a single count without offending the rule against duplicity." *Berardi,* 675 F.2d at 898. In the context of mail and bank fraud specifically, for which the statutes criminalize each "execut[ion]"[1] of a scheme,

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1 *See* 18 U.S.C. § 1341 ("Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. * * *") (emphasis added); 18 U.S.C. § 1344 ("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;

the Seventh Circuit has made clear that although "for each count of conviction, there must be an execution," "the law does not require the converse: each execution need not give rise to a charge in the indictment." *United States v. Hammen*, 977 F.2d 379, 383 (7th Cir. 1992). In other words, "an act which *can* be viewed as an independent execution of a scheme" and thus charged as a separate count does not *need* to be charged in a separate count. *United States v. King*, 200 F.3d 1207, 1213 (9th Cir. 1999) (citing *United States v. Bruce*, 89 F.3d 886, 889-90 (D.C. Cir. 1996)).

If several fraudulent executions are part of the same scheme, the government thus has discretion to (a) charge each execution in a separate count or (b) "allege only one execution of an ongoing scheme that was executed numerous times." *Hammen*, 977 F.2d at 383; *accord Bruce*, 89 F.3d at 889-90 (denying motion to dismiss an indictment as duplicitous where it alleged "four separate loan applications each as one 'part'" of an "overall scheme" because the government "'carefully crafted the indictment to allege only one execution of an ongoing scheme that was executed numerous times'") (quoting *Hammen*, 977 F.2d at 383).

The government here chose the latter route. The indictment alleges only one execution in each Count: (1) in Count I, it alleges that a mailing on April 16, 2007 of a payoff check relating to the straw buyer's purchase of the 46th Street property constituted mail fraud in violation of 18 U.S.C. § 1341; and (2) in Count II, it alleges that the funding of a mortgage by Citibank, N.A. on April 16, 2007 for the straw buyer's

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shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.") (emphasis added).

purchase of the 46th Street property constituted bank fraud in violation of 18 U.S.C. § 1344. R. 1 at 9, 10.[2] And it describes the 2004, 2005, and 2006 transactions as part of a scheme rather than as separate executions of bank or mail fraud. *See* R. 1.

The fact that the indictment clearly charges only one execution in each count goes a long way toward satisfying Rule 7(c)(1)'s requirement of "adequately inform[ing] the defendant of the nature of the charges against h[er]." *Vaughn*, 722 F.3d at 925. It also distinguishes this case from *United States v. Tanner*, 471 F.2d 128 (7th Cir. 1972), on which O'Brien relies. In *Tanner*, the Seventh Circuit held that an indictment was duplicitous where the government had "delineate[d] as a single offense all trips [transporting explosives across state lines] that occurred within a period of time" without "defining at what point the act of transporting explosives is completed" or which trip completed it. *Id.* at 138-39; *see also United States v. Schock*, 2017 WL 4780614, at *20-21 (C.D. Ill. Oct. 23, 2017) (dismissing theft of government funds count as duplicitous where "the Government has made it impossible for Defendant (and the court) to determine which disbursement" of the numerous disbursements alleged "gave rise to the allegations" in that count).

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2 O'Brien does not challenge for purposes of this motion whether each of these 2007 executions was a complete offense falling within the statute of limitations. *See* R. 96 at 4 n.6. This fact distinguishes this case from *United States v. Anderson*, 188 F.3d 886 (7th Cir. 1999), where the court reversed a bank fraud conviction because "no conduct charged in the indictment . . . that constitutes" a complete "execution" occurred within the statute of limitations. *Id.* at 891.

Throughout her filings, O'Brien makes much of the likely reason the government chose to proceed this way: the 2004, 2005, and 2006 transactions would have been outside the statute of limitations if charged separately. But as long as they are part of the same scheme, this choice was within the government's discretion. *See, e.g.*, *Hammen*, 977 F.2d at 383; *United States v. Longfellow*, 43 F.3d 318, 322-25 (7th Cir. 1994) ("only one or two executions fell within the Statute of Limitations," but that "does not detract from the entire pattern of loans[] being a scheme, and renders Longfellow no less culpable for that entire scheme"); *United States v. Mermelstein*, 487 F. Supp. 2d 242, 254 (E.D.N.Y. 2007) (rejecting argument that "executions" of fraud completed outside the statute of limitations "are barred," because a fraud indictment "may properly charge, in a single count, a pattern of executions . . . as part of a single, overarching continuing scheme").

The crucial question therefore becomes whether the 2004, 2005, 2006, and 2007 transactions are all fairly alleged to be part of a single scheme to defraud. *See Davis*, 471 F.3d at 790-91 ("an indictment can be duplicitous if numerous discrete instances of criminal conduct are lumped into a single count," but this is not the case if the indictment, "fairly interpreted," alleges a scheme) (quotation marks omitted); *United States v. Zeidman*, 540 F.2d 314, 317 (7th Cir. 2006) (the fact that "each of the frauds . . . could constitute a separate offense" was "not determinative" of duplicity where each count "charges only one mailing" and alleges a scheme). Although "[a]s its ordinary meaning suggests, the term 'scheme to defraud' describes a broad range of conduct," *United States v. Doherty*, 969 F.2d 425, 429

(7th Cir. 1992), a scheme is generally understood to be a "'continuing course of conduct, during a discrete period of time.'" *Davis*, 471 F.3d at 790 (quoting *Berardi*, 675 F.2d at 898); *see also* R. 46 at 11 n.26 & 14 n.27 (O'Brien citing *Davis* for same).

Where a defendant challenges the government's allegations of a scheme on duplicity grounds, courts analyze: "(1) whether defendant's alleged actions may legitimately be regarded as a single course of conduct" during a discrete time period; "and (2) whether defendant would be prejudiced by h[er] prosecution on a single-count basis." *United States v. Grossi*, 1995 WL 571417, at *3 (N.D. Ill. Sept. 25, 1995) (quotation marks and alterations omitted); *accord Berardi*, 675 F.2d at 899 (examining whether "offenses joined bear a relationship to one another and may be said to constitute a continuing course of conduct" and whether "[t]he dangers posed by a duplicitous indictment" are "present in the instant case") (quotation marks omitted). The Court addresses each consideration in turn.

A. Single Course of Conduct during Discrete Time Period

<u>Course of Conduct</u>. To determine whether transactions constitute a single course of conduct so as to be part of one scheme, the Seventh Circuit has looked to whether they "have a sufficiently close nexus" or are "sufficiently interrelated" with an eye toward meaningful commonalities and differences. *See Zeidman*, 540 F.2d at 317-18; *accord United States v. Hollnagel*, 2011 WL 3664885, at *9 (N.D. Ill. Aug. 19, 2011); R. 46 at 11 n.26 (O'Brien citing *Zeidman* for same). Having a sufficiently close nexus does not, however, mean that the transactions must be interdependent.

O'Brien at one point invokes the test from the Seventh Circuit's decision in *United States v. Allender*, 62 F.3d 909, 912 (7th Cir. 1995), that "a separate execution must be chronologically and substantively independent and not dependent on another for its existence." R. 72 at 21-22. But that is the test for separate executions—not for separate schemes. Again, two or more executions of bank or mail fraud—*i.e.*, "chronologically and substantively independent" events, *Allender*, 62 F.3d at 912—can be joined in a single count as long as they are part of the same scheme. *E.g.*, *Hammen*, 977 F.2d at 383.

Here, unsurprisingly, the government emphasizes the commonalities among the four transactions alleged in the indictment, often at a high level, and O'Brien emphasizes the differences, often at a granular level. As the government explains, the common elements between the transactions alleged are: (1) they all involved at least one of a pair of investment properties in Chicago's south side; (2) they all involved O'Brien; (3) they all involved lies in loan documents; (4) they all involved the same class of victims (lenders); and (5) they all involved the same goals (obtaining financing related to the two investment properties and personal enrichment). R. 55 at 6-7. Courts have found similar commonalities sufficient to allege a single course of conduct. *See, e.g.*, *United States v. Mason*, 2016 WL 2755401, at *2 (N.D. Ill. May 12, 2016) (alleged scheme to submit falsified documents to four different government entities at different times was not duplicitous and had "an adequate nexus" where conduct "occurred during the same two year time span, targeted the same class of victims, and utilized the same sort of fraudulent communications"); *United States v. Brown*, 894 F. Supp. 1150, 1154 (N.D. Ill. 1995) (scheme involving 13 defendants cashing stolen and forged checks at 22 different banks over the course of two and a half years was a single scheme "unified by the presence of the defendant Brown in each alleged act of fraud").

O'Brien takes issue with each of the government's five alleged commonalities, focusing on what she claims to be key differences among the transactions. *First*, O'Brien claims that not all of the transactions related to the investment properties because the 2006 line of credit was "used to cover business expenses." R. 46 at 8. But, as O'Brien acknowledges (R. 46 at 3), on a motion to dismiss this Court "assumes all facts in the indictment are true and must view all facts in the light most favorable to the government." *United States v. Segal*, 299 F. Supp. 2d 840, 844 (N.D. Ill. 2004) (quotation marks omitted). And the indictment alleges a direct connection between the 2006 line of credit and the investment properties—*i.e.*, that the funds from the line of credit were used "to maintain the 46th Street and 54th Street properties." R. 1 at 4.

Second, O'Brien points out that even though she was allegedly involved in all four transactions, Bartko was not. She claims this means that the parties involved are not sufficiently alike. In *Hollnagel*, the court rejected a similar argument that because the indictment did not allege that each defendant "participated in each of the misrepresentations and transactions, the [indictment] must allege separate schemes and therefore fails for duplicity." 2011 WL 3664885, at *11. The court explained that in a scheme (unlike in a conspiracy), each participant "need not know about the existence and activities of the other co-schemers." *Id.* (citing *United States v. Wilson*, 506 F.2d 1252, 1257 (7th Cir. 1974)). Although the fact "that many of the alleged co-schemers were unaware of the existence of a larger scheme" would be "fatal to an allegation of conspiracy," it "is irrelevant to an allegation of a common scheme." *Brown*, 894 F. Supp. at 1155.

Thus, Bartko did not "need not know about" the 2004 and 2006 transactions for them to be part of a single scheme. *See Hollnagel*, 2011 WL 3664885, at *11. The indictment alleges that O'Brien was involved in each transaction, which is a significant, although not dispositive, commonality. R. 1. at 2-10; *see, e.g.*, *Brown*, 894 F. Supp. at 1154 (scheme was "unified by the presence of the defendant Brown in each alleged act of fraud"). And the indictment alleges integral involvement by Bartko—namely, that she reached agreements with O'Brien and played an important role in the 2005 and 2007 transactions. R. 1 at 5-6, 7-10.[3] Those allegations, if proven, would constitute

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[3] O'Brien's filings raise a number of additional issues regarding Bartko's involvement that are not appropriate for this Court to consider or resolve on a motion to dismiss. In a supplement to her motion to dismiss and reply in support (R. 86 & R. 96), for example, O'Brien argues that the evidence before the grand jury did not support that Bartko was involved in the alleged scheme "beginning in or about 2004" as the government alleges at paragraph 2 of the indictment. O'Brien's argument about how accurately the indictment reflects the grand jury testimony goes well beyond the face of the indictment. And at the motion to dismiss stage, "[a]n indictment is reviewed on its face, regardless of the strength or weakness of the government's case." *United States v. White*, 610 F.3d 956, 958 (7th Cir. 2010). This Court therefore limits its consideration of O'Brien's argument to the face of the indictment.

On its face, O'Brien is right that paragraph 2 of the indictment "could have been framed in a more satisfactory manner." *Vaughn*, 722 F.3d at 925 (quotation marks omitted). Paragraph 2 implies participation by Bartko in a "common scheme" to defraud. *See Wilson,* 506 F.2d at 1257 ("common scheme" to defraud existed when "each defendant knowingly participated and either mailed or caused the

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that Bartko was involved as early as 2004, and the remainder of the indictment implicates Bartko only in the 2005 and 2007 transactions. R. 1 at 3-10. But paragraph 2 also states that the scheme is "further described below." *Id.* at 3. And the indictment goes on to make Bartko's involvement clear. *Id.* at 3-10. As explained above, "[t]he test for validity is not whether the indictment could have been framed in a more satisfactory manner, but whether it conforms to minimal constitutional standards." *Vaughn,* 722 F.3d at 925 (quotation marks omitted).

O'Brien also raises a number of issues that go to the sufficiency of the government's evidence of Bartko's participation in the alleged scheme prior to 2007. O'Brien claims the grand jury testimony indicates that Bartko did not know about O'Brien's investment properties prior to 2007. R. 86 at 3. O'Brien further claims that the government's *ex parte* application to the Chief Judge of this district seeking tax returns in 2016 focused on evidence of the 2007 transaction. R. 72 at 2-6. And O'Brien contends there is no evidence that Bartko was a loan originator during the 2005 transaction. R. 46 at 7 n.19; R. 72 at 14 n.18. But these arguments implicate "factual issues that are not appropriate for the Court to resolve" on a motion to dismiss an indictment. *Hollnagel,* 2011 WL 3664885, at *11; *see also United States v. Polichemi,* 1995 WL 733473, at *4 (N.D. Ill. Dec. 8, 1995) ("It must be determined whether the indictment can fairly be read as alleging a single scheme; whether a single scheme will be proven at trial is not a consideration.").

O'Brien seems to be previewing a variance argument, which is of course premature. A defendant has a right to be tried on the charges actually brought by the grand jury. "A variance is fatal only when the defendant is prejudiced in her defense because she cannot anticipate from the indictment what evidence will be presented against her or she is exposed to double jeopardy." *United States v. Howard,* 619 F.3d 723, 727 (7th Cir. 2010) (quotation marks and alterations omitted).

mailing charged in the indictment against him or her," and co-schemers were "responsible for the acts and declarations of another party in furtherance of the common scheme" with whom they had reached an agreement "whether or not he knew of or agreed to any specific mailing").

Third, O'Brien claims the transactions all involved different types of conduct: "for the 2004 transaction . . . lies about Ms. O'Brien's monthly income and her failure to disclose a mortgage liability; for the 2005 transaction . . . lies about Ms. O'Brien's employer and her monthly business income; for the 2006 transaction . . . lies about O'Brien Realty, LLC's annual revenue and annual profit; and for the 2007 transaction . . . lies relating to a straw buyer, concealment of funds from lenders, inflated sales price, and a false representation." R. 72 at 14. But "an indictment is not duplicitous if it charges a single offense carried out through many different means." *Davis*, 471 F.3d at 790. And the Seventh Circuit has recognized that "[s]chemes to defraud by mail often are multi-faceted and therefore the various means used in committing the offense may be joined without duplicity." *Zeidman*, 540 F.2d at 318.

Applying these principles in *Hollnagel*, the court found that "misrepresentations and misappropriations, bribes, and concealment" were "various means" used in a single course of conduct. 2011 WL 3664885, at *9. And in *United States v. Freed*, 2016 WL 374133 (N.D. Ill. Feb. 1, 2016), the court likewise found that two different types of conduct—(1) "taking money from . . . joint venture partners"; and (2) "ma[king] presentations to . . . various financial institutions that undervalued the joint venture's projected debt and the cost of sale"—were both "means" of committing fraud that constituted a single course of conduct. *Id.* at *3-4. Like in *Hollnagel* and *Freed*, the different types of conduct in this case are all fairly understood as different means of carrying out fraud. Indeed, the types of conduct in this case are more alike than those in *Freed* and *Hollnagel* because, as O'Brien acknowledges (R. 72 at 14), they all involved lies in documents submitted to lenders.

Fourth, O'Brien points out that the victims in this case were several different lenders. But the Seventh Circuit and courts in this district evaluating duplicity have not parsed the victims involved so finely. To the contrary, courts have found transactions involving several different <u>classes</u> of victims to be part of a single course of conduct. *E.g.*, *Zeidman*, 540 F.2d at 315 ("two classes of victims"); *Hollnagel*, 2011 WL 3664885, at *9 ("current and prospective investors and financial institutions"); *Freed*, 2016 WL 374133, at *3 ("joint venture partners and their bankers"). Here, there is one, common class of victims: lenders.

O'Brien relies on a decision by a court in the District of New Jersey in *United States v. Hinton*, 127 F. Supp. 2d 548, 556 (D.N.J. 2000), which concluded that an indictment was duplicitous in part because the scheme involved six different financial institutions. Unlike the *Hinton* court, which implied that a single scheme to defraud cannot involve "more than one financial institution," *id.* at 554, the Seventh Circuit has found that alleged fraud involving even two different "classes of victims"—debtors and creditors—was properly joined as a single course of conduct. *Zeidman*, 540 F.2d at 315. The *Hinton* court acknowledged that a court in this district had rejected a duplicity challenge in a similar case. *Id.* at 554 (citing *Brown*, 894 F. Supp. at 1154). Moreover, *Hinton* is factually distinguishable. It involved "at least 128 transactions executed in furtherance of frauds" for which the "alleged perpetrator(s) for a particular institution's transactions d[id] not generally overlap." *Id.*

Fifth, O'Brien argues that each of the transactions in this case had different goals: "[t]he goal of the 2004 transaction involved obtaining a mortgage loan to purchase properties, the goal of the 2005 transaction involved refinancing two mortgage loans, the goal of the 2006 transaction involved obtaining a $25,000 Small Business Act commercial line of credit, and, the goal of the 2007 transaction involved Ms. O'Brien selling real estate properties." R. 72 at 16. O'Brien cites *United States v. DiCosola*, 2014 WL 4057420 (N.D. Ill. Aug. 14, 2014), for the proposition that "different charges" do not "relate to the same scheme just because they share a similar uncharged or non-criminal motive, especially when it is a generic one like financial gain." *Id.* at *5.

The *DiCosola* decision, on which O'Brien heavily relies throughout her filings, is distinguishable from this case for several reasons. It addressed a different type of motion governed by a different standard—namely, a severance motion for misjoinder of counts under Fed. R. Crim. P. 8(a). *See id.* at *2. And, more importantly, *DiCosola* involved three very different kinds of crimes—bank fraud, tax violations, and bankruptcy fraud—joined in a single indictment. *See id.* at *1-3. Although this Court agrees with the *DiCosola* court that a broadly alleged motive like "financial gain" is not enough to link crimes together that are very different in nature, the transactions in this case are all executions of fraud involving lenders. The result may be different had the government tried to tie a dissimilar crime into the scheme. But the common goal that fairly can be gleaned from the indictment in this case is more specific than mere "financial gain." It is also more specific than "obtaining money from another" like in *United States v. Jenkins*, 884 F. Supp. 2d 789, 792 (E.D. Wis. 2012), another case on which O'Brien relies. The goal of each alleged transaction in this case was to make money off of O'Brien's two investment properties through fraud involving lenders.

Other courts have found similar goals sufficient to link different "means" of committing fraud together as part of a single course of conduct. *E.g.*, *Hollnagel*, 2011 WL 3664885, at *11 (the indictment "sets forth multiple means utilized by multiple Defendants to achieve the common goal of fraudulently obtaining and retaining financing for Defendant BCI and obtaining funds for the individual Defendants' personal enrichment"); *Freed*, 2016 WL 374133, at *3 (common goal or result was devaluation of the joint venture); *Brown*, 894 F. Supp. at 1153 (common goal was, in O'Brien's own words (R. 72 at 21 n.26), "to obtain money individually, with a share of the funds obtained through forging checks").

"Nor is it significant" in assessing whether the scheme had a common goal "that the whole scheme was not planned out in advance." *E.g.*, *Owens v. United States*, 221 F.2d 351, 354 (5th Cir. 1955). "A continuing intention to devise it, . . . or an imperfectly conceived plan to defraud which becomes more and more sophisticated . . . may well constitute a single scheme." *Id.*

Like in many fraud cases, "[t]he line between multiple offenses and multiple means to the commission of a single continuing offense" with a common goal is "difficult to draw" in this case. *Berardi*, 471 F.3d at 791 (quotation marks omitted). But this "decision" fell "to the discretion of the prosecution" as an initial matter, and this Court finds that the indictment was not an inappropriate exercise of that discretion. *See id.*

Discrete Time Period. Courts also have looked to whether transactions occurred "during a discrete period of time" to determine whether they are fairly alleged as part of a single scheme. *Davis*, 471 F.3d at 790 (quotation marks omitted). Although the transactions in this case were spread out over the course of three years, that time period is significantly shorter than time periods that other courts have found sufficiently discrete. In *Freed*, for example, the court declined to dismiss a mail and bank fraud indictment on duplicity grounds where it "set[ ] out an ongoing and continuous course of conduct . . . for a specific period, albeit one that lasted from at least November 2007 to at least February 2011." 2016 WL 374133, at *3. In *Hollnagel*, the court declined to dismiss a wire fraud count on duplicity grounds where it alleged a scheme lasting "from 2000 to mid-February 2009." 2011 WL 3664885, at *1. And in *Grossi*, the court declined to dismiss a fraud indictment on duplicity grounds alleging a scheme that involved six transactions between 1984 and 1993. 1995 WL 571417, at *1.

In sum, although the question is a close one, the Court finds that the transactions in this case had a "sufficiently close nexus" and occurred during a sufficiently discrete period of time "that they are fairly characterized as one scheme." *Zeidman*, 540 F.2d at 317.

B. Prejudice

The second consideration in determining whether the indictment in this case is problematically duplicitous is "whether [O'Brien] would be prejudiced." *Grossi*, 1995 WL 571417, at *3; *accord Berardi*, 675 F.2d at 899. O'Brien alleges that the indictment prejudices her in a number of ways. To begin, O'Brien claims the indictment "prevents the jury from convicting on one offense and acquitting on another." *United States v. James*, 749 F. Supp. 2d 705, 708 (S.D. Ohio 2010) (quotation marks omitted). The Court finds that this concern is substantially addressed by the way the indictment is drafted. As explained above, the indictment is drafted to allege only one discrete and well-described execution in each count (one mailing in Count I and one loan by a bank in Count II). As long as the jury instructions and special verdict form make this clear (as further addressed below), a jury will not mistakenly convict simply because it "believed the 2004 allegations" or "the 2006 allegations" as O'Brien speculates. R. 46 at 21. A unanimous jury will need to find that the 2007 executions of mail and bank fraud took place. With proper instructions, therefore, this indictment will not result in "[t]he overall vice of duplicity that the jury cannot in a general verdict render its finding on each offense, making it difficult to determine whether a conviction rests on only one of the offenses or both." *Buchmeier*, 255 F.3d at 425 (quotation marks omitted).

O'Brien also broadly alleges that the indictment violates her Sixth Amendment right to "notice of the nature and cause of the accusation." *Tanner*, 471 F.2d at 139. Again, this concern is addressed by the way the indictment is drafted. Unlike in *Tanner*, the indictment in this case is clear about which specific acts are alleged to have violated the laws in question. *Compare id.* ("individual roles" of defendants were not "specified," and government had "delineate[d] as a single offense all trips [transporting explosives] that occurred within a period of time" without specifying any particular trip as the basis of the charge).

O'Brien next claims that the indictment prejudices her "by prosecuting her for conduct that occurred outside the statute of limitations." R. 46 at 18. But O'Brien is not contesting for purposes of this motion (*see* R. 96 at 4 n.6) that the 2007 executions alleged to have constituted mail fraud (in Count I) and bank fraud (in Count II) occurred within the 10-year statute of limitations. *See* 18 U.S.C. § 3293. O'Brien is correct that if the 2004, 2005, and 2006 transactions were charged in separate counts, they would be subject to a motion to dismiss on statute of limitations grounds. But the government did not charge them as separate counts. It charged only one execution within the statutory period in Count I and one execution within the statutory period in Count II. As explained above, doing so was well within the government's discretion. *See, e.g.*, *Longfellow*, 43 F.3d at 325 (the fact that "only one or two executions fell within the Statute of Limitations does not detract from the entire pattern of loans[ ] being a scheme").

Other courts in this district have rejected arguments like O'Brien's for dismissal on duplicity grounds because "the government circumvented the statute of limitations" by lumping offenses together in an allegedly duplicitous count. *Hollnagel*, 2011 WL 3664885, at *12. To explain its rejection of this argument, the court in *Hollnagel* quoted *United States v. Wellman*, 830 F.2d 1453, 1464 (7th Cir. 1987), for the proposition that "'the fact that the scheme, and acts committed in furtherance of it, may have extended over a period in part barred by the statute of limitations does not mean that they are irrelevant in determining whether mailings occurring within the statutory period were in furtherance of a scheme to defraud.'" 2011 WL 3664885, at *12 (quoting *Wellman*, 830 F.2d at 1464 (time-barred evidence "was highly relevant to the existence of the very same scheme to defraud which the mailings in this case were alleged to have furthered")).

Similarly in *Grossi*, 1995 WL 571417, the defendant argued that a count should be dismissed on duplicity grounds because "prosecution in a single count deprive[d] him of the defense of the statute of limitations" and "much of the conduct charged should be barred as beyond the statute of limitations." *Id.* at *4. The *Grossi* court explained that "where a defendant is properly charged with multiple acts in furtherance of a single scheme, events occurring prior to the limitations period are relevant to establish a scheme to defraud and the defendants' intent." *Id.* (quotation marks omitted). Likewise here, the Court finds that evidence regarding the pre-statute of limitations transactions is "relevant to establish a scheme to defraud and [O'Brien's] intent." *Id.* The government is not improperly "prosecuting [O'Brien] for conduct that occurred outside the statute of limitations" as she alleges. R. 46 at 18.

O'Brien further argues that because the government has grouped the transactions together, O'Brien cannot testify regarding certain transactions but invoke her Fifth Amendment right to remain silent on others, which she claims she would be able to do if they were charged as separate counts. *See United States v. Lewis*, 547 F.2d 1030, 1033 (8th Cir. 1976) ("A defendant may be willing to take the stand and testify as to one count but might prefer to remain silent and put the government to its proof on another count."). That is an unlikely scenario in the real, non-theoretical world. It is also a concern present any time the government charges several executions of a single scheme in one count that could be charged in separate counts, which, as explained above, is in its discretion to do.

Moreover, as the government points out, even if the grand jury had returned an indictment with a fraud scheme involving only the 2007 transactions, O'Brien still would be subject to cross-examination on the uncharged transactions if she chose to testify because they are all probative of her character for truthfulness under Fed. R. Evid. 608(b). *See, e.g., United States v. Alexander*, 135 F.3d 470, 478 (7th Cir. 1998) (affirming denial of severance motion and explaining that in trial on other counts defendant "would be subject to cross-examination on the fraudulent representations [including fraudulent representations in loan documents] charged in other counts because those instances of dishonesty are relevant to [defendant's] 'character for truthfulness' under Fed. R. Evid. 608(b)").

O'Brien responds that a right to cross-examination on these other transactions would not be automatic under Rule 608(b). *See* Fed. R. Evid. 608(b) (a "court may, on cross-examination, allow" "specific instances of a witness's conduct" "to be inquired into if they are probative of the [witness's] character for truthfulness or untruthfulness") (emphasis added). This point leads directly to O'Brien final, prejudice-related argument: that the indictment prejudices her by allowing time-barred evidence to be admitted as probative of a scheme that this Court otherwise may not admit under Fed. R. Evid. 608(b), 404(b), and 403. *See United States v. Seymour*, 472 F.3d 969, 971 (7th Cir. 2007) ("Rule 403 establishes the standard for the exercise of the judge's discretion in evidentiary matters, which of course includes cross-examination" under Rule 608 (b)); *United States v. Gomez*, 763 F.3d 845, 860 (7th Cir. 2014) ("[T]o overcome an opponent's objection to the introduction of other-act evidence [under Rule 404(b)], the proponent of the evidence must first establish that the other act is relevant to a specific purpose other than the person's character or propensity to behave a certain way. . . . If the proponent can make this initial showing, the district court must in every case assess whether the probative value of the other-act evidence is substantially outweighed by the risk of unfair prejudice and may exclude the evidence under Rule 403 if the risk is too great.").

This is the most concerning type of potential prejudice that O'Brien alleges. But this potential for prejudice was equally present in *Grossi* and *Hollnagel*, where the government charged multiple transactions as part of a single scheme that would have been excluded on statute of limitations grounds if charged in separate counts, and the courts found "evidence" of those transactions "relevant to establish a scheme to defraud and the defendants' intent." *Grossi*, 1995 WL

571417, at *4; *Hollnagel*, 2011 WL 3664885, at *12. The *Grossi* and *Hollnagel* courts did not express concern that the evidence might not otherwise be admitted under a Rule 608(b) and 404(b) analysis. Again, the government had discretion to charge the indictment the way it did as long as it fairly alleges a scheme, which the Court has found that it does. Moreover, the Court notes for the record that based on the evidence as it currently stands, the Court would very likely admit the evidence of the 2004, 2005, and 2006 transactions under Rule 608(b) (if O'Brien testified) or Rule 404(b) in any event.

II. Measures for Curing Potential Prejudice

Even if the Court were to find the indictment duplicative, it would not find dismissal an appropriate remedy. "'[D]ismissal is a disfavored remedy that should be avoided when appropriate clarifying instructions can redress concerns over a potentially duplicitous indictment." *Freed*, 2016 WL 374133, at *3 (quotation marks omitted). "The Seventh Circuit has concluded that jury instructions can sufficiently safeguard against possibly duplicitous counts." *Id.*

In *United States v. Marshall*, 75 F.3d 1097 (7th Cir. 1996), for example, the Seventh Circuit reasoned that "even if the offenses are arguably separate and distinct," the jury instructions ensured a unanimous conviction. *Id.* at 1112. And in *Buchmeier*, the Seventh Circuit explained that its conclusion in *Marshall* "that the indictment was not fatally flawed rested in large part on the fact that the district court had avoided prejudicing the defendant by instructing the jury that it was required to unanimously agree as to which of the offenses included in the disputed count the defendant had committed." 225 F.3d at 425 (citing *Marshall*, 75 F.3d at 1112); *accord United States v. Starks*, 472 F.3d 466, 471 (7th Cir. 2006) (proper jury instructions allayed any worries about duplicity). As these cases suggest, the Court will mitigate against "[t]he overall vice of duplicity," through a jury instruction and special verdict form making clear that the jury "must unanimously agree" that each element of the mail and bank fraud statutes have been met based on the 2007 executions. *See Buchmeier*, 255 F.3d at 425.

Conclusion

For the foregoing reasons, the Court denies O'Brien's motion to dismiss (R. 45).

ENTERED:

/s/ Thomas M. Durkin
United States District Judge

Dated: November 9, 2017

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DENYING PETITION FOR REHEARING EN BANC (SEPTEMBER 1, 2020)

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JESSICA ARONG O'BRIEN,

Defendant-Appellant.

No. 19-1004

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 17-cr-00239-1—Thomas M. Durkin, Judge.

Before: Joel M. FLAUM, Kenneth F. RIPPLE, Circuit Judges., and Diane P. WOOD, Chief Judge.

On consideration of the petition for rehearing and petition for rehearing en banc filed by the defendant appellant in the above case on August 14, 2020, no judge in active service has requested a vote thereon and all judges on the original panel have voted to deny the petition. The petition is therefore DENIED.