**X. THE SECURITIES FRAUD CONSPIRACY CONVICTION SHOULD BE REVERSED.**

**A. The jury instruction failed to require a finding of an overt act charged in the Indictment.**

To convict on Count 13, the jury was required to find that member of the conspiracy committed one of the overt acts charged in the Indictment. *See* Sixth Circuit Pattern Jury Instruction 304; *Brown v. Elliott*, 225 U.S. 392, 401 (1912)(“[T]he period of limitation must be computed from the date of the last [overt act] of which there is appropriate allegation and proof….”)(emphasis added).

Before trial, Defendants moved to dismiss Count 13 because it failed to include any overt acts.[[1]](#footnote-1) The court denied the motion and held that paragraph 40 of the Indictment contained the following overt acts: “It specifically lists 20 individuals who were allegedly defrauded, the days they were defrauded and the amounts of money each allegedly lost.”[[2]](#footnote-2) Paragraph 40 alleges, “On or about the following dates,… defendants,…in connection with the sale of securities…did use and employ manipulative and deceptive devices and contrivances….” In other words, the overt acts were acts of fraud by conspirators that induced the purchases of Emperor packages listed in Count 13.

An initial draft of the court’s instructions did not so limit the overt acts. Defendants objected arguing “it is impossible to decipher what the alleged overt acts are” and that it was necessary for the court to limit the overt acts at issue in the instruction to those charged in the Indictment.[[3]](#footnote-3) The court agreed and ruled that “we’re going to define overt acts as -- as it was defined in the -- in the -- in paragraph 40, sub (c).”[[4]](#footnote-4)

Despite this ruling, the final version of the instructions did not limit the overt acts to those charged in the Indictment. Rather, the instruction read, “For Count 13, the third element that the Government must prove is that a member of the conspiracy committed an overt act for the purpose of advancing or helping the conspiracy to commit securities fraud with respect to the sale of the following securities.”[[5]](#footnote-5) This did not contain any limitation on the potential overt acts at issue and improperly instructed the jury on an ultimate issue – that the Emperor packages were securities.

Because there was no proof that any conspirator committed an act of fraud within the statute of limitations, the error in this instruction was prejudicial.

**B. There was no proof of an overt act charged in the Indictment within the limitations period.**

The court properly instructed that to convict on Count 13 the jury must find “that at least one overt act was committed for the purpose of advancing or helping the conspiracy after November 13, 2014.”[[6]](#footnote-6) However, as noted above the overt act must be charged in the Indictment. *See Brown v. Elliott*, 225 U.S. 392, 401 (1912). The only overt act that the Government contended fell within the limitations period related to “S.H.”

But the undisputed proof shows that S.H. purchased his Emperor packages (from Scott Magers) on October 31, 2014.[[7]](#footnote-7) Thus, the overt charged in the Indictment -- fraudulent acts by a conspirator that induced the purchase -- necessarily occurred on or before the date S.H. made the purchase.[[8]](#footnote-8) Thus, the securities fraud claim was barred by the statute of limitations.

Finally, S.H. purchased the Emperor packages outside of the United States. Magers met with S.H. in London, England in August 2014.[[9]](#footnote-9) Based on that conversation, S.H. agreed to become an Emperor.[[10]](#footnote-10) S.H. wired money from London, England on October 31, 2014.[[11]](#footnote-11) Because the alleged overt act is an act of securities fraud with respect to S.H.’s purchase, that allegation would be barred as extraterritorial. Only domestic transactions are governed by the securities laws. *Morrison v. Nat’l Austl. Bank* Ltd., 561 U.S. 247, 267 (2010); *U.S. v. Vilar*, 729 F.3d 62, 74-75 (2d Cir. 2013); *Clark v. Martinez*, 543 U.S. 371, 386 (2005); *United States v. Coffman*, 771 F. Supp. 2d 735, 737 (E.D. Ky. 2011);

1. R.437 [↑](#footnote-ref-1)
2. R.452 at #3528. [↑](#footnote-ref-2)
3. R.702, #11098. [↑](#footnote-ref-3)
4. R.702, #11104. [↑](#footnote-ref-4)
5. R. 554, #5263. [↑](#footnote-ref-5)
6. R.554 at #5264. [↑](#footnote-ref-6)
7. R.671, #7456-67. [↑](#footnote-ref-7)
8. There was also no proof that Magers, who over objection testified for the Government on rebuttal, was a conspirator [↑](#footnote-ref-8)
9. R.671, #7452. [↑](#footnote-ref-9)
10. *Id.* [↑](#footnote-ref-10)
11. R.671, #7456-7457. [↑](#footnote-ref-11)