UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
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UNITED STATES OF AMERICA,

-vs-

Crim. No. 16-155(JLL)
Hon. Jose L. Linares
Newark, New Jersey

GUY GENTILE,

Defendant.

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MEMORANDUM OF LAW IN SUPPORT OF GUY GENTILE'S MOTION TO DISMISS THE INDICTMENT BASED ON VIOLATIONS OF THE STATUTE OF LIMITATIONS, HIS RIGHT TO A SPEEDY TRIAL, AND HIS RIGHT TO DUE PROCESS

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PRELIMINARY STATEMENT

The Government's decision to indict Guy Gentile in March 2016, eight years after the conduct alleged, is outrageous. It is outrageous considering his extensive cooperation over the last four years which resulted in dozens of arrests and indictments, several guilty pleas of individuals involved in a wide variety of high-profile and sophisticated securities frauds, millions of dollars in disgorgement, penalties, injunctions, and lifetime industry bars. It is outrageous because the Government obtained Mr. Gentile's extensive cooperation by assuring him – with explicit words, implicit conduct, and winks and nods all designed to give him a false sense of assurance – that he would not be charged if he just kept cooperating for a little longer. It is outrageous because the United States Attorney's Office arrested him in 2012, and for four years subjected him to strict extra-judicial bail conditions, restricted his liberties, left the accusations in the public domain, and caused him extreme anxiety in violation of his rights to a speedy trial. Not only is the instant prosecution fundamentally unfair, but it also violates several of Mr. Gentile's Constitutional rights in ways that mandate immediate dismissal of the Indictment.

Four years ago, on Friday, July 13, 2012, over four years after Mr. Gentile indisputably walked away from the conduct alleged in the current Indictment, the Government arrested him and took him into custody on a sealed complaint charging him with one count of conspiracy to commit wire fraud. While in custody, the agents told Mr. Gentile that they wanted him to cooperate. Mr. Gentile replied that he would do so, but wanted the charges against him to go away. The agents advised him, "we can do that."

That weekend, Mr. Gentile and the Government entered into an oral cooperation agreement. As per the terms of that initial agreement, the Assistant United States Attorney agreed that the Government was to consider *in good faith* never reinstating felony charges

against Mr. Gentile at the conclusion of his cooperation – and rather, if it decided to reinstate any charge, the Government would only bring a misdemeanor – if Mr. Gentile provided extraordinary cooperation to both the United States Attorney's Office and Securities Exchange Commission ("SEC"), aimed at not only his alleged co-conspirators, but some of the country's largest broker-dealers and other individuals whom the Government suspected routinely orchestrated illegal pump-and-dump and other securities fraud schemes.[1] Mr. Gentile signed a one-year "tolling affidavit" and immediately began to cooperate.[2]

To demonstrate that it too was bargaining in good faith, and suggest that Mr. Gentile might not be charged with a felony if he cooperated as agreed, after the basic terms of the cooperation agreement were reached, rather than present Mr. Gentile to a judge on Monday morning and release Mr. Gentile under Court supervised bail conditions (with the complaint remaining under seal), the Government instead decided to withdraw the sealed complaint it had filed. After the Government withdrew the complaint, it released Mr. Gentile from prison on July 16, 2012, three days following his arrest.

Upon release, Mr. Gentile's liberty was substantially restricted under strict bail conditions set and enforced by the U.S. Attorney's Office, which ordered – without any judicial knowledge, approval or oversight – that Mr. Gentile, and his parents as sureties, each post bail directly with the U.S. Attorney's Office in the respective amounts of $175,000 and $100,000, by executing surety and appearance bonds, and confessions of judgment in favor of the Government. Furthermore, as a condition of this prosecutor-imposed bail, Mr. Gentile was

[1] Mr. Gentile never agreed that he would plead guilty to any charge related to the allegations in the complaint.

[2] Mr. Gentile was instructed that the SEC's involvement was a necessary part of his cooperation with the Department of Justice ("DOJ"). In fact, the DOJ transmitted wiretaps to the SEC throughout the course of the various investigations with which Mr. Gentile assisted.

directed to do whatever the Government instructed of him, including: (1) surrendering his passports, (2) restricting himself geographically to locations dictated by Assistant U.S. Attorneys and FBI agents, (3) surrendering three of his legitimately possessed firearms to the FBI, (4) cooperating on a full-time basis as the Government demanded, and (5) being unable to sell or otherwise transfer his interests in either his New York based broker-dealer, Stock USA Execution Services., Inc., or his Bahamian Broker-Dealer, Swiss America Securities, Ltd d/b/a SureTrader ("SureTrader"), because, as an offshore broker-dealer, the Government could use it, through Mr. Gentile, as a proverbial "mousetrap" (an FBI agent's phrase), to help locate individuals engaged in securities fraud.[3]

By early 2014, Mr. Gentile did everything the Government asked of him and then some. He provided unparalleled cooperation which, as referenced above, directly resulted in arrests and indictments, as well as guilty pleas and SEC settlements by his alleged co-conspirators and other individuals involved in a wide variety of securities frauds, millions of dollars in disgorgement, penalties, injunctions, and lifetime industry bars. In fact, the FBI agents informed Mr. Gentile that he fulfilled his end of the bargain by February 2014, and its agents further told him, at that time, that he would not be charged with a felony. At that point, the Government should, in good faith, have definitively agreed to refrain from reinstating any felony charges against him. Yet, the Government instead had Mr. Gentile continue to work as a Government cooperator for another two years, while (1) the U.S. Attorney's Office led Mr. Gentile to believe that he could do better than only being charged with a misdemeanor (i.e., receive a non-prosecution agreement) if he continued to cooperate for just a little longer, and (2) FBI agents working with

[3] The Government also required Mr. Gentile to continue operating his restaurant business in the Bahamas, Sur Club Sushi Bar, Ltd., for purposes of meeting, and baiting with phony investment transactions, targets of the FBI and SEC. Because Mr. Gentile, however, was not permitted to personally attend to the restaurant due to his travel restrictions, the business ultimately floundered, causing him to sustain significant monetary and reputational losses.

Mr. Gentile told him explicitly and repeatedly that he would not be charged at all, stating that they had spoken with the new Assistant U.S. Attorney recently assigned to the case who confirmed as much.[4]

Having been told by the FBI agents in February 2014 that he had "fulfilled his [original] agreement" with the U.S. Attorney's office, and having continued to cooperate with the belief that his continued cooperation would be credited towards a non-prosecution resolution, starting in July of 2014 and continuing throughout that fall, Mr. Gentile told the Government on several occasions that he no longer wanted to cooperate absent a formal agreement that no felony charges would ever be reinstated, and additional cooperation would support a government decision of not charging him at all. Accordingly, he told the U.S. Attorney's Office in July 2014 that he would not sign another one-year tolling agreement. In response, on August 14, 2014, during a meeting between Mr. Gentile and numerous Government lawyers from both the SEC and U.S. Attorney's Office, the U.S. Attorney's Office told Mr. Gentile that it was more likely he (1) would be charged with a felony if he stopped cooperating, and (2) it was more likely he would not be charged if he continued to do so. In what Mr. Gentile understood to be a sign of good faith, the Government agreed that he did not have to sign a third one-year tolling agreement, the previous one having expired two weeks prior, with the understanding that the statute of limitations applicable to his potential charges would expire in 11 months later. Thus, based on the statements of the U.S. Attorney's Office and the now actively running statute of limitations, Mr. Gentile agreed to continue cooperating, comforted that even if the Government was not dealing in good faith, that his cooperation would have to end, at the latest, by June 30, 2015, the date upon which the statute of limitation would expire.

[4] After the agents began making promises to him, Mr. Gentile lawfully recorded several of their conversations.

Consistent with the statements of the U.S. Attorney's Office, the FBI agents also continued to unequivocally insist to Mr. Gentile that he would not be charged because he "fulfilled his agreement," that he "would walk," that he was "no longer a cooperating witness" but "more like an undercover agent," that he would "be working with them forever," that the agents "would never let him go to prison," and that he "would not be charged."

The Government's statements and conduct, before and after August 2014, caused Mr. Gentile to continue cooperating for nearly another year beyond the point he determined there was no additional benefit to doing so, undoubtedly the Government's intention. Indeed, during the late summer and fall of 2014, Mr. Gentile was instrumental in several investigations, one that involved an international stock manipulator, which ultimately led to one of the highest-profile prosecutions the U.S. Attorney's Office for the District of New Jersey has ever brought in the securities field. After Mr. Gentile made a written defense submission to the Government, dated October 10, 2014, which again sought an assurance that he would not be charged if he continued cooperating[5], the Assistant U.S. Attorney in charge of the investigation (Chief of the Economic Crimes Unit) told him that he would "get what he wanted" if he kept cooperating until the end of the specific investigation referenced above. As a result, Mr. Gentile continued cooperating through the fall of 2014. Then, on December 18, 2014, Mr. Gentile told the Government he no longer wanted to cooperate unless he was assured he would not be charged with a felony. In response, the Government simply kept requiring him to cooperate – secure in its knowledge that Mr. Gentile had no judicial recourse – until June 2015.

[5] The October 10, 2014 submission, provided in furtherance of compromise negotiations, is inadmissible under Fed.R.Evid. Rule 408. Nonetheless, that Mr. Gentile provided a written submission to the Government in an attempt to resolve its allegations with a non-prosecution resolution is a fact properly before the Court.

In June of 2015 – after three years of Mr. Gentile providing what the Government has consistently acknowledged has been the most helpful cooperation ever provided to its office, during which he did everything the Government demanded, without a single issue being raised regarding his truthfulness or helpfulness – the Government informed Mr. Gentile that it intended to indict him for the same conduct upon which it had arrested him in 2012. In response, Mr. Gentile advised the Government during a meeting on September 24, 2015, that it could not do so because such action would be fundamentally unfair, and no later than October 1, 2015, that it would violate his right to a speedy trial and the applicable statute of limitations.

The statute of limitations applicable to Mr. Gentile's alleged conduct expired no later than June 30, 2015. Although Mr. Gentile signed two one-year tolling agreements, they fail to salvage the instant Indictment, brought eight years after-the fact, for several reasons. First, the tolling agreements specifically reflected, in accordance with the parties understanding at the time of their execution, that the tolled charges would in fact be time-barred if not brought by June 30, 2015. Second, the second tolling agreement was not properly executed in the manner to which the parties agreed, thereby rendering it ineffective and precluding the Government from relying upon it for an additional year of tolling. And third, even assuming *arguendo* that both agreements validly tolled the statute of limitations for two years, and June 30, 2015 was not an agreed upon final date to bring a charge, the statute of limitations applicable to the entire Indictment is five years, which places the alleged eight-year old conduct beyond the Government's prosecutorial reach, in any event.

Additionally, Mr. Gentile's right to a speedy trial – triggered by his arrest on July 13, 2012, restricted liberty, public accusation, threatened welfare, disruption of life, anxiety and public scorn – was violated. In fact, during the nearly four years in which Mr. Gentile remained

under the control of the Government, both the record of his arrest and unresolved fraud charges were left visible in law-enforcement databases, found by Government employees who used the information to restrict Mr. Gentile's constitutional rights, intentionally disclosed to other regulators by the AUSAs, and made public through the media. Moreover, during the same timeframe, the Government precluded Mr. Gentile from participating in basic civic engagements, such as local political campaigns and charitable work, on account of his public accusation. The extensive pre-trial delay in this matter is presumptively prejudicial and mandates dismissal of the Indictment with prejudice.

The Government's explicit and implicit statements, in conjunction with its course of dealings which were specifically designed to lead Mr. Gentile to reasonably believe that he would not be charged (so as to encourage him to keep cooperating for two years past the time he "fulfilled his agreement"), created a *de facto* non-prosecution agreement, which must be enforced based on the Due Process Clause considerations. However, even if the Government's words and actions did not create an enforceable agreement, given the totality of the circumstances, the fundamental fairness doctrine of the Fifth Amendment's Due Process Clause precludes Mr. Gentile's prosecution. The Government intentionally misled Mr. Gentile into objectively believing that, in exchange for his incredible and lengthy cooperation, it would not reinstate any felony charges against him. The Government must now be held to that promise.

Notwithstanding the Government's awareness of these fatal flaws to any prosecution of Mr. Gentile, on March 23, 2016, the Government filed a two-count Indictment charging him with: (1) Conspiracy to Commit Securities Fraud, in violation of 18 U.S.C. § 371; and (2) Securities Fraud, in violation of 15 U.S.C. §§ 78j(b) and 78ff, 17 C.F.R. §240.10b-5, and 18 U.S.C. § 2. In addition to the Constitutional arguments raised above, the Government also

wrongfully charged Mr. Gentile with a statute he never tolled, 15 U.S.C. § 78ff. Mr. Gentile never tolled the entirety of § 78ff; only § 78ff(a). Since § 78ff was never tolled, regardless of which statute of limitations applies, it is time-barred.

The Constitution precludes the Government from doing what it has done here – arresting and then subjecting an individual to strict bail conditions, without judicial knowledge or supervision – for nearly four years, while inducing him to work with false and misleading promises, all without obtaining a waiver of his right to a speedy trial and effectively tolling the statute of limitations. Allowing this prosecution to go forward would create a dangerous precedent. It would place a judicial stamp of approval on the Government's arrest of a citizen and stripping away of his basic liberties for the Government's own significant gain, without any attendant judicial safeguards. Assistant U.S. Attorneys and their federal agents, which operate under our executive branch of government, have no place usurping the role of our judiciary – particularly when they do so, as here, for their own benefit at great expense of an individual. The defense believes what happened in this case to be an anomaly. In any event, it should not be sanctioned by the Court or it risks becoming the norm.

The most straight-forward reason to dismiss the Indictment – as Mr. Gentile has been insisting since December 2014 – is that the Government's prosecution of him is not fair. In more specific legal terms, the Indictment here should be dismissed, as it violates the applicable statute of limitations, Mr. Gentile's Sixth Amendment right to a speedy trial, and his Fifth Amendment right to Due Process.

STATEMENT OF FACTS

The FBI arrested Mr. Gentile during the evening of Friday, July 13, 2012, on a sworn complaint charging him with one count of conspiracy to commit wire fraud under 18 U.S.C. § 1349. (Ford Aff. 29, Ex. A)[6] Specifically, the complaint charged Mr. Gentile with participating in a conspiracy to commit two separate stock manipulation schemes involving the shares of Raven Gold Corporation ("RVNG") in mid-2007, and Kentucky USA Energy ("KYUS) from late 2007 through June 2008.[7] (*Id.*) Irrespective of the nature of Mr. Gentile's alleged involvement in these schemes, the Government acknowledged in that complaint (and the instant Indictment) that he exited the conspiracy of his own volition eight years ago, in June 2008. (*Id.*)

After arresting Mr. Gentile that Friday evening, Customs and Border Patrol handcuffed Mr. Gentile, informed him of his rights, and took him into custody before handing him over to the FBI. (Gentile Aff. 1) Over the course of that weekend, while Mr. Gentile remained jailed in Newark, FBI agents informed him that they were mostly interested in his cooperation against Adam Gottbetter, an individual engaged in securities frauds, and that they wanted him to cooperate. (Gentile Aff. 2)

After speaking to counsel, Mr. Gentile agreed to cooperate with the Government pursuant to an oral cooperation agreement.[8] (Ford Aff. 30, Ex B) The terms of the agreement provided that Mr. Gentile was to supply the Government with extraordinary cooperation, including: (1) cooperating against his alleged co-conspirators in the charged RVNG and KYUS schemes; (2)

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[6] The defense adopts and incorporates herein the averments made by Adam Ford, Esq. and Guy Gentile, in their respective affidavits, each dated July 14, 2016.

[7] The schemes alleged in that complaint are identical in all respects to those charged in the instant Indictment.

[8] During the course of these discussions, Mr. Gentile signed a waiver of his "right to a speedy appearance before a federal magistrate and a timely probable cause determination" that was, by its terms, effective for a three-day period, expiring on July 16, 2012. (Ford Aff. 31, Ex. C)

assisting the Government in its investigation of high-value targets unknown to Mr. Gentile, who, though having been on the radar of prosecutors and Federal regulators for years, were previously beyond the Government's reach; (3) leading the Government to individuals and broker-dealers unknown to the Government, whom Mr. Gentile learned to be involved in illegal penny stock schemes (unaffiliated with Mr. Gentile); (4) training FBI agents to communicate effectively with targets involved in pump-and-dump schemes; and (5) giving instructional courses to FBI agents and U.S. Attorney's Office regarding certain securities frauds which are extremely difficult to detect because of their high-degree of sophistication.

In exchange for Mr. Gentile's significant cooperation, the Government decided to withdraw the complaint it had filed and consider in good faith at its conclusion, whether to refrain from reinstating the underlying charges and instead charge Mr. Gentile with only a misdemeanor, based on the extent of his cooperation, the age of the alleged conduct, and his reputed minimal role within it. In addition, to further induce Mr. Gentile to cooperate, the Government agreed not to carry out its previous threats to close his businesses, freeze all of his assets, and "investigate" his wife, parents, and siblings. (Gentile Aff. 3)

Over the course of the next two years, Mr. Gentile provided what the Government consistently and, to this day, still describes as extraordinary cooperation, the likes of which no one in its office has previously encountered. (Ford Aff. 13; Gentile Aff. 4) Mr. Gentile worked for the Government on an almost full-time basis during the first six months of his cooperation. (Gentile Aff. 30) And, that is not hyperbole. *Within just those first six months*, Mr. Gentile attended over 50 meetings with dozens of different targets of several separate investigations, authored thousands of emails to targets, wrote thousands of text messages to targets, and attended in excess of 50 meetings with Government officials, including those from the United

States Attorney's Office for the District of New Jersey, the United States Attorney's Office for the Southern District of New York, the Royal Mounted Canadian Police, and the Securities and Exchange Commission. (Gentile Aff. 9, 10, 59, 60 and 70)

The Government has always acknowledged up to the present day that it was not just Mr. Gentile's provision of time that made his cooperation so valuable, but the fact that he assumed a leadership role in many of the planning sessions and meetings, so as to provide critical strategy suggestions, industry knowledge, and operational know-how that neither agents from the FBI nor other governmental agencies possessed. (Ford Aff. 14) As explained by the Assistant U.S. Attorney ("AUSA") who worked closest with Mr. Gentile and oversaw this matter, Gurbir Grewal ("Grewal"), the former Chief of the Economic Crimes Unit from February 2014 until his appointment as Acting Bergen County Prosecutor in January 2016, Mr. Gentile's "cooperation has given the Newark office visibility into a space it has never had before, first ever criminal case for high-frequency trading, and given the office real time visibility into these high profile areas." (Ford Aff. 20)

By way of background, Mr. Gentile's cooperation originally took aim at his alleged co-conspirators in the KYUS deal – Adam Gottbetter ("Gottbetter"), Samuel DelPresto ("DelPresto"), Mike Taxon ("Taxon"), and Itamar Cohen ("Cohen") – some of whom the Government believed had continued to engage in pump-and-dump schemes beyond June 2008, until 2013. As part of this cooperation, Mr. Gentile provided information to the Government relating to Taxon and Cohen, which aided the Government in charging Gottbetter, Delpresto, Taxon, and Cohen with several felonies. Ultimately, all four defendants pled guilty on account of Mr. Gentile's cooperation. (Gentile Aff. 5)

During the course of the Government's investigation into Gottbetter between July 2012 and his arrest in December 2013, Gottbetter, an attorney, routinely reaffirmed to Mr. Gentile during FBI-monitored conversations what he had told him during the alleged conduct, that neither of them committed any crime or wrongdoing during the KYUS stock promotion, as Gottbetter understood the law and knew how to stay within its boundaries. As a result, the Government instructed Mr. Gentile to work with Gottbetter to devise a new pump-and-dump scheme involving the shares of another company, Dynastar Holdings, Inc. After Gottbetter took sufficient steps in furtherance of the new scheme, the Government put a stop to it and charged Gottbetter criminally for his involvement in that scheme, not in KYUS. (Gentile Aff. 6; Ford Aff. 32, Ex. D)

Equally significant, both DelPresto and his associate, Danny Wainstein, agreed themselves to cooperate after being confronted with concrete evidence of their fraudulent conduct, produced from Mr. Gentile's cooperation. Their cooperation, in turn, led to two separate investigations which yielded an indictment against over a dozen individuals charged with securities fraud for their involvement in two $300-million-dollar pump-and-dump schemes. (Gentile Aff. 7)

After Mr. Gentile's first year of intensive cooperation, the FBI agents with whom he had been working began treating Mr. Gentile as one of their own. (Gentile Aff. 8) For example, they consistently told him that they were not going to allow the Government to prosecute him. They permitted him to carry a concealed weapon during meetings. (*Id.*) They also told him that they believed they would be working together forever. (*Id.*).

Over the next year-and-a-half, Mr. Gentile continued to work with the Government in connection with its investigations of 25 potential targets, the majority with whom Mr. Gentile

had no prior dealings, including several "high-value targets." In fact, one such target – a trader known only as "the Ghost" – was highly coveted by the Government, as it did not know of his identity, having only discovered his existence on account of his large-scale securities fraud schemes that had gone previously undetected. During a particularly dangerous operation, Mr. Gentile was able to obtain both a photograph and fingerprints of "the Ghost." Importantly, Mr. Gentile's cooperation led to the shuttering of two broker-dealers involved in market manipulation and put a stop to several pump-and-dump schemes before any investors were actually harmed. As explained by AUSA Grewal, these targets were "not just regular targets but lawyers, people on the SEC's radar for years, people on the U.S. Attorney's Office radar for years." (Ford Aff. 15)

Mr. Gentile offered the key assistance necessary for the SEC to charge his alleged co-conspirators, Taxon and Cohen, in connection with the RVNG and KYUS deals. The SEC followed suit by further charging his alleged co-conspirators, Gottbetter, David Stevenson, and Mitchell Adam, on May 26, 2015. (Gentile Aff. 11; Ford Aff. 33, Ex, E)

In addition to the foregoing, Mr. Gentile brought to the attention of the SEC and DOJ an approximate $1 million insider trading scheme involving a former JP Morgan investment bank analyst, Ashish Aggarwal, who was illegally tipping his close friend, Shahriyar Bolandian, with confidential information about clients involved in impending mergers and acquisitions of technology companies. To facilitate appropriate action by law enforcement, Mr. Gentile also provided supporting documentary evidence to the SEC and the DOJ. As a result of Mr. Gentile's efforts, criminal and civil securities-related charges have been brought against both individuals.[9] (Gentile Aff. 12)

[9] Mr. Gentile's cooperation in this matter is ongoing, as he has offered to testify at the upcoming trial.

All told, Mr. Gentile's assistance directly led to dozens of individuals being charged not only by the DOJ, but by the SEC as well, which to date has received in excess of 12 million dollars in penalties and disgorgement. (Gentile Aff. 15)

Mr. Gentile provided extraordinary proactive cooperation to the Government for over three years. The value of Mr. Gentile's assistance, however, did not end there. Recognizing his unique knowledge and insight, the Government tapped Mr. Gentile to actually train undercover FBI agents and assist the FBI with respect to the detection of securities violations. To that end, Mr. Gentile provided an FBI agent with step-by-step instructions on how to speak with a target in order to assess whether the target intended to break the law or was merely being aggressive by attempting to take advantage of legitimate legal loopholes. Mr. Gentile also gave the agent a crash course on financial instruments and tax strategies in preparation for the agent's prospective meeting with targets of an investigation. (Gentile Aff. 13) As a result of such training, the agent was able to infiltrate a massive securities fraud conspiracy, enabling the SEC to file charges against Robert Bandfield and Andrew Godfrey for their involvement in managing an offshore business intended to help their clients, comprising more than 100 U.S. citizens and residents, evade U.S. securities and tax laws by concealing their ownership of certain microcap stocks, as part of a larger scheme to launder more than $500 million dollars. (Gentile Aff. 14)

As a result of his extensive assistance, by early to mid-2014, the FBI agents working with Mr. Gentile began telling him that he had "fulfilled his obligations" and that they were "not going to let anything happen to [him]." One agent, in particular, after arresting Gottbetter, told Mr. Gentile that he was "more like an undercover agent" and "no longer a cooperating witness." (Gentile Aff. 16). The agents further told Mr. Gentile that there was no need to charge him given

that his testimony was no longer needed.[10] (*Id.*) As a result of his evolving relationship with the agents, Mr. Gentile believed that his cooperation was causing his status to change from that of a cooperator who might not be charged with a felony to that of an undercover agent working with the Government who would at most be charged with a misdemeanor or not be charged at all.

In response to what the FBI agents were telling him, by the summer of 2014, Mr. Gentile began advising the FBI and U.S. Attorney's Office that he believed he fulfilled his end of the bargain (as the agents had expressed to him) and that he wanted his cooperation to come to an end. (Gentile Aff. 17 and 18) When the Government presented him with a third one-year tolling agreement in July, he refused to sign it. (Gentile Aff. 19).

On August 14, 2014, while meeting with the Government, Mr. Gentile made clear that he believed: (1) he fulfilled, as of earlier in the year, all the terms of the original agreement he and the Government reached during the weekend of his arrest earlier in the year; (2) he had continued to provide additional cooperation entitling him to additional "credit;" and (3) any further cooperation would only be given if it counted towards the Government definitively agreeing not to bring any charges. As such, Mr. Gentile stated that the Government, if it wanted him to continue cooperating, could no longer just agree to consider in good faith whether it would refrain from refiling felony charges against him. Instead, as Mr. Gentile declared, the Government would have to definitively refrain from doing so. (Ford Aff. 17, 18) In reply, AUSA Grewal did not advise that charges were forthcoming. Instead, he responded that it remained in

[10]During this same time period, the FBI agents with whom Mr. Gentile worked instructed him on how to respond to questions by their internal affairs division regarding their operations with him. (Gentile Aff. 8) Believing the agents might ask him to lie during the process, Mr. Gentile legally recorded their discussions. And, during at least one such recorded conversation, the FBI agents instructed Mr. Gentile on how to answer certain questions that would cast them (the agents) in the best possible light. The friendly relationship which existed between the agents and Mr. Gentile, including their acting as though they were all on the same team for purposes of leading internal affairs away from their questionable conduct, further led Mr. Gentile to believe that he was one of them and would not be charged at the conclusion of his cooperation.

Mr. Gentile's best interest to keep cooperating. Clarifying that position, AUSA Grewal stated that it was more likely Mr. Gentile (1) would be charged with a felony if he stopped cooperating, and (2) it would be more likely he would not be charged if he continued to do so. All of these communications were conveyed to Mr. Gentile. (Gentile Aff. 18)

Fearful that the Government would force him to cooperate indefinitely, Mr. Gentile told the Government, through counsel, during their meeting on August 14, 2014, that he was refusing to sign another one-year tolling agreement because he wanted to be certain that his involvement with the Government would end by June 30, 2015, the date upon which the statute of limitations would expire. (Gentile Aff. 19) The Government agreed that Mr. Gentile did not have to sign another tolling agreement and, never disputed Mr. Gentile's articulated belief that the statute of limitations would run on June 30, 2015. (Ford Aff. 18)

Following the August 14th meeting, Mr. Gentile continued cooperating with the Government in one of the most sophisticated, high-profile investigations in the history of the District of New Jersey. Specifically, Mr. Gentile identified and explained to the Government that Aleksandr Milrud ("Milrud"), a Russian national, was involved in a complex, high-speed international stock trading scheme, involving the use of traders from around the world to place buy or sell orders and then cancel them quickly. The activity, referred to as layering or spoofing, would artificially raise or lower stock prices, thereby allowing traders to exploit the price moves for profit. Incredibly, the subject activity was believed to yield to as much as $600,000 in a single day, and generate between $1 million and $50 million *per month*. Yet, the Government only understood the fraudulent nature of this scheme after Mr. Gentile identified it and explained how it functioned. As part of the Government's investigation into this activity, and at the Government's direction, Mr. Gentile traveled with Milrud to the Bahamas on several occasions

during the fall of 2014, in order to visit Mr. Gentile's broker-dealer, SureTrader, and establish and fund a trading account within it. (Gentile Aff. 20)

Given that the Government during the August 14th meeting did not make any binding promises and instead only encouraged him to continue cooperating for a likelihood of a better result, Mr. Gentile began to seek a more concrete assurance that his continued extensive and almost full-time assistance in a particularly dangerous investigation would definitively result in his non-prosecution. During several discussions, Mr. Gentile's counsel expressly told AUSA Grewal that Mr. Gentile had no interest in providing further cooperation unless he was not going to be charged at its conclusion, and if the Government was planning on charging him, he needed to be told so. Beyond these discussions, Mr. Gentile, through his counsel, submitted a 20-page, single spaced presentation to the Government, dated October 10, 2014, which, in addition to outlining his extensive cooperation as of that date, sought a firm commitment that he would not be charged in exchange for his continued cooperation. Following this presentation, the Government affirmatively told Mr. Gentile that: (1) it was very excited about the investigation into Milrud, (2) the U.S. Attorney's Office for the District of New Jersey for the first time was given an entry into sophisticated trading cases, and (3) Mr. Gentile would "get what he wanted" in terms of a non-felony resolution if he kept cooperating and saw this investigation through to the end. (Ford Aff. 20, 21)

On December 18, 2014, during yet another meeting with the Government attended by both AUSA Grewal and the U.S. Attorney, Mr. Gentile, through his counsel, again sought a formal assurance, explicitly stating that he no longer wanted to continue to cooperate without receiving such a benefit.[11] Significantly, with that clear *quid pro quo* in mind, the Government

[11] During this meeting, Mr. Gentile's counsel did not raise Grewal's statement that Mr. Gentile would "get what he wanted" but rather stated, as part of a fundamental fairness argument, that the agents

continued using Mr. Gentile as an active cooperator, over the next six months, in order to complete its case against Milrud in January 2015, and begin work on several additional investigations. The Government's continued use of Mr. Gentile as a cooperator following the December 18th meeting led Mr. Gentile to believe that he would not be charged with a felony. (Gentile Aff. 21) In fact, the Government continued to use Mr. Gentile as a cooperator until July of 2015, approximately a year after Mr. Gentile refused to sign a third tolling agreement on August 14, 2014. (Gentile Aff. 22)

Despite the fact it benefitted from its ongoing use of Mr. Gentile's continuing cooperation, the Government, in July of 2015, informed Mr. Gentile that it intended to reinstate his felony charges from 2012. In response, Mr. Gentile asserted, through his counsel, about three-quarters of a year before his Indictment was filed in March of 2016, that such a prosecution was fundamentally unfair; and, subsequently, that his right to a speedy trial was violated and that the applicable statute of limitations had expired no later than June 30, 2015, in accord with the two prior tolling agreements. (Ford Aff. 27, 34 and 35, Exs. B and C)

The instant Indictment followed – nine-months later – on March 23, 2016.

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explicitly expressed to Mr. Gentile that he would not be charged, while the AUSAs, being more circumspect with their words, but sent mixed messages that encouraged Mr. Gentile to continue cooperating. Counsel had concluded that – at that time – the fundamental fairness argument based on the totality of the circumstances and the extent of Mr. Gentile's cooperation was the strongest argument in favor of receiving an official commitment from the U. S. Attorney's Office that Mr. Gentile would not be charged with a felony in exchange for his cooperation. (Ford Aff. 22). For the same reason, counsel for Mr. Gentile also chose to focus on a similar fundamental fairness argument based on his cooperation which continued past the December 2014 meeting, through the summer of 2015, and during the September 24, 2015, meeting. (Ford Aff. 27).

ARGUMENT

I. BOTH COUNTS OF THE INDICTMENT, CHARGING CONDUCT WHICH ENDED EIGHT YEARS EARLIER, MUST BE DISMISSED, BASED ON A VIOLATION OF THE FIVE-YEAR STATUTE OF LIMITATIONS

A. The Offense Conduct Was Subject to a Five-Year Statute of Limitations at the Time It Allegedly Occurred

1. The Statute of Limitations Is 5 Years

Under the applicable statute of limitations – the one in effect during the period of Mr. Gentile's alleged criminal conduct – his Indictment is unquestionably time-barred.

According to the Indictment, Mr. Gentile's alleged participation in the charged conspiracy to commit securities fraud (Count One) ended "in or about June 2008," while his alleged commission of the charged substantive securities fraud (Count Two) ended "in or around May 2008." (Indictment at pp. 2-3, 8) Federal law sets forth a five-year statute of limitations for noncapital offenses, including those charged in the Indictment, "[e]xcept as otherwise expressly provided by law." 18 U.S.C. § 3282(a). Thus, the applicable five-year statute of limitations would have required the Government to indict Mr. Gentile by June of 2013.

However, the Government persuaded Mr. Gentile to enter into two one-year tolling agreements, which effectively extended its deadline to indict until June 30, 2015, at the latest.[12] The first agreement, an affidavit signed by Mr. Gentile on August 1, 2012, tolled the statute of limitations from July 31, 2012 to July 31, 2013. The second agreement, an affidavit signed by him on July 31, 2013, tolled the statute from that date until July 31, 2014.

[12] The tolling affirmations only tolled certain specified crimes, particularly Title 18, United States Code, Sections 371 (conspiracy), 1343 (wire fraud), 1349 (conspiracy), and 2 (aiding and abetting), as well as securities fraud, in violation of Title 15, United States Code, Sections 78j (b) and 78ff (a), and Title 17, Code of Federal Regulations, Section 240.10b-5. All of these crimes were, at the time of the alleged offense conduct, subject to a five-year statute of limitations.

After the expiration of the second tolling agreement, on July 31, 2014, the Government had, at most, 11 months in which to indict Mr. Gentile under the statute of limitations. But, it instead chose to wait until March 26, 2016 – long after the statute of limitations had already expired – to return a true bill. The Indictment must be dismissed for this reason.

2. Dodd-Frank Does Not Apply Retroactively

The Government will presumably claim that it actually had the benefit of an additional year, by virtue of the six-year statute of limitations made applicable to specifically enumerated substantive and conspiratorial types of securities fraud offenses, by the Dodd-Frank Act, enacted on July 21, 2010. *See* 18 U.S.C. § 3301. Dodd-Frank provides: "Except as otherwise specifically provided in this Act or the Amendments made by this Act, this Act and such amendments shall take effect 1 day after the date of enactment of this Act." Dodd-Frank Act, Pub. L. 111-230 § 4, 124 Stat. at 1390. The new six-year statute of limitations, therefore, took effect on July 22, 2010, and applies to all conduct on or after that date. July 22, 2010 is, of course, more than two years after Mr. Gentile's alleged conduct ended in June of 2008.

Any claim by the Government that Mr. Gentile's alleged conduct is governed by a statute of limitations other than the one in effect at the time such conduct supposedly occurred would simply be wrong. As noted above, the revised six-year statute of limitations, upon which the Government may wish to rely, became effective *more than two years after* Mr. Gentile's charged conduct ended. The fatal blow to the Government's potential position is that the new statute *does not* explicitly state that it applies to pre-enactment conduct. Without Congress' explicit statement in the statute (or its legislative history) that it applies to pre-enactment conduct, any attempt by the Government to make § 3301 retroactive is impermissible under well-established Supreme Court and Third Circuit law.

The United States Supreme Court has held that the "presumption against retroactive legislation is deeply rooted in our jurisprudence" and that the "principal that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal." *Landsgraf v. USI Film Products,* 511 U.S. 244, 265 (1994) (quotation and citation omitted). Accordingly, courts should apply "this time-honored presumption unless Congress has clearly manifested its intent to the contrary." *Hughes Aircraft Co. v. United States ex rel. Schumer,* 520 U.S. 939, 946 (1997)*; see also, United States ex rel. Sefen v. Animas Corp.,* 607 Fed. Appx. 165, 167 (3d Cir. 2015); *United States v. Richardson,* 512 F.2d 105, 106 (3d Cir. 1975). Moreover, criminal statutes of limitation, which are at issue here, "are to be interpreted in favor of repose." *Id. (citing Toussie v. United States,* 397 U.S. 112, 115 (1970)).

The Supreme Court in *Landsgraf*, *supra*, established a two-part test for determining whether prescribed limitations periods should be applied to past conduct. First, courts must examine whether Congress "expressly prescribed the statute's intended reach." 511 U.S. at 280. If so, the issue is resolved. Second, if the statute does not reflect Congress's "express command," courts must perform a "retroactive effect" analysis to determine whether retroactively applying the limitations period "would impair rights a party possessed when he acted, a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* If the statute has a retroactive effect in this sense, "our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result." *Id.*; *see also Sefen,* 607 Fed.Appx. at 167 (following *Landsgraf* analysis); *Lieberman v. Cambridge Partners, L.L.C.,* 432 F.3d 482, 488-89 (3d Cir. 2005) (same).

In this case, the provision of the Dodd-Frank Act enlarging the statute of limitations for securities fraud violations states only that "[n]o person shall be prosecuted, tried, or punished for a securities fraud offense, unless the indictment is found or the information is instituted within 6 years after the commission of the offense." 18 U.S.C. § 3301(b). That provision does not "expressly prescribe[]" Congressional intent because it offers no clear guidance as to whether or not the new limitations period should apply to conduct prior to July 22, 2010. Courts in this Circuit have reached the same conclusion under analogous circumstances. *See, e.g., Sefen ex rel. United States v. Animas Corp.,* 2014 WL 2710957, at *4-5 (E.D. Pa., June 13, 2014) *affirmed Sefen,* 607 Fed.Appx. 165 (3d Cir. 2015) (Dodd-Frank amendments to the Federal False Claims Act ("FCA"), which provide that a "civil action … may not be brought more than 3 years after the date when the retaliation occurred," do not offer "clear and unambiguous guidance from Congress regarding retroactivity.").

The second prong of the *Landsgraf* test asks if the new limitations period would have a "retroactive effect" such that "only Congress's *clear* intent to apply the statute retrospectively will overcome the presumption" against retroactivity. *Sefen,* 2014 WL 2710957 at *6 (*quoting Mathews v. Kidder, Peabody & Co., Inc.,* 161 F.3d 156, 161 (3d Cir. 1998)). In this case, applying the new six-year statute of limitations to Mr. Gentile's conduct would have a classic retroactive effect: By abolishing a complete defense to the charges, based on the statute of limitations, the new provisions would expose Mr. Gentile to criminal liability, thereby "increasing a party's liability for past conduct." *Landsgraf,* 511 U.S. at 280.

Authority in the Third Circuit reinforces this conclusion. In *Sefen,* the District Court considered whether retroactive application of the Dodd-Frank Act's new three-year statute of limitation for certain claims under the Federal False Claims Act ("FCA") had a retroactive effect

under *Landsgraf*. The Court noted that, without the new extended three-year limitations period, the applicable Pennsylvania state statute of limitations would have "already elapsed when Plaintiff's claim was filed." 2014 WL 2710957 at *6. Accordingly, the Court held that retroactive application of the Dodd-Frank Act with respect to the FCA, so as to impose a longer statute of limitations, would "indisputably increase[ ] [a party's] liability for past conduct." *Id.* at *5. In the absence of any "clear intent" from Congress that would rebut the presumption against such retroactive legislation, the District Court held that the claim was time-barred. *Id.* at *6. The Third Circuit, in affirming the dismissal of Plaintiff's claim, specifically commended the District Court for its "well-reasoned" application of the *Landsgraf* test. *See Sefen,* 607 Fed. Appx. at 167.

Sefen's reasoning and conclusion apply squarely to Mr. Gentile's case. Given the absence of any clear intent by Congress to apply the Dodd-Frank Act retroactively, and the indisputable retroactive effect its new statute of limitations would have upon Mr. Gentile's liability, the Dodd-Frank Act cannot possibly save the Indictment. The Government, for reasons of its own, made a tactical decision to wait before indicting Mr. Gentile until March 23, 2016 – almost eight years after the alleged conduct. The Government must accept the consequences of that decision.

3. Dodd-Frank Did Not Extend the Statute of Limitations for 15 U.S.C. § 78(j)(b) and 17 C.F.R. § 240.10b-5

In addition, the Indictment is nonetheless time-barred because the Dodd-Frank Act did not apply the newly extended 6-year statute of limitations to any of the criminal offenses with which Mr. Gentile is charged. In particular, the Dodd-Frank Act explicitly lists within 18 U.S.C. § 3301 those "securities fraud offenses" to which the new 6-year statute of limitations applies. Notably omitted from that exclusive list are 15 U.S.C. § 78(j)(b) and 17 C.F.R. § 240.10b-5.

While 15 U.S.C. § 78ff(a) is included in that list, the Government did not charge Mr. Gentile with a violation of that subsection. Instead, it charged him under the more general provision of 15 U.S.C. § 78ff. Given that 15 U.S.C. § 78ff contains three separate subsections, the Indictment cannot stand, as Fed.R.Crim.P. 7(c)(1) provides that the "indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated." Also, significantly, Mr. Gentile, pursuant to the terms of his tolling agreements with the Government, never agreed to toll the statute of limitations for 15 U.S.C. § 78ff in its entirety. Rather, he agreed only to toll subsection (a) thereunder. Thus, to the extent the Government maintains that it is permitted to proceed in such a general fashion, it loses the benefit of its tolling agreements, thereby rendering its Indictment time-barred in any event. *United States v. Mergen*, 764 F.3d 199, 208 (2d Cir. 2014) (holding tolling agreement is limited to its specific terms, ambiguities are construed against the Government, and dismissing the indictment).[13]

B. Mr. Gentile Signed "Tolling Affidavits" Which Provide That Any Charges Filed After June 30, 2015 Would Be Time-Barred

Regardless of whether a limitations period of five or six years applies, Mr. Gentile signed two "tolling affidavits," each of which expressed his agreement to toll the statute of limitations for specified crimes for one year. (Ford Aff. 34 and 35, Ex. F and G) Notably, when signing the affidavits, Mr. Gentile believed he was tolling a five-year statute of limitations – as did the

[13] Additionally, subsection (a) of 15 U.S.C. § 78ff, entitled "Penalties," is not a substantive crime, in and of itself. Rather, by its express terms, it is a penalty provision, which provides for increased punishments where certain violations of securities laws are deemed *willful*. As a result, 15 U.S.C. § 78ff(a) has no application without a finding that some other statute has, in the first instance, been violated. Because every other charge contained in the Indictment is time-barred by the Statute of Limitations, no such finding can be made here. And, accordingly, the charge of 15 U.S.C. § 78ff(a) must be dismissed for its inability to stand alone in this criminal prosecution.

Government.[14] That belief was clearly supported by the language of each tolling agreement, which expressly noted that Mr. Gentile could assert a statute of limitations defense if no charges were brought by June 30th of the following year, i.e., within *5 years after the alleged conduct ended*, after discounting the time tolled.

Both affidavits which Mr. Gentile signed were identical in all material respects except for their relevant dates. The express language of each agreement stated: (1) in paragraph 2, that Mr. Gentile did "agree to toll any statute of limitations relating to [specified] sections of the United States Code … for a period of one year," and (2) in paragraph 3, that Mr. Gentile did "expressly reserve [his] privilege to assert any right or defense relating to [those] provisions of the United States Code … in the event that the United States Attorney's Office fails to commence criminal prosecution by indictment, information, or otherwise, on or before by June 30[th]" of 2014 and 2015, respectively.

The first affidavit, signed on August 1, 2012, expired on July 31, 2013, and provided that Mr. Gentile could assert a time-bar defense if the Government failed to reinstitute any charges against him by June 30, 2014. The second tolling agreement, dated July 31, 2013, expired on July 31, 2014, and provided that Mr. Gentile could assert a time-bar defense if the Government failed to reinstitute any charges against him by June 30, 2015. Because the Government failed to bring charges by June 30, 2015, the charges are time barred under the terms of the tolling agreement.

That the Government deliberately included in each agreement a separate paragraph (paragraph 3), relating not to the tolling periods but rather to the filing of any charges and a

[14] As noted in Footnote 11, *infra*, every crime Mr. Gentile explicitly agreed to toll in his tolling affirmation was subject to a five-year statute of limitations. The only statute provision in the affirmation effected by Dodd-Frank was 78ff(a), a penalties provision. This fact further supports Mr. Gentile's belief that the government drafted his affirmations to reflect a five-year limitations period.

defense of them, establishes that the paragraph must have a purpose. Provisions to a contract must have a meaning. The Government drafted this provision, and Mr. Gentile agreed to it, in order to give *both parties* additional protection. Specifically, paragraph 3 prevented Mr. Gentile from arguing that the statute of limitations would expire contemporaneously with the expiration of each tolling agreement, by expressly providing that the Government would still have another 11 months to prosecute him after the document expired.[15] Mr. Gentile also gained the protection of ensuring that the Government would only have those 11 more months to bring charges against him, after which he could thwart any indictment by asserting his statute of limitations defense. The purpose of paragraph 3, as Mr. Gentile believed when he signed his affidavits, was to reflect that all parties understood the applicable statute of limitations to be five years, such that if charges were not brought against him by June 30, 2015, they would be precluded as time-barred.[16]

Obviously, Mr. Gentile would have been able to assert his right to a statute of limitations defense the day after each tolling agreement expired – August 1, 2013 and August 1, 2014, respectively. Therefore, paragraph 3 cannot be read to indicate the days he could first assert such a defense. The only logical reason for including language that Mr. Gentile "reserve[d] [his] privilege" to assert a statute of limitations defense if the Government did not file charges against

[15] 11 months following the expiration of the tolling agreement was purposely selected, as 4 years and 1 month (49 months) had already elapsed between the end of the alleged offense conduct in June 2008 and July 31, 2012, the effective date of the first tolling agreement. The11 months was intended to manifest the understanding of all parties that the applicable statute of limitations was 5 years (i.e., 49 months plus 11 months).

[16] To the extent there is any ambiguity, the agreements must be construed strictly against the Government which drafted them under the well-established concept of *contra proferentem*. *See, e.g.*, *Bouton v. Litton Industries, Inc.*, 423 F.2d 643, 645 (3d Cir. 1970) ("as the draftsman the agreement will be construed strictly against it"); *In re Donato*, 170 B.R. 247, 254 (Bankr. D.N.J. 1994). The Third Circuit accords exacting standards against the party that drafts a contract. Indeed, when one party to a contract is unilaterally responsible for its drafting, courts apply *contra proferentem* and construe ambiguous terms against the drafter. *Aleynikov v. The Goldman Sachs Group, Inc.*, 765 F.3d 350 (3d Cir. 2014), *quoting Norton v. K-Sea Transp. Partners L.P.*, 67 A.3d 354, 360 (Del. 2013).

him by June 30, 2014 (under the first tolling agreement), and then June 30, 2015 (under the second tolling agreement), was to identify the dates on which the statute of limitations would actually expire. Certainly, this was Mr. Gentile's understanding of the affidavits when he signed them.

Indeed, during the August 14, 2014 meeting with the Government, Mr. Gentile, through counsel, made clear to the Government that he was refusing to sign a third tolling agreement because he wanted an assurance that he would no longer have to cooperate beyond June 30, 2015. (Ford Aff. 18). If the Government now contends that the language in paragraph 3 was intended to specify June 30, 2014, and then June 30, 2015, as the respective dates upon which Mr. Gentile could first assert his right to a statute of limitations defense, or that such language is simply meaningless, it effectively tricked Mr. Gentile into tolling the statute of limitations for 23 months under each agreement, as each agreement, on its face, informed Mr. Gentile that he was agreeing to toll the statute of limitations "for a period of one year." Such a scenario cannot be reconciled with the ends of justice. *See United States v. Low*, 257 F. Supp. 606 (W.D. Pa. 1966) ("Moreover, any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege.") (*quoting Miranda v. Arizona*, 384 U.S. 436, 476 (1966)).[17]

Accordingly, when Mr. Gentile signed both affidavits, and when the Government agreed not to force him to sign a third, everyone believed that the language conveyed (1) that the

[17] The Constitution cannot tolerate any other outcome where both the Government and Mr. Gentile have been operating pursuant to their cooperation agreement under the belief that his alleged criminal conduct was subject to a five-year statute of limitations. Both tolling agreements – drafted and relied on by the Government – contain language indicating that the Government believed Mr. Gentile's alleged criminal conduct was subject to a five-year statute of limitation. And, accordingly, Mr. Gentile believed he was tolling the statute of limitations, at most, only until June 30, 2015, as the explicit language of the tolling agreements reflects. A *post facto* enlargement of the statute of limitations would unconstitutionally negate his limited waiver, as the Constitution will not tolerate a criminal defendant being "tricked or cajoled into a waiver." *Miranda v. Arizona*, 384 U.S. 436, 476 (1966).

Government would have eleven months after the expiration of each tolling period in which to bring charges and, concomitantly, (2) that if no charges were brought within that timeframe, the Government would lose the benefit of the tolled time and all charges would otherwise be time-barred. In fact, that belief was articulated on numerous occasions, one of which was during a conversation in February 2014, when Mr. Gentile told FBI agents that he was not going to sign a third tolling agreement because his refusal to do so would leave the Government with only one more year within which to charge him. The FBI agents acknowledged that fact. (Gentile Aff. 17)

In sum, based on the very terms it drafted, the Government had only until June 30, 2015, at the latest, to indict Mr. Gentile. Yet, the Government waited until another nine months thereafter, on March 23, 2016, to do so, in violation of the statute of limitations.[18]

C. The Un-notarized Affidavit Has no Legal Effect

Even assuming the Court were to retroactively apply the new six-year statute of limitations and ignore the June 30, 2015 deadline set forth in the second tolling agreement, the Government cannot establish that it timely filed the Indictment because the second tolling agreement, which purports to toll the limitations period for a second one-year period, is a legal nullity. Although Mr. Gentile signed that document, the Government specifically drafted it as an

[18] Even assuming that Dodd-Frank retroactively extends the statute of limitations to six years, given the language in the tolling agreements, the parties nonetheless agreed to restrict the limitations period to five years. "[I]t is well settled that parties may contractually limit the time for bringing claims, despite a statute of limitations to the contrary." *Smith v. TA Operating LLC*, 2011 WL 3667507, at *3 (D.N.J. Aug. 19, 2011) (citing *Order of United Comm. Travelers of America v. Wolfe*, 331 U.S. 586 (1947)); *see also Mirza v. Ins. Adm'r of America,* 800 F.3d 129, 133 (3d Cir. 2015) ("parties may agree to a shorter limitations period so long as the contractual period is not unreasonable"). Given that the agreements, drafted by the Government, reflect the parties' understanding that the matter would be subject to a 5-year statute of limitations, the Government should be bound by that limitations period, regardless of whether it now claims, after-the-fact, that the new 6-year statute of limitations applies retroactively.

affidavit. That affidavit was never notarized, so as to execute it legally. Nor, for that matter, did the Government ever counter-sign the document. (Ford Aff. 35, Ex. G) Consequently, it has no legal effect in this matter.

As an initial point, the Government cannot rely on the second affidavit as competent evidence to support a claim that the limitations period was tolled for a second year. To be appropriately received in evidence, an affidavit must be submitted in proper form under Fed. R. Civ. P. 56(c) and (e), so as to satisfy the rule in *Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986). To be clear, affidavits are only admissible "if they are made under penalties of perjury; ... unsworn documents purporting to be affidavits may be rejected." *Pfeil v. Rogers,* 757 F.2d 850, 859 (7th Cir.1985), *cert. denied,* 475 U.S. 1107, 106 S. Ct. 1513, 89 L.Ed.2d 912 (1986). While it is true that an affidavit does not need to be perfectly notarized as a perquisite to its admissibility, in the absence of such a notarization, it must at a bare minimum satisfy the more lenient standard of 28 U.S.C. § 1746. That provision states, in relevant part:

> Whenever, under any ... rule, ... any matter is required or permitted to be supported, evidenced, established, or proved by the sworn ... affidavit, in writing of the person making the same ..., such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, ... in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form:
> ....
> (2) If executed within the United States, ...: 'I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature).' "

Here, lacking any statement therein that the submission was made under penalty of perjury, *see* 28 U.S.C. § 1746, an oath before a duly authorized officer was necessary to bestow the affidavit with any evidentiary value. See *Green v. Mayor & City Council of Baltimore*, 198 F.R.D. 645, 646 (D. Md. 2001). Mr. Gentile's affidavit does not even meet these comparatively lenient requirements. The crucial language "under penalty of perjury" is nowhere to be found.

Because the affidavit is wholly unsworn, the Court simply lacks the authority to consider its contents.

Moreover, parties must stringently comply with the terms of tolling agreements (or affidavits) in order to render them effective, and such documents must be strictly construed against the Government. To that end, the Court, in *United States v. Spector*, 55 F.3d 22 (1st Cir. 1995), held that the Government's failure to counter-sign a tolling agreement invalidated it because the agreement "expressly called for acceptance of the offer in the form of a signature by the Government attorney." *Id.* at 25. While *Spector* recognized that an agreement to extend the statute of limitations need not be in writing, it nevertheless emphasized that "*where the parties themselves have chosen to set forth the terms in writing,* it makes sense to hold them to those terms…." *Id.* at 26. (emphasis added). *Spector* affirms the proposition that the plain language of an agreement should dictate its enforceability. *Id.* at 25–26.

Here, rather than entering into a bilateral contract with Mr. Gentile, requiring the signature of both parties, the Government chose to rely on another method to effectuate a second one-year tolling of the statute of limitations. It drafted an affidavit for Mr. Gentile to sign *and notarize*, so as to swear to his agreement that he would not raise a statute of limitations defense if the Government brought charges by a certain date. Significantly, the first affidavit was duly notarized. In stark contrast, the second affidavit was not properly executed in such a manner. The Government failed to secure such a proper execution from Mr. Gentile. Accordingly, the Government, here, is in the same position it stood within *Spector*. Having failed to abide by the terms set forth in its own writing for proper execution, it cannot now rely on the document to support an additional one-year of tolling. *See id.* at 26 ("where the Government reaches an agreement with a potential criminal defendant, and where both parties expressly establish, in

writing, the terms of their bargain and map out the conditions under which it will be effective, we think the parties are best held to the plain terms of that agreement").

D. Conclusion

The charges in the Indictment, brought nearly eight years after-the-fact, are subject to a five-year statute of limitations. The parties expressly agreed that any charges had to be filed by June 30, 2015 (at the latest), regardless of which limitations period applies.[19] And the Government cannot put forth evidence entitling it to any more than a one-year tolling period. Having chosen to wait until March of 2016 to file charges, the Government is out of time. Relying on the Dodd-Frank Act and its two one-year tolling agreements, the Government may contend that its deadline for filing charges against Mr. Gentile was June 30, 2016, almost eight years after his alleged conduct ended. But as set forth above, the Dodd-Frank Act cannot be applied retrospectively in the absence of clear Congressional intent so as to expand, from five years to six years, the statute of limitation in effect at the time of Mr. Gentile's charged conduct, without violating the presumption against retroactivity, as promulgated by the U.S. Supreme Court in *Landsgraf*. Since Congress did not expressly state that Dodd-Frank's new limitations period applies retroactively, this Court is restricted from concluding that it does so.

Given that the alleged conduct in this matter ended just shy of eight years before the Government filed the instant Indictment, the Government can only prevail if it (1) unconstitutionally overcomes the presumption of the five-year statute of limitations, (2) gains the benefit of any ambiguity in a document it drafted and demonstrates that both tolling agreements are to be illogically construed against Mr. Gentile, *and*, (3) establishes that the second tolling

[19] To be clear, however, the agreements, themselves, specifically contemplate a statute of limitations of five years. Indeed, June 30, 2015 – the date the Government specified in the second agreement as its deadline to refile charges – is five years after the charged conduct ended in June of 2008 (after subtracting two years of tolling).

agreement was effectively executed. Because the Government cannot satisfy any one of these requirements, let alone all three, the Indictment must be dismissed, as having been brought in violation of the statute of limitations.

II. MR. GENTILE'S SIXTH AMENDMENT RIGHT TO A SPEEDY TRIAL WAS VIOLATED, REQUIRING DISMISSAL OF THE INDICTMENT WITH PREJUDICE

A. Mr. Gentile's Right to a Speedy Trial Was Triggered by His Arrest, Restriction of Liberty, Public Accusation and Anxiety.

The Sixth Amendment to the Constitution states that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." This right is so fundamental to our liberties that, if violated, dismissal of the indictment is constitutionally mandated. *United States v. MacDonald,* 456 U.S. 1, 6-7, 102 S.Ct. 1497, 71 L.Ed.2d 696 (1982)). The right to a speedy trial commences on "the date of the arrest or indictment, whichever occurs first…," *id*., and it continues to protect a defendant to the extent that his fundamental liberties, such as the right to travel, are restricted, or he remains publicly accused of crimes or under threat of their reinstatement. *Id.; see also United States v. Marion,* 404 U. S. 307, 320 (1971); *Klopfer v. North Carolina*, 386 U.S. 213, 221-22 (1967). While the law is clear that the speedy trial clause has no applicability either before arrest or pre-indictment (or other accusation) or *after* dismissal of an accusatory instrument (when the defendant is not under public accusation or restricted liberty), it is equally clear that the Sixth Amendment protects a defendant who has been arrested, if he remains (1) publicly accused, under the threat of reinstatement of charges, and (2) subject to the restriction or elimination of fundamental liberties, such as travel and speech. *See MacDonald,* 456 U.S. at 8 (ruling no speedy trial violation following dismissal of charges when "any restraint on liberty, disruption of employment, strain on financial resources, and exposure to public

obloquy, stress and anxiety is *no greater than it is upon anyone openly subject to a criminal investigation*."); *Marion,* 404 U. S. at 320 (emphasis added), *Klopfer*, 386 U.S. at 221-22.

As the United States Attorney's Office knows from its own manual, the speedy trial clause of the Sixth Amendment is triggered by either (1) a formal indictment or information, or (2) the actual restraints imposed by arrest and holding to answer a criminal charge. Criminal Resource Manual 628, *citing United States v. Marion*, 404 U.S. 307, 320 (1971). For this reason, there can be no question that one who has been arrested and released under 18 U.S.C. § 3141(a) would be entitled, under *Marion,* to the protections of the speedy trial clause. There is also no question that one who has been arrested and released under identical conditions as those found in § 3141(a), but imposed by the United States Attorney's Office instead of a Court – as they were here – must also be entitled, under *Marion* and its progeny, to the protections of the speedy trial clause.

Speedy trial protections are premised on the basic idea that "arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends." *United States v. Marion,* 404 U. S. at 320. For these reasons, speedy trial rights are designed not only "to minimize the possibility of lengthy incarceration prior to trial," but "to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges." *MacDonald,* 456 U.S. at 8.

Consistent with the above principles, the Supreme Court in *Klopfer v. North Carolina, supra*, struck down a local ordinance that gave a state prosecutor a procedural tool, called *nolle*

prosequi, to restore a previously withdrawn criminal indictment to the trial docket at any time without further order of the court. *Klopfer*, 386 U.S. at 225. The Supreme Court held that, notwithstanding the voluntary withdrawal of charges, the ordinance violated speedy trial rights because the prosecutor could reinstate the charges at will. As the *Klopfer* Court explained:

> The petitioner is not relieved of the limitations placed upon his liberty by this prosecution merely because its suspension permits him to go "whithersoever he will." The pendency of the indictment may subject him to public scorn and deprive him of employment, and almost certainly will force curtailment of his speech, associations and participation in unpopular causes. By indefinitely prolonging this oppression, as well as the "anxiety and concern accompanying public accusation," the criminal procedure condoned in this case by the Supreme Court of North Carolina clearly denies the petitioner the right to a speedy trial which we hold is guaranteed to him by the Sixth Amendment of the Constitution of the United States.

Id. at 221-22.

Moreover, "prolonging this oppression" causes the accused to live "under a cloud of anxiety, suspicion, and often hostility" with often disastrous psychological effects. *United States v. Boone*, 2002 WL 31761364, at *16 (D.N.J. Dec. 6, 2002); *see also Barker,* 407 U.S. at 532-33. The Third Circuit has stated that "such anxiety in a defendant is one of the evils against which the Sixth Amendment is designed to protect." *United States v. Shovlin,* 464 F.2d 1211, 1215 (3d Cir.1972) (being "sensitive" to anxiety suffered); *see also United States v. Dreyer,* 533 F.2d 112, 116 (3d Cir.1976) (considering defendant's psychiatric record of "severe mental disturbance"). In short, the Sixth Amendment's right to a speedy trial is far more than a bulwark against lengthy pretrial incarceration. It is triggered by post-arrest Government action that curtails an accused's liberty (whether he is free on bail or not), exposes him to public accusation, threatens his welfare, disrupts his patterns of life, and subjects him to anxiety and public scorn. Mr. Gentile, as demonstrated below, has been subjugated in exactly these ways by the Government. Since his initial arrest on July 13, 2012, Mr. Gentile's liberty has been substantially restricted, he has been

publicly accused of the crimes for which he is now indicted, and he has suffered extreme disruptions in his life, as well as anxiety and scorn. Consequently, the speedy trial clock has continuously run since Mr. Gentile's arrest in 2012, and the Indictment must be dismissed based on a violation of his right to a speedy trial under the Sixth Amendment.[20]

B. Since His Arrest, Mr. Gentile Has Suffered Deprivations of His Liberty, the Continuous Threat of Forfeiture and Indictment, Public Disclosure of His Arrest and Cooperation with the Government, and Curtailment of His Rights of Association and Speech

Since his arrest on July 13, 2012, Mr. Gentile has been at the mercy of the Government, which has curtailed his freedom and disrupted his life in fundamental ways.

At the outset, the Government has stripped Mr. Gentile of essential liberties. At the same time that it withdrew his initial Complaint, on July 16, 2012, the Government entered into an oral cooperation agreement with Mr. Gentile and unilaterally imposed "bail" conditions upon him, all without the supervision of any court. Indeed, Mr. Gentile was directed, as a condition of his release to: (1) post $175,000 in bail directly with the United States Attorney's Office, by executing a surety and appearance bond, and signing a confession of judgment in favor of the Government (Ford Aff. 36, Ex. H); (2) further secure his Government-imposed bail by having

[20] Moreover, 18 U.S.C. § 3161(h) – the Federal speedy trial statute – provides the enumerated periods of delay which shall be excluded in calculating speedy trial time, and none apply here. The closest would appear to be that set forth in subsection (7)(A) thereof, which is routinely employed in the case of cooperation, but the attendant procedural requirements have not been satisfied. Specifically, §3161(h)(7)(A) states that the following is excluded from the calculation: "Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record, of the case, either orally or in writing, its reasons for finding that the ends of justice served by granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial." Obviously, none of this occurred, as the Government restricted Mr. Gentile's liberty in a manner which removed the judiciary from the process. Additionally, the Court is also authorized to dismiss the Indictment under Fed. R. Crim. Proc. 48(b), as the Government, here, is responsible for an unnecessary delay in presenting its charges to a Grand Jury and bringing Mr. Gentile to trial.

both of his parents post an additional $100,000 with the United States Attorney's Office by executing similar documents in favor of the Government (Ford Aff. 37, Ex. I); (3) surrender three legitimately possessed firearms to the FBI; and (4) relinquish his passports to the custody of his counsel, to be returned and used for travel only when pre-approved by the Government. (Ford Aff. 38-41, Exs. J, K, L and M). Of course, Mr. Gentile was also required to do whatever the Government instructed of him. Even in the absence of a charging instrument, Mr. Gentile was subjected to restrictions of a kind imposed upon an accused only by a court and after a hearing.

During the first year following his arrest, Mr. Gentile cooperated with the Government on an almost full-time basis. Significantly, on several occasions during that period when Mr. Gentile requested permission to travel for personal reasons, the Government denied his requests or restricted his travels to accommodate an investigation.[21] (Ford Aff. 12, 38, Ex. J, Gentile Aff. 23) For example, during the summer of 2013, Mr. Gentile requested permission to travel to Italy. (Ford Aff. 12) The Government originally denied that request.[22] On other occasions, such as Valentine's Day of 2013, Mr. Gentile was required to leave his wife and children to aid in the FBI investigation of Adam Gottbetter, despite the fat that his marriage was under significant strain. (Gentile Aff. 42) Throughout the entire time Mr. Gentile was cooperating, the agents and the U.S. Attorney's Office controlled his life. Indeed, had Mr. Gentile refused to do anything the Government directed, he risked forfeiting not only his own $175,000 bail, but the additional

[21] It is well-recognized that the right to travel is a fundamental right granted under our Constitution and is not to be abridged absent a compelling justification. *Kent v. Dulles*, 357 U.S. 116, 125-26 (1958) ("The right to travel is part of the 'liberty' of which the citizen cannot be deprived without the due process of the law under the Fifth Amendment . . . Travel abroad, like travel within the country… may be as close to the heart of the individual as the choice of what he eats, or wears, or reads."); *see also Zeller v. Donegal School Dist. Bd. of Ed.*, 517 F.2d 600, 614, n.3 (3d Cir. 1975).

[22] After negotiations, Mr. Gentile was permitted to restricted travel with the express condition that he return within 24 hours of being given notice to return. (Ford Aff. 12, Gentile Aff. 24)

$100,000 his parents posted, constituting their entire life savings. These *sub rosa* bail conditions remained in effect until they were replaced by the conditions imposed by the Court on March 28, 2016.

Furthermore, because Mr. Gentile was denied a formal written immunity or non-prosecution agreement by the Government, he was compelled to continue his cooperation again and again, over a span of years, in the hopes that he would earn his freedom. By February 2014, Government agents orally promised Mr. Gentile that his continued cooperation would mean he would not face felony charges at the end of the day. But, that day never came. Mr. Gentile was caught on a treadmill that did not cease moving until the summer of 2015. Nine months later, despite his prodigious cooperation with the authorities, he was indicted. Nothing better illustrates what the Supreme Court in *MacDonald* called "the disruption of life caused by arrest and the presence of unresolved criminal charges." *United States v. MacDonald*, 456 U.S. at 2.

In *MacDonald*, the Court found no speedy trial violation occurred because "once the charges instituted by the Army were dismissed, MacDonald was legally and constitutionally in the same posture as though no charges had been made. He was free to go about his affairs, to practice his profession, and to continue with his life." *MacDonald*, 456 U.S. at 10. Mr. Gentile's situation could not be any different.

In contrast to the defendant in *MacDonald*, Mr. Gentile has suffered, just as the defendant did in *Klopfer,* the "anxiety and concern accompanying public accusation" and the "curtailment of his speech [and] associations" as a result of public exposure. Even after the Complaint was withdrawn a few days after Mr. Gentile's arrest on July 16, 2012, the charges against him remained listed and open to view in law-enforcement databases. Mr. Gentile, himself, on June 10, 2015 ordered and was mailed a copy of a report listing his open wire fraud complaint in

Newark, New Jersey. (Ford Aff. 42, Ex. N) Mr. Gentile's life was threatened by at least two targets of the Government's investigations. For example, on March 14, 2014, Mr. Gentile received threatening text messages after a target of an investigation became suspicious of him. (Ford Aff. 43, Ex. O) And in the summer of 2015, another target threatened to kill Mr. Gentile if he could confirm that he was, in fact, a cooperating witness. (Ford Aff. 44, Ex. P). The Government was notified of both of these threats, took them seriously, and responded appropriately to protect Mr. Gentile's life and safety. (*Id.*).

Several other individuals discovered that Mr. Gentile had been charged in a criminal complaint in the District of New Jersey, which caused significant disruption to Mr. Gentile's life. First, members of the press learned of his arrest and cooperation, and reported on it. On at least one occasion, information regarding Mr. Gentile's status as a cooperator was leaked to the local media, which published such information. (Ford Aff. 45 - 47, Exs. Q, R and S). Based on those exposures, the Government instructed Mr. Gentile to cease taking part in local political, civic, or charitable endeavors in Putnam County. (Ford Aff. 48, Ex. T)

When Mr. Gentile submitted his renewal application for his pistol permit in Connecticut in March 2015, he received a return call from an official in the licensing unit who advised that she could not grant the renewal because he had an open arrest record "from July 2012 from FBI Newark case #318c118788 Fraud by Wire." This matter, the official recounted, was still listed as "pending." (Ford Aff. 49, Ex. U).

In all of these respects, Mr. Gentile's constitutionally protected liberty interests have been infringed since his arrest in July of 2012. The Government's imposition of bail conditions – without any judicial knowledge, approval and supervision – has made Mr. Gentile a prisoner to the dictates of Government agents and lawyers. The Government's false and ultimately

misleading statements that non-prosecution was just around the corner disrupted Mr. Gentile's life and kept him in a state of anxiety and suspense for years. His public "outing" as an alleged criminal and cooperator with the Government led to threats upon his life and the curtailment of normal social and civic activities. Consequently, as explained below, the Indictment must be dismissed on speedy trial grounds.

C. The *Barker* Factors All Weigh in Favor of Dismissal with Prejudice

Courts determine whether a defendant's right to a speedy trial has been violated by weighing the four factors set forth by the Supreme Court in *Barker v. Wingo,* 407 U.S. 514, 530 (1972): (1) the length of the delay, (2) the reason for the delay, (3) the extent to which the defendant asserted his speedy trial right, and (4) the prejudice suffered by the defendant. *See also Doggett v. United States*, 505 U.S. 647, 655 (1992). No one factor is dispositive and all are considered as part of a fact-sensitive balancing test. *See Barker,* 407 U.S at 533. Here, all four factors weigh strongly in favor of dismissing the Indictment with prejudice.

1. The Lengthy Four-Year Delay Between Mr. Gentile's Arrest and His Indictment Supports Dismissing the Indictment

The first factor under the *Barker* test, length of delay, entails two inquiries. *Hakeem v. Beyer*, 990 F.2d 750, 759-60 (3d Cir. 1993). As the Court in *Hakeem*, *id.*, observed:

> Simply to trigger a speedy trial analysis, an accused must allege that the interval between accusation and trial has crossed the threshold dividing ordinary from "presumptively prejudicial" delay, since, by definition, he cannot complain that the government has denied him a "speedy" trial if it has, in fact, prosecuted his case with customary promptness. If the accused makes this showing, the court must then consider, as one factor among several, the extent to which the delay stretches beyond the bare minimum needed to trigger judicial examination of the claim. This latter enquiry is significant to the speedy trial analysis because ... the presumption that pretrial delay has prejudiced the accused intensifies over time.

As recognized by the Court in *United States v. Velazquez*, 749 F.3d 161, 174 (3d Cir. 2014), lower courts in the Third Circuit have generally found 'postaccusation delay' approaching one year sufficient to trigger further review of *Barker* factors." And the Third Circuit, itself, has definitively held that "fourteen months is sufficient to trigger [such further] review." *Velazquez*, *id.* Once this initial threshold has been met, "the state…bears the burden to justify the delay." *Id.*

Here, there can be no question that the pretrial delay in this matter has been presumptively prejudicial. After Mr. Gentile was initially arrested on July 13, 2012, approximately 44 months of speedy trial time had elapsed before this Court entered an Order of continuance on March 28, 2016. At the time the Court did so, it acknowledged that the Order would not affect any arguments the defense maintained with respect to Mr. Gentile's right to a speedy trial prior to the continuance. In accord with seminal law in this Circuit, a delay of 44 months is indeed presumptively prejudicial, so as to trigger further review of the remaining *Barker* factors while placing the burden to justify such delay on the Government.

2. The Sole Reason for the Delay Was the Government's Interest in Continuing to Use Mr. Gentile As a Cooperator in Its Prosecution of High-Profile Securities Cases

The second factor under the *Barker* test – the reason for the delay – requires courts to determine the reasons for the delay. In this matter, the reason for the delay is, simply put, outrageous. The Government, through its words and actions, caused the delay by disingenuously dangling before Mr. Gentile the prospect of first a non-felony resolution, and ultimately a non-prosecution, in order to induce his continued efforts as a cooperator. And when the Government

was finally done benefitting from those efforts, it simply reneged on its word, indicting Mr. Gentile, approximately 44 months after his initial arrest.

With respect to speedy trial analysis, courts have made clear that "when the Government deliberately prolongs a defendant's case for its own benefit, it does so at its own risk." *United States v. Davis*, 679 F.2d 845, 850 (11th Cir. 1982). Accordingly, courts draw a line "between intentional delays that are permissible and those that are impermissible, with deferring prosecution because of an ongoing trial by another sovereign or a missing witness on the one side of the line, and deferring prosecution as a means to exert pressure on a potential cooperating witness on the impermissible side." *United States v. Heshelman*, 521 F. App'x 501, 509 (6th Cir. 2013) (citing *United States v. Roberts*, 515 F.2d 642, 647 (2d Cir. 1975)) (citations omitted).

As the Second Circuit has explained, "we…reject the notion that a defendant in effect waives his right to a speedy trial by consenting to [a cooperation] agreement. If the Government wishes to bargain for this condition, it may but should do so mindful of the risks which it thereby assumes of dismissed indictments for unconstitutional delay." *United States v. Roberts*, 515 F.2d 642, 647 (2d Cir. 1975); *see also United States v. New Buffalo Amusement Corp.*, 600 F.2d 368, 378 (2d Cir. 1979) ("Good faith plea negotiations by a defendant should not be equated to a waiver of speedy trial rights, and, under the circumstances, the Government must assume responsibility for the risk of institutional delays where the bargain ultimately is unsuccessful."); *Bulgin v. State*, 912 So. 2d 307, 311 (Fla. 2005) ("any delay … was attributed to the State in the first instance by … seeking the benefit of the cooperation of the defendants to make other cases.").

The Government's conduct here is much more egregious than mere delay in order to pursue a plea or cooperation agreement. Rather, the Government manipulated Mr. Gentile, with

false statements and suggestions (as well as explicit statements) of non-prosecution, into performing what the Government has consistently described as extraordinary cooperation over a period of 36 months. Even after:

(1) August 2014, when Mr. Gentile refused to sign a third tolling affidavit and explicitly told the Government he no longer wished to cooperate in the absence of a non-prosecution disposition,

(2) October 10, 2014, when he sent the Government a written submission stating that he no longer wanted to cooperate unless he received a Deferred Prosecution Agreement, and

(3) December 18, 2014, when he again explicitly stated that he no longer wished to cooperate unless he was guaranteed a non-felony resolution,

Government lawyers and agents persisted in stringing him along and forcing him to continue cooperating for their own ends. This is a malicious example of the Government "deliberately prolong[ing] a defendant's case for its own benefit." *United States v. Davis*, 679 F.2d at 850. As such, the delay here should be charged against the Government.

3. Mr. Gentile Asserted His Right to a Speedy Trial at the Earliest Opportunity and Repeatedly

"The third factor in the *Barker* analysis is the degree to which the defendant asserts his speedy trial right, including the frequency and force of such assertions." *United States v. Claxton*, 766 F.3d 280, 296 (3d Cir. 2014). Generally, a defendant can show he asserted his right to a speedy trial by (1) identifying "a motion or some evidence of direct instruction to counsel to assert the right at a time when formal assertion would have some chance of success" or (2) through "informal correspondence to the court." *United States v. Battis*, 589 F.3d 673, 681 (3d Cir. 2009). And while the second form is given less weight, "even if a defendant fails to adequately assert his right to a speedy trial, that means only that the third *Barker* factor will be

weighed against him. It does not mean that he cannot claim that his right to a speedy trial was violated." *Id.*

Given the unique procedural history of this case, Mr. Gentile, by his counsel, first asserted his right to a speedy trial during pre-indictment negotiations with the Government, following his September 2015 meeting, shortly after being informed that the Government intended to reinstate the felony charges originally filed against him in 2012. That assertion was made several months before the instant Indictment was filed. Post-indictment, Mr. Gentile raised with the Court at his arraignment the violation of his right to a speedy trial. And he continues to assert it by means of the present motion to dismiss, which has been filed at the earliest possible opportunity.

Mr. Gentile promptly asserted his right to a speedy trial, and this factor strongly weighs in his favor.

4. Mr. Gentile Has Been Prejudiced by the Government's Misconduct

A defendant can establish the fourth *Barker* factor, prejudice, in two ways: (1) "he can claim prejudice without providing affirmative proof of particularized prejudice if the delay is excessive," *Doggett*, 505 U.S. at 655; or (2) "he can demonstrate that he was subject to oppressive pretrial incarceration, that he suffered anxiety and concern about the impending trial, or that his defense was impaired as a result of the delay." *Barker*, 407 U.S. at 532. Mr. Gentile can establish prejudice both ways, as (1) the Government has, in fact, subjected him to excessive delay, and (2) he has suffered anxiety and concern as a result of the Government's misconduct, and his defense has been impaired as a result of the delay. Therefore, this factor, too, weighs heavily in favor of Mr. Gentile.

First of all, the delay between Mr. Gentile's arrest and any potential trial is extraordinary and excessive, creating a presumption of prejudice. The "presumption that pretrial delay has prejudiced the accused intensifies over time." *Hakeem v. Beyer*, 990 F.2d at 759-60. Where several years elapse, such as here, courts describe the delay as "extraordinary," and in the case of "extraordinary delay," "the Government faces a high, and potentially insurmountable, hurdle in seeking to disprove general prejudice." *Velazquez*, 749 F.3d at 185-86; *see also Doggett*, 505 U.S. at 652. Moreover, the "importance" of presumptive prejudice, when weighing the *Barker* factors, "increases with the length of delay," because "time's erosion of exculpatory evidence and testimony can hinder a defendant's ability to prove his defense." *United States v. Mensah-Yawson*, 489 F. App'x 606, 612 (3d Cir. 2012). As a matter of law, the Third Circuit has held that "prejudice will be presumed when there is a forty-five month delay in bringing a defendant to trial, even when it could be argued that only thirty-five months of delay is attributable to the Government." *United States v. Battis*, 589 F.3d 673, 683 (3d Cir. 2009).

Here, the delay between Mr. Gentile's arrest and potential trial already far exceeds the 35-month delay in *Battis*. A 44-month period has elapsed between the arrest of Mr. Gentile and the instant Indictment. And notably, the alleged conduct underlying that Indictment is already eight years old. Moreover, the delay is wholly attributable to the Government's continued exploitation of Mr. Gentile as a cooperator, for its own exclusive benefit.

In addition to the presumption of prejudice that exists, the passage of time caused by the Government's tactics has undercut Mr. Gentile's ability to defend himself in this criminal case. For example, Mr. Gentile no longer has access to essential financial records, as the reasonable retention period for such documents has long since passed. *See, e.g.*, 31 C.F.R. § 103.38 (requiring financial institutions to retain records for five years). Additionally, Mr. Gentile is no

longer able to subpoena and/or otherwise obtain such records necessary to his defense from financial institutions which, though previously possessing them, have shut down since the alleged conduct occurred eight years ago. Likewise, given the timeworn nature of this matter, individuals who could potentially shed light on the relevant issues may no longer be available to testify and/or experience faded memories regarding them.

A second source of prejudice lies in the anxiety and concern suffered by Mr. Gentile as a direct result of the Government's conduct. As the Third Circuit has held, an "[i]nordinate delay wholly aside from possible prejudice to a defense on the merits, may seriously interfere with the defendant's liberty whether he is free on bail or not, and may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and friends." *United States v. Dreyer*, 533 F.2d 112, 115 (3d Cir. 1976) (internal quotation marks and ellipses omitted); *see also In re Moses*, 2006 WL 2572090, at *490 (D.V.I. Aug. 29 2006) (restrictions on travel, loss of job opportunity, impacted work schedule, and interference with marriage and family all support finding that defendant was prejudiced).

In this case, the Government's control over Mr. Gentile, for nearly four years, has had just the negative impact described in *Dreyer*. Such Governmental control has "seriously interfere[d] with [Mr. Gentile's] liberty," by subjecting him to stringent extra-judicial conditions of release, including travel restrictions and a combined $275,000 in Government-imposed bail posted by him and his parents. Moreover, it has served to "curtail his associations," "subject him to public obloquy," and "create anxiety in him, his family and his friends," as (1) Mr. Gentile's unresolved criminal charges and status as a cooperator have been made public, (2) he has received resulting threats to his life, and (3) he has been rendered unable to engage in local political, civic, or charitable endeavors. And, to make matters worse, all of this occurred while

Mr. Gentile was compelled to live under the looming shadow of a prospective indictment for conduct allegedly occurring eight years ago.

D. Conclusion

A balancing of the *Barker* factors establishes that Mr. Gentile's Sixth Amendment right to a speedy trial was violated. While no one factor is dispositive, all four support dismissal of the Indictment with prejudice. As set forth above, the Government egregiously delayed bringing Mr. Gentile to trial for an excessive period of time, in order to benefit itself, while causing him presumed and real prejudice, over his timely objection. While the Government's conduct in this case has been atypical to say the least – deliberately subjecting an individual to restricted liberty for years away from the Court's supervision and constitutional protections – the Court is nonetheless armed with the customary measure of dismissal to redress it now. In so doing, the Court will not only remedy this specific wrong, but prevent the Government from relying on *post facto* judicial approval of its usurping the functions of the Court, to the detriment of criminal defendants, so as to advance its own agenda.

III. THE INDICTMENT MUST BE DISMISSED IN ACCORD WITH DUE PROCESS, AS THE GOVERNMENT AGREED NOT TO PROSECUTE GUY GENTILE IN EXCHANGE FOR HIS CONTINUED COOPERATION AND HE FULFILLED HIS END OF THE BARGAIN

A. The Government Must Adhere to the Terms of Its Agreement with Mr. Gentile

When the Government enters into a plea or cooperation agreement with a criminal defendant, the standard of conduct to which it will be held by the courts is well-settled – it is one of good faith and fair dealing. Indeed, prosecutors must adhere to "the most meticulous standards of both promise and performance" when negotiating with a criminal defendant. *See e.g.*, *Correale v. United States*, 479 F.2d 944, 947 (1st Cir.1973). As reasoned in *Santobello v.*

New York, a plea agreement between the Government and a defendant "must be attended by safeguards to insure the defendant what is reasonably due in the circumstances," a "constant factor [of which] is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, *such promise must be fulfilled*." 404 U.S. 257, 262 (1971) (emphasis added). *See also*, *Dunn v. Colleran*, 247 F.3d 450, 458, 461 (3d Cir. 2001) (a prosecutor must "fulfill the promises" made or "he or she violates the defendant's due process rights").[23]

Moreover, the terms of an agreement with the Government need not be reduced to writing. Rather, they may be shown by the Government's verbal assurances. *Williams v. Spitzer*, 246 F. Supp.2d 368, 383 (S.D.N.Y. 2003) ("But the Court's language in *Santobello* is crystal clear and broadly stated: When a plea rests in any significant degree on a *promise or agreement* of the prosecutor, so that it can be said to be a part of the inducement or consideration, such promise must be fulfilled. *Must be fulfilled!* The Court did not add 'unless the promise was oral'….") (emphasis in original).

The terms of an agreement with the Government may also be demonstrated implicitly by the manner in which the Government conducts itself with a defendant. *United States v. McHan*, 101 F.3d at 1034 ("While a contract is made when the parties verbally express their mutual assent to its essential terms, it may also be implied when the parties' conduct manifests their agreement."). Accordingly, in determining whether the Government has violated an agreement with a defendant, the Court must determine whether its "conduct is inconsistent with what was

[23] Because cooperation agreements necessarily implicate and result in the same waiver of constitutional rights as plea agreements, courts have extended the reasoning of *Santobello* to cooperation agreements. *See e.g.*, *United States v. Pinter*, 971 F.2d 554, 557 (10th Cir. 1992); s*ee also United States v. Eliason*, 3 F.3d 1149, 1153 (7th Cir. 1993) ("the due process clause requires prosecutors to scrupulously adhere to commitments made to suspects in which they induce the suspects to surrender their constitutional rights in exchange for the suspects giving evidence that the Government needs against others which simultaneously implicates themselves.").

reasonably understood by the defendant" when entering into such an agreement. *United States v. Badaracco*, 954 F.2d 928, 939 (3d Cir. 1992) (internal quotation omitted).

The Third Circuit takes a particularly rigid approach in this area, mandating that "the Government must adhere strictly to the terms of the bargain[s] it strikes with defendants." *United States v. Miller*, 565 F.2d 1273, 1274 (3d Cir.1977), *cert. denied*, 436 U.S. 959 (1978). If "the prosecutor fails to do so, whether purposefully or inadvertently, that breach must be remedied regardless of whether the defendant was prejudiced thereby." *Dunn v. Colleran*, 247 F.3d at 458; *see also United States v. Baird*, 218 F.3d 221, 229 (3d Cir. 2000).

B. The Government's Promise Not to Prosecute Mr. Gentile, in Exchange for the Cooperation He Continued to Provide, Constitutes a Binding Contract, Which Must Be Enforced Under the Due Process Clause

"Agreements to exchange cooperation for [ ] immunity are governed by [the same] traditional principles of contract law" set forth above. *United States v. McHan*, 101 F.3d 1027, 1034 (4th Cir. 1996) (*citing Santobello*, 404 U.S. at 262). Consequently, "such agreements are unique and are to be construed in light of 'special due process concerns.'" *United States v. Stolt-Nielsen S.A.*, 524 F.Supp.2d 609, 613 (E.D. Pa. 2007) (*quoting United States v. Baird*, 218 F.3d 221, 229 (3d Cir. 2000)) (citations omitted). Mindful of the fact that parties who enter into non-prosecution agreements frequently forgo valuable constitutional rights, the Court must determine whether the Government's conduct comported with "what was reasonably understood by defendant when entering" the agreement. *Id.* (dismissing indictment where Government obtained the benefit of a non-prosecution agreement, so as to secure guilty pleas from co-conspirators, but nonetheless indicted defendants, thereby failing to afford them the benefit of their bargain).

Where a defendant alleges that the Government has violated a cooperation agreement, courts undertake a three-step analysis, asking: (1) what are the terms of the agreement, and what

is the conduct alleged to violate it; (2) did the conduct violate the cooperation agreement; and (3) if the agreement has been violated, what remedy is appropriate? *Forman v. Straw*, 1996 WL 729838, at *3 (E.D. Pa. Dec. 10, 1996) (*citing United States v. Boqusz,* 43 F.3d 82, 94 (3d Cir. 1994), *cert. denied,* 115 S.Ct. 1812 (1995) (*superseded by statute on other grounds*).

The Government and Mr. Gentile entered into a binding agreement, the terms of which were that if Mr. Gentile continued to cooperate beyond the fall of 2014 and certainly beyond December 18, 2014, he would not be charged with a felony.

On several occasions, starting in August 2014, Mr. Gentile insisted to both the FBI and, through counsel, the U.S. Attorney's Office that he no longer wanted to provide cooperation unless he would not be charged at the conclusion of his cooperation. And on just as many occasions, the Government, while being circumspect and careful with its words, told Mr. Gentile it was more likely he would be charged if he stopped cooperating, and more likely he would not be charged if he continued to do so.

Then, at some point after mid-October 2014, the Assistant U.S. Attorney serving as Chief of the Economic Crimes Unit and overseeing Mr. Gentile's investigation and cooperation explicitly told Mr. Gentile, through his counsel, that Mr. Gentile would "get what he wanted" if he continued to cooperate against Milrud to completion because the U.S. Attorney's Office was so excited about that investigation and upcoming indictment. Throughout his cooperation, increasingly in the fall of 2014, and most directly in his October 10, 2014 submission, Mr. Gentile expressed to the U.S. Attorney's Office via his counsel, and directly to the FBI agents, that "what he wanted" in exchange for his continued assistance was not to be prosecuted for any of the conduct alleged within his initial complaint from 2012.

Next, on December 18, 2014, Mr. Gentile again informed the Government that he no longer wanted to cooperate unless he was formally assured that he would not be charged at the conclusion of his cooperation. In response, the Government simply continued to use Mr. Gentile as a cooperator until the statute of limitations expired in June of 2015.

Individually and together, these two events – the AUSA in charge of the investigation telling Mr. Gentile's counsel that Mr. Gentile would "get what he wanted" in terms of non-prosecution and then continuing to use Mr. Gentile as a cooperator after he expressly conditioned such use on non-prosecution – created a promise by the Government which "must be fulfilled," given that Mr. Gentile satisfied his end of the bargain. *Santobello*, 404 U.S. at 262. The terms of Mr. Gentile's non-prosecution agreement with the Government were clear – if Mr. Gentile continued to cooperate against Milrud, the Government would not prosecute him.

Indeed, based on the Government's agreement not to prosecute him in exchange for his continued cooperation against Milrud, Mr. Gentile continued to provide substantial and self-endangering cooperation against Milrud to its completion months later in January of 2015. And Mr. Gentile then continued to cooperate on other matters throughout the first half of 2015, during which time he spoke with the FBI agents almost daily. Specifically, with respect to Milrud, Mr. Gentile traveled to the Bahamas on numerous occasions, where he permitted the Government full use of his Bahamian broker-dealer, wired his entire office with video and audio surveillance so that FBI agents had a recording of everything that transpired, installed keystroke recording software on his computer, and met with Milrud in his office where he was able to get Milrud to demonstrate how his securities fraud scheme operated. This was after, of course, Mr. Gentile explained to the Government how Milrud's sophisticated securities fraud worked. Equipped with this irrefutable evidence obtained by Mr. Gentile, on January 13, 2015, the Government

arrested Milrud, who, having no defense, plead guilty on September 14, 2015. In other words, Mr. Gentile performed his part of the bargain.

The Due Process Clause precludes the prosecution of Mr. Gentile as a result of these dealings. Mr. Gentile lived up to his end of the agreement, induced to do so based on what he "reasonably understood" to be a promise of immunity. *United States v. Badaracco*, 954 F.2d 928, 939 (3d Cir. 1992) (internal quotation omitted) (in determining whether the Government has violated an agreement with a defendant, the Court must determine whether its "conduct is inconsistent with what was reasonably understood by the defendant" when entering into such an agreement). "[S]uch promise must be fulfilled." *Santobello v. New York*, 404 U.S. at 262.

The appropriate – and indeed only – remedy here is to dismiss the Indictment.

IV. THE NUMEROUS STATEMENTS OF THE FBI AGENTS, TOGETHER WITH THE TOTALITY OF THE CIRCUMSTANCES, MANDATE DISMISSAL OF THE INDICTMENT UNDER THE FUNDMENTAL FAIRNESS DOCTRINE OF THE DUE PROCESS CLAUSE

A. Introduction

The U.S Attorney's Office induced Mr. Gentile to continue cooperating, up until the statute of limitations expired, in exchange for what would ultimately prove to be a false promise of non-prosecution. But even if this Court concludes that no binding agreement existed, that does not end the Due Process analysis.

In addition to the inducements set forth above, the FBI agents with whom Mr. Gentile worked on a daily basis, repeatedly and explicitly throughout the course of his three years of cooperation, assured him that he would not be charged with a felony if he kept cooperating. Those statements, when viewed together with all of the facts and circumstances surrounding this

prosecution, warrant dismissal of the Indictment based on principles of fundamental fairness guaranteed by the Due Process Clause.

B. Fundamental Fairness Warrants Dismissal of the Indictment

As a matter of common sense, an agent's promise of non-prosecution to a defendant, when authorized by the U.S. Attorney's Office, will bind the Government. However, even where such a promise is unauthorized, in the Third Circuit, Due Process nonetheless requires that it bind the Government under "exceptional circumstances." *United States v. Friedland*, 879 F.Supp. 420, 427 (D.N.J. 1995). Stated otherwise, where an agent, without authorization from the U.S. Attorney's Office, conveys a promise of non-prosecution, the Government will be required to honor it if the failure to do so will "render[ ] a prosecution fundamentally unfair." *United States v. Williams*, 780 F.2d 802, 803 (9th Cir. 1986).

In accord with the foregoing, the Courts in *United States v. Pascal*, 496 F. Supp 313 (N.D. Ill. 1979), and *United States v. Carrillo*, 709 F.2d 35, 36 (9th Cir. 1983), both dismissed indictments following unauthorized promises of non-prosecution by agents, based on considerations of fundamental fairness. In *Pascal*, 496 F. Supp. at 315, a Drug Enforcement Administration ("DEA") agent, in order to induce a defendant to cooperate in a narcotics investigation, advised the defendant that he was the defendant's "best friend" at the moment, and that, if he were to cooperate, the DEA would recommend "that he not be prosecuted," and that "it would be extremely unlikely the Government would prosecute" him. Moreover, during the course of the defendant's cooperation, which involved frequent and substantial contact with members of the DEA over nearly eight months, the agent, in order to encourage the defendant's further cooperation, stated that the defendant was "80% of the way there" in fulfilling his promise to cooperate. *Id.* at 316. In order to "cure the damage caused by [such] conduct of certain agents," the Court dismissed the indictment. *Id.* at 320. In so doing, the Court relied upon

(1) its "power to dismiss the indictment with prejudice under its supervisory powers," and (2) "[c]ase law [which] also dictates that when the 'totality of circumstances' surrounding the government misconduct is such as to offend basic tenets of fair play and justice, dismissal of the indictment with prejudice is proper." *Id*. at 319.

Similarly, in *United States v. Carrillo*, 709 F.2d at 35, following the defendant's arrest, DEA agents "offered not to prosecute if he cooperated with the government's investigation" of certain suspected drug traffickers. Consequently, "[a]cting under DEA instructions, [the defendant] thereafter made numerous contacts with the suspects and arranged to buy narcotics" and "provided concrete information in furtherance of the investigation," resulting in the arrest of "three suspected heroin distributors." *Id*. at 36. Despite the assurances of the DEA agents, the Government indicted the defendant. To remedy that violation, the Court affirmed dismissal of the indictment, noting that "[t]he record clearly establishes that [the defendant] did in fact affirmatively undertake actions not otherwise required of him and [ ] participated and cooperated…." *Id.* at 37. Because the defendant fulfilled his obligations, the Court in *Carrillo* held that "under settled notions of fundamental fairness the government was bound to uphold its end of the bargain." *Id.* (internal citations omitted). Furthermore, the Court, relying on *Santobello*, added that that "[t]he remedy for the breach of this promise rests within the sound discretion of the trial court," and sanctioned dismissal of the indictment as a proper remedy so as to "effectively enforce[ ] the agreement." *Id.*

Third Circuit courts recognize the fundamental fairness doctrine. In *United States v. LaPorta*, 651 F.Supp. 884, 890 (E.D. Pa. 1986), the Court observed that, under special circumstances, even an agent's unauthorized promise could bind the Government, citing to *United States v. Hudson*, 609 F.3d 1326 (9th Cir. 1979), and *United States v. Lombardozzi*, 467

F.2d 160 (1972). In *Hudson*, 609 F.3d at 1328, the Court specifically held that while it did "not suggest that federal agents as a matter of law may never bind the prosecution to promises" made to criminal defendants, "the record [was] devoid of facts or allegations [in that case] suggesting [the defendant] relied to her detriment on any promise, such that nonenforcement would be fundamentally unfair." Similarly, in *Lombardozzi*, 467 F.2d at 162-163, the Court held that the Government would not be bound by the promise of an agent where the agent's comment was found to "fall[ ] short of amounting to a promise," the agent "testified that he never guaranteed anything to [the defendant]," the defendant "received, in short, all that he bargained for," and "that even if there had been a 'promise,' [the defendant's] decision … was not made in reliance on it."

In stark contrast to the circumstances in *Hudson* and *Lombardozzi*, those present here are exceptional, such that non-enforcement of the agent's promises would be fundamentally unfair. The Government's conduct at issue here would render the prosecution far more unfair than the conduct found in *United States v. Pascal*, *supra*, and *United States v. Carrillo, supra*. As in *Pascal* and *Carrillo*, the FBI agents in this matter consistently induced Mr. Gentile to cooperate over the course of years by assuring him, in no uncertain terms, that he would not be prosecuted in exchange for his efforts. Those assurances started on the day Mr. Gentile was arrested, grew after February 2014, and continued through December 2014.

Specifically, the agents told Mr. Gentile:

- They could make his charges go away if he cooperated against Gottbetter;
- They were "not going to let anything happen to [him]";
- He was "more like an agent" and "no longer a cooperating witness";
- There was no need to charge him given that his testimony was no longer needed;

- He "would walk," because he "fulfilled his agreement with Gurbir"; and,
- He "would not be prosecuted."

The actions of the agents, who treated Mr. Gentile not as a cooperating witness but as a partner in law enforcement, supported those assurances and served to further lure Mr. Gentile into a false sense of trust. Indeed, the agents went so far as to tell Mr. Gentile that they would be working together forever, and even permitted him, for a time, to lawfully carry a concealed weapon during meetings.

The circumstances in this case are unusual and exceptional under any standard. First, the FBI explicitly and repeatedly assured Mr. Gentile, through words and actions, that he would not be prosecuted in exchange for his ongoing cooperation. Second, the statements and conduct of the U.S. Attorney's Office working in tandem with the FBI, as set forth in Point III, *infra*, buttressed those promises. Third, the Government's assurances induced Mr. Gentile to continue cooperating to his great detriment for three years, as he had his liberty restricted, his employment disrupted, his associations curtailed, his life threatened, his emotional health harmed, his public image denounced, his family relationships (including that with his wife) adversely impacted, and his social and personal life generally fractured. And fourth, while failing to honor its commitment to Mr. Gentile, the Government nonetheless benefitted from his extraordinary cooperation, having realized dozens of arrests and indictments, several guilty pleas of individuals involved in a wide variety or securities frauds, millions of dollars in disgorgement, penalties, injunctions, and lifetime industry bars. Based on the preceding circumstances, failing to hold the Government accountable for its assurances to Mr. Gentile would render this prosecution fundamentally unfair.

C. Conclusion

The Government misleadingly exploited Mr. Gentile, plying him with false winks and nods and more explicit words, in order to give, as the U.S. Attorney's Office has acknowledged, "the Newark office visibility into a space it has never had before, first ever criminal case for high-frequency trading, and … real time visibility into these high profile areas." (Ford Aff. at 20) The circumstances here so offend basic tenets of fair play and justice as to require dismissal of the Indictment under the Due Process Clause. Consequently, as in *Carrillo* and *Pascal*, this Court should exercise its inherent remedial power in order to dismiss the Indictment based on principles of fundamental fairness.

CONCLUSION

To have indicted Mr. Gentile in March of 2016 – after watching eight years pass since the alleged conduct, after receiving three years of unprecedented cooperation, and after four years of substantially restricting Mr. Gentile's liberties and subjecting him to public accusation – the United States Attorney's Office for the District of New Jersey must have engaged in grotesque legal gymnastics. In order to sustain the Indictment, it must successfully engage in more. The Government must establish that Dodd-Frank applies retroactively without any, let alone clear, evidence of Congressional intent (either in the statute or its legislative history) that it does so. It must convince this Court, without legal support, and indeed in contravention of Supreme Court and Third Circuit precedent, that the elimination of a complete defense does not increase Mr. Gentile's liability for alleged past conduct.

The Government must convince this Court that the tolling affidavits it drafted – which reflect, as of the time they were signed, both parties' understanding that the applicable statute of limitations is five years and a related deadline for filing charges of June 30, 2015 – should be

construed against Mr. Gentile, such that paragraph 3 (identifying that deadline) has no meaning and the Government actually had until June 30, *2016* to file charges. It must assert that, while believing the limitations period to be six years, it misled Mr. Gentile into believing the statute of limitations was five years, but that such trickery has no legal recourse. The Government must prove that it may, for the first time, indict an individual on a provision (15 U.S.C. § 78ff) that is not a substantive crime, but only a penalties provision, for crimes whose limitations period have all expired. It must establish that it can indict Mr. Gentile, eight years after the alleged conduct, on a statute – again § 78ff – that was never tolled, as Mr. Gentile never agreed to toll that statute in its entirety; only a specific subsection within it (§ 78ff(a)). And, the Government must persuade this Court that it can properly admit as valid evidence an un-notarized affidavit, the validity of which is expressly conditioned upon it being notarized.

Moreover, to salvage the Indictment, the Government must take the dangerous position that Sixth Amendment speedy trial protections do not apply to an individual, whom it arrested and, for four years, subjected to public accusations and the restriction of fundamental constitutional rights and liberties, while on bail. It must demonstrate that the individual's resulting anxiety and stress of being under the threat of constant re-indictment is different than that caused by the procedure in *Klopfer*, which the Supreme Court found unconstitutional decades ago. In addition, the Government must ask this Court to sanction the practice of any Assistant United States Attorney arresting an individual, and imposing – without judicial supervision – bail conditions that if imposed by a court would unarguably trigger a defendant's right to a speedy trial.

It must establish that the way it strung Mr. Gentile along with the intention of making him believe he would not be charged at the conclusion of his cooperation was fundamentally fair.

The Government must convince this Court that it was fundamentally fair for FBI agents to repeatedly reassure Mr. Gentile that he "would walk," while an Assistant United States Attorney stated he "would get what he wanted." Or that it was fair to keep using him as a cooperator after he expressed his desire to stop cooperating unless he was assured he would not be charged.

The unique and exceptional circumstances in this matter offend basic tenets of fair play and justice. They resulted in violations of Mr. Gentile's Fifth and Sixth Amendment rights, and violate the statute of limitations. For all the foregoing reasons, Mr. Gentile respectfully submits that the instant Indictment against him should be dismissed with prejudice.

Dated: July 14, 2016
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