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

UNITED STATES OF AMERICA	**:**	
v.	**:**	**CRIMINAL No. 15-398-3**
WAYDE MCKELVY,	**:**	
Defendant	**:**	

DEFENDANT'S MOTION TO DISMISS COUNTS 1-9 AND MOTION TO STRIKE COUNT 10 OF THE INDICTMENT, FOR FAILURE TO STATE AN OFFENSE

AND NOW, this 24th day of July, 2017, defendant Wayde McKelvy, by his attorneys, Walter S. Batty, Jr. and William J. Murray, Jr., submits McKelvy's Motion to Dismiss Counts 1-9 and to Strike Count 10 of the Indictment, for Failure to State an Offense, and states as follows:

1. For the reasons stated in his Offense Memorandum, McKelvy moves to dismiss Counts 1-9 and to strike all references to the word "fraud" in Count 10.

WHEREFORE, McKelvy moves to dismiss Counts 1-9 and to strike all references to the word "fraud" in Count 10, with prejudice.

Respectfully submitted,

***/s/* Walter S. Batty, Jr.**
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CERTIFICATE OF SERVICE

I hereby certify that I have served by electronic mail a true and correct copy of the foregoing Motion to Dismiss Counts 1-9 and to Strike Parts of Count 10 of the Indictment, for a Failure to State an Offense, upon Assistant U.S. Attorney Robert J. Livermore:

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/s/ Walter S. Batty, Jr.
Walter S. Batty, Jr.

Dated: July 24, 2017

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

UNITED STATES OF AMERICA	**:**	
v.	**:**	**CRIMINAL No. 15-398-3**
WAYDE MCKELVY,	**:**	
Defendant	**:**	

ORDER

AND NOW, this day of , 2017, upon consideration of the defendant's Motion to Dismiss Counts 1-9 and to Strike Part of Count 10 of the Indictment, for a Failure to State an Offense, as to defendant McKelvy only, and the Memorandum in support thereof, and any response by the government, the Court herby

ORDERS

that the defendant's Motion to Dismiss Counts 1-9 and to Strike Part of Count 10 of the Indictment with prejudice, as to defendant McKelvy only, is herby,

GRANTED.

BY THE COURT:

_____

JOEL H. SLOMSKY, J.

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

UNITED STATES OF AMERICA	**:**	
v.	**:**	**CRIMINAL No. 15-398-03**
WAYDE MCKELVY,	**:**	
Defendant	**:**	

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS COUNTS 1-9 OF THE INDICTMENT FOR FAILURE TO STATE AN OFFENSE AND IN SUPPORT OF MOTION TO STRIKE PARTS OF COUNT 10

Defendant Wayde McKelvy, by his attorneys, Walter S. Batty, Jr. and William J. Murray, Jr., submits this Memorandum ("Offense Memo") in Support of his Motion to Dismiss Counts 1-9 of the Indictment, for Failure to State an Offense ("Offense Motion"), and in Support of his Motion to Strike Parts of Count 10 ("First Strike Motion"), and states as follows:

I. INTRODUCTION.

There are four types of "charging" paragraphs in the indictment:

Count 1, ¶ 8 charges that co-defendants Troy Wragg, Amanda Knorr, and Wayde McKelvy with conspiracy and agreeing together to "commit offenses against the United States, that is, wire fraud affecting a financial institution, in violation of" 18 U.S.C. § 1343 and 18 U.S.C. § 371.

Counts 2-8, ¶ 4, of the indictment charge that the three defendants, "in circumstances affecting a financial institution, … devise[d] a scheme to defraud and to obtain money and property by means of false and fraudulent pretenses, representations and promises," in violation of 18 U.S.C. ¶1343. Although Counts 2-8 incorporate certain parts of Count 1, specifically paragraphs 1 through 7 (Background) and 9 through 16 (Manner and Means), there is no further description of the "scheme to defraud" in the charging paragraph.

Count 9, ¶ 2 charges the three defendants with conspiracy "to commit offenses against the United States, that is, securities fraud, in violation of [15 U.S.C. §] 78j(b) and 78ff, [and] Title 17, [C.F.R. §] 240.10b-5." Although Count 9 incorporates paragraphs 1-7 (Background) and 9-16 (Manner and Means) of Count 1, there is no further description of the "scheme to defraud" in the charging paragraph.

Count 10(single paragraph) charges the three defendants with substantive acts of securities fraud, "in violation of [15 U.S.C. §] 78j(b) and 78ff, [and] Title 17, [C.F.R. §] 240.10b-5." Although Count 10 incorporates paragraphs 1-7 (Background) and 9-16 (Manner and Means) of Count 1, there is no further description of the "securities fraud" in the single paragraph which constitutes Count 10.

II. SUMMARY OF ARGUMENT.

There are two different grounds on which McKelvy bases his motion to dismiss Counts 1-9 for failure to state an offense. First, under United States v. Huet, 665 F.3d 588 (3d Cir. 2012), an indictment is facially insufficient if it fails to "contain[] the elements of the offense intended to be charged." Id. at 594-95 (citations and quotation marks omitted). Second, an indictment is defective if it does not "sufficiently apprises the defendant of what he must be prepared to meet." Id.

As to the "elements" ground, Count 1, as stated above, charges the three defendants with conspiring and agreeing "to "commit … wire fraud," in violation of 18 U.S.C. § 1343 and 18 U.S.C. § 371. Count 1 has failed to state an offense because it does not provide any allegation as to what the defendants conspired to do, other than the conclusory objective of "wire fraud." Moreover, even if there were some authority - McKelvy is aware of none - for interpreting Count 1 to incorporate charging language from Counts 2-8, the substantive mail fraud counts – Count 1 would still fail, because those counts did not, in any way, describe the factual orientation of the scheme to defraud.

The same arguments would apply to Count 9, the securities fraud conspiracy count.

Also as to the "elements" ground, Counts 2-8 - and by extension, Count 9 – should be dismissed because the charging paragraphs merely recite the statutory elements for their respective violations and do not contain any "factual orientation" whatsoever for these allegations. See United States v. Stock, 728 F.3d 287, 292 (3d Cir. 2013).

As to the "sufficiently apprises" ground, McKelvy argues that Counts 1-8 should be dismissed for four reasons regarding the second element of wire fraud in these counts – participation in the same common, overall, single, unitary, or overarching scheme, with the specific intent to defraud. Later, McKelvy will argue that a similar analysis should be applied to the securities fraud counts, Counts 9 and 10.

First, the absence of any "factual orientation" whatsoever in the charging paragraphs, so as to enable the jury to be able to determine whether there is a common scheme to defraud, fails to sufficiently apprise the defendant of what he must be prepared to meet, in that it is impossible for McKelvy to draft an appropriate "common scheme" instruction because the charging paragraphs in Counts 1-8 merely recite in general terms the statutory elements. See Stock, 728 F.3d at 292. Similarly, although McKelvy has found only persuasive authority, rather than direct precedent, he argues that an appropriate "common scheme" instruction is required by the Constitution.

Second, because there is no way that McKelvy can take the "merely reciting" language from the indictment and craft it into a suitable "common scheme" instruction, he has not been "sufficiently apprise[d]" of the contours of the alleged scheme to prepare an appropriate point for charge. Even if the government argues that language in the body of the indictment should be incorporated into the charging paragraph. Cf. United States v. Panarella, 277 F.3d 678, 685 (3d Cir. 2002), it would be impossible to draft an appropriate instruction, absent a lawful amendment of the indictment. McKelvy has examined what would seem to be the most likely candidates for such an implicit incorporation – four paragraphs (¶¶ 9-12) in the Manner and Means section of Count 1 of the indictment. There are significant problems, both in the language of the indictment and

in the supporting evidence, which would seem to prohibit an adoption of any of these paragraphs (or any other language).

Third, McKelvy argues that this case is also governed by United States v. Dobson, 419 F.3d 231, 237 (3d Cir. 2005), which requires that the jury be instructed that, to be able to return a guilty verdict in a case such as this one where the defendant has demonstrated that there are arguably two layers of fraud, it would be impossible for the jury to find a defendant guilty of the "overarching" scheme, because no such scheme was described in the charging paragraphs of the indictment. Cf. United States v. Blood, 232 Fed.Appx. 199, 202-03 (3d Cir. 2007)

Although Dobson concerns the defendant's entitlement to a "culpable participation" instruction, McKelvy argues, by analogy, that the Court's finding in Dobson that the error of not including such an instruction was a fundamental one, constituting plain error implicating the fairness of the judicial process, supports his contention that Counts 1-8 should be dismissed.

Fourth, although there are some differences between wire fraud counts, such as Counts 1-8, and a securities fraud count, such as Count 9, such differences would not affect the requirements of the case law described above. Count 9 should likewise be dismissed. Moreover, if this Court decides to dismiss Count 9, then it should also strike the parts of Count 10 which refer to securities fraud. McKelvy does not, however, move to dismiss the other substantive crimes alleged in Count 10, because he concedes that, in that respect, Count 10 was properly pled.

III. PROCEDURAL ASPECTS OF THE OFFENSE MOTION

A. Rule 12(b)(3)(B) authorizes a defendant to file a motion to dismiss for "failure to state an offense."

Rule 12(b)(3)(B) provides that a motion to dismiss the indictment for failure to state an offense

> **must be raised by pretrial motion if the basis for the motion is then reasonably available and the motion can be determined without a trial on the merits.**

Fed.R.Crim.P. 12(b)(3)(B).

B. This Court can consider this motion pre-trial, for the same reasons as are set out in the Amended Limitations Memo.

As with the Amended Limitations Memo at 8-11, the Offense Motion and Memo are filed pursuant to Fed.R.Crim.P.12(b)(3). The difference between the two motions is that the Offense Motion is filed under Rule 12(b)(3)(B), which concerns a defect in instituting the prosecution, and the Amended Limitations Motion, which is filed under Rule 12(b)(3)(A), which concerns "a defect in instituting the prosecution." McKelvy asserts that "the basis for" the Offense Motion "is [now] reasonably available and the motion can be determined without a trial on the merits."

As argued in the Amended Limitations Memo, Rule 12(d) – which is also applicable here - provides: "The court must decide every pretrial motion before trial unless it finds good cause to defer a ruling …. When factual issues are involved in deciding a motion, the court must state its essential findings on the record." McKelvy asserts that there is no such "good cause" here.

As also argued in the Amended Limitations Memo, there are five requirements which a defendant, who requests a court to rule pre-trial on a motion to dismiss, must meet regarding "the basis for the motion." Rule 12(b)(3). First, any facts must be undisputed, United States v. Levin, 973 F.2d 463, 470 (6th Cir. 1992); second, the issue must be able to be decided as a matter of law, without invading the province of the jury on the facts, Levin, supra; third, a trial of the disputed factual issues would not have "assisted the … court in deciding the legal issues," Levin, supra; fourth, the (factual) basis for the within motion to dismiss must be "reasonably available," under Rule 12(b)(3)(A), and there must be no "good cause to defer a ruling," under Rule 12(d); and fifth, the defendant "must accept as true the factual allegations … in the indictment." Stock, 728 F.3d at 299. See also, Sewell v. United States, 406 F.2d 1289, 1292 (8th Cir. 1969) (Rule 12(b) serves the "purpose of preventing unnecessary trials and deterring the interruption of a trial … for any objection relating to the institution … of the charge").

C. As to the defendant's argument that such cases as Camiel, Kemp, Stock, and Panarella require an instruction in garden-variety fraud cases, that the jury can convict only after finding evidence of a common scheme, the defendant is entitled to such an instruction by making only a colorable showing.

On the question of the standard by which a district court can be required to give a "common scheme" instruction, there are at least two possible views. The first such view would be that a trial court would always be required to give such an instruction, in cases such as this one, where more than one defendant has been charged in a wire/mail fraud scheme. Cf. sections below, at 16-17, on CA3 Model Jury Instructions ("Model Instructions").

The second view would be that, as is the case here, such an instruction is necessary in cases where more than one scheme is charged in the indictment, id., or where, as here, there is evidence of more than one scheme. (Depending on the Court's view of the indictment here, it charges either no scheme, on the one hand, or multiple schemes, on the other.) McKelvy submits that the Court determines the number of schemes charged as a matter of law, and also asserts that it can rule at this stage whether the defendant has made out a colorable case, by proffers or otherwise, that there is evidence of more than one scheme. Cf. Mathews v. United States, 485 U.S. 58, (1988). As the Supreme Court stated in Mathews, "he is entitled to an instruction [on a defense such as entrapment] whenever there is sufficient evidence from which a reasonable jury could find [the existence of such a defense]." As McKelvy stated in his Amended Limitations Motion, the terms "colorable" and "prima facie" are sometimes used to describe this threshold. He will use the term "colorable," in the interest of clarity.

D. In terms of this Court's consideration of the "two schemes" or "two layers" argument, the Court can determine this motion pre-trial, if it decides that it can now review the defendant's proffers as support for these contentions.

As stated above, Rule 12(b)(3)(B) provides that a motion to dismiss the indictment for failure to state an offense "must be raised by pretrial motion if the basis for the motion is then reasonably available and the motion can be determined without a

trial on the merits." As also stated above, the established procedures under Rule 12 require that the defendant accept as true the factual allegations in the indictment. As he did in the Amended Limitations Memo, McKelvy will not accept as true the legal allegations against him in the indictment.

To properly present his argument that he has a colorable argument that the facts here would qualify for a "culpable participation" instruction, McKelvy will make the proffers set out below. The core facts in the proffers are remarkably similar to the core facts in Dobson, where the conviction was vacated for failure to give an "overarching scheme" instruction. Both McKelvy and Dobson were overeager sales people. Dobson's sales techniques, which she alleged were separate from the underlying fraud, were the second "layer" in her case.

As McKelvy reads Dobson, which is discussed more fully below, for a defendant to be entitled to a "culpable participation" instruction, he only has to make a colorable allegation that such an instruction is merited – he does not have to prove that there were two such arguably separate layers. For example, the Third Circuit's finding of a qualifying "two layers" in Dobson was based on nothing more than the defendant's statement

> **[T]hat she was unaware that UL, overall, was a fraud or that its marketing materials were bogus, [but] she admitted to making several false representations to prospective brokers in order to increase her sales total.**

See Blood, 232 Fed.Appx. at 203, summarizing the Court's prior ruling in Dobson, 419 F3d at 238.

Here, in McKelvy's proffers, he will deny the government's legal allegation that he knew that, overall, Mantria was a fraud or that its claims of financial success were bogus, but he also will admit, for the purposes of this motion, that he made two false representations to prospective investors to increase his sales commissions.

It is clear from the discovery that, at the time of filing the indictment, the government did not have any cooperative "inside" witness against McKelvy. Indeed, the support for any fraud allegations against McKelvy was so remote that the two items of

proof against him which were informally articulated by the government's attorney and which have now been formally conceded by McKelvy, as noted immediately above, were not mentioned in the seven instances of material false statements listed in ¶ 13 (a-g).

As such, McKelvy argues that he would have, following the holding in Dobson, qualified for a culpable participation instruction, if the government had included an allegation of the overarching scheme in the indictment.

In much the same manner as he proceeded with the Limitations Memorandum, McKelvy will demonstrate here that he has satisfied all five of the requirements under Rule 12 for filing a pre-trial motion to dismiss. If the Court decides to defer consideration of the issues presented here until trial, when McKelvy would raise these grounds as a basis to dismiss Counts 1-9, and to strike parts of Count 10, at the close of the government's case and after all the evidence has been heard.

IV. SUPPLEMENTAL FACTUAL BACKGROUND.

The factual background set out here is to be considered as supplemental to the Factual Background section in the Amended Limitations Motion, at pages 17-33. This evidence is proffered to support McKelvy's contention that, under both the "common scheme" cases, which require instructions if the facts show more than one scheme, and under such "overarching scheme" cases such as Dobson, which concern fraud schemes which involve "two [arguably separate] layers" of the fraud, the discovery shows that there were two schemes and/or dual layers here.

As stated below, McKelvy maintains that, until counsel were advised that Wragg had given a proffer on September 22, 2016, there was no evidence that McKelvy knowingly participated in any scheme with Wragg and Knorr, including a scheme "to mislead investors as to the true financial status of Mantria," which appears to be the central focus of the indictment. Cf. Count 1, ¶ 10, discussed below.

As McKelvy concedes below, there is now, with Wragg's 2016 proffer, some evidence that he (McKelvy) engaged in a scheme "to mislead investors as to the true financial status of Mantria,"

but that does not affect – as the government's evidence in Dobson did not affect - the sufficiency of the defendant's factual basis to be able to qualify for a common scheme instruction or a culpable participation instruction and, ultimately, dismissal of Counts 1-9 and the striking of parts of Count 10. It cannot be over-emphasized that, under Dobson, McKelvy does not have to prove, by any standard, that there were in fact two separate layers of fraud, but only that this argument is a colorable one.

In his proffers, McKelvy takes a three-track approach: first, he concedes, as he must, that he cannot challenge the sufficiency of the factual assertions in the indictment, but rather accepts them as true for purposes of this motion; second, taking the government's factual allegation in the indictment at face value, he challenges several legal assertions there and represents what the government's evidence did and did not show, for purposes of showing that there were two schemes or dual layers to the fraud; and third, he admits, for purposes of this motion, two allegations about his statements at Speed of Wealth seminars, even though these statements did not rise to the level where they were even generally identified in the indictment as allegedly being false.

McKelvy makes the representations set out here after having reviewed all of the government's testimonial evidence, including the testimony before the grand jury; testimony at depositions conducted by the U.S. Securities and Exchange Commission ("SEC"); testimony at the hearings in connection with SEC's civil case against Mantria, et al.; and all of the FBI 302s of its witnesses. Moreover, McKelvy has reviewed thousands of pages of the government's documentary evidence, including financial records, investors' questionnaires, and hundreds of emails recovered by the SEC from several computers, including those of Wayde McKelvy, Donna McKelvy (now Donna Jarock), Jadah Hill (a liaison with Mantria investors), and others.[1]

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[1] At the request of the government or of the Court, McKelvy is prepared to provide references in the discovery which support the proffers set out here.

As with the Amended Limitations Memo, McKelvy will proceed by proffers, as set out below, and will also separately file Proposed Findings of Fact and Conclusions of Law in support of the Offense Memo.[2] In this Memo, McKelvy will refer to the proffers in the Amended Limitations Memo as Pr1., and will refer to the proffers in this memo as Pr2.

A. Proffers – Mantria and Mantria Financial - background.

1. McKelvy adopts by reference Pr. 1, 1-66, as set out in the Amended Limitations Memo at pages 18-33, and the Proposed Findings of Fact filed in support of that memo, Nos. 1-44, at pages 1-15 of that document, filed previously. McKelvy will also file separately Proposed Findings of Fact, based on the proffers here, in support of the Offense Memo.

2. McKelvy will continue his practice in the Amended Limitation Memo of referring to Mantria Corp. and all other Mantria entities as "Mantria" and will refer separately only to Mantria Financial.

3. Based on the testimony in the grand jury and in the SEC depositions, the only ones who had comprehensive knowledge of Mantria's books and records were Wragg, Knorr, former CFO Daniel Rink, Mantria's outside accountant Steven Granoff, and perhaps members of the accounting unit at Mantria.

B. Proffers – summary of the facts underlying the two fraud schemes and two "layers" of the fraud charged – the case against Wragg and Knorr, the case against and admissions by McKelvy.

Although McKelvy has a detailed paragraph-by-paragraph comparison of the allegations in the indictment and the evidence against Wragg and Knorr on the one hand, and McKelvy on the other, he has deferred filing that analysis. In the paragraphs

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[2] McKelvy, in a prior draft of this Offense Memo, had included over 20 additional pages of specific excerpts of testimony and of FBI 302 statements from several government witnesses. In the interests of judicial economy, and based on what he has reason to believe is a view of the facts shared with the government, McKelvy is deferring inclusion of those additional pages, pending the government's response to the more general proffers contained here.

immediately below, McKelvy provides a summary of his detailed analysis.

4. With respect to the indictment and on the guilty pleas of Wragg and Knorr to all ten counts, McKelvy takes as true all of the factual and legal allegations in the indictment as they apply to the conduct of Wragg and Knorr. Put most briefly, these two defendants knowingly participated together in a Ponzi scheme to defraud over 300 investors of a net amount of approximately $37 million.

5. Generally speaking, McKelvy accepts as true, as he must for purposes of this motion, all the factual allegations in the indictment. Contrastingly, he denies, as legal conclusions, every allegation in the indictment which concerns his intent.

6. Based on the factual and legal allegations in the indictment, Wragg's and Knorr's guilty pleas, and the testimonial and documentary evidence which had been gathered by the government's investigation as of the filing of the indictment, there was ample support for the allegations in Count 1, ¶¶ 10 and 11 (Manner and Means) as against Wragg and Knorr.[3]

7. Based on the factual and legal allegations in the indictment, Wragg's and Knorr's guilty pleas, and the testimonial and documentary evidence which had been gathered by the government's investigation as of the filing of the indictment, there was ample support for the allegations in Count 1, ¶ 12 (Manner and Means), that Wragg and Knorr made materially false statements and omitted material facts to mislead prospective investors and induce them to invest in Mantria securities.

8. Specifically, while McKelvy admits that he made numerous false statements about Mantria's financial status based on what he had been told by Wragg and/or Knorr, he denies the legal allegations that he knew at the time that such statements were false and he denies the legal allegations that he intended to mislead investors as to Mantria's financial status. Moreover,

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[3] McKelvy argues in his Offense Memo that the conduct of Wragg and Knorr, as set out in Count 1, ¶¶ 10, 11, and 12, constitute the first fraud scheme and/or the first layer of the fraud in this indictment. See Pr2. 7, 8.

McKelvy specifically denies the legal allegations in Count 1, ¶ 10 (Manner and Means), that he intentionally joined Wragg and Knorr in their acting "to mislead investors as to the true financial status of Mantria."

9. McKelvy represents that he believed, based on what he had been told by Wragg, that the Mantria investments were both high-yielding and were safe ones because they were initially tied to land sales in a purportedly hot market in Tennessee and were "secured" by "collateral," at a value of two-to-one, by the land in Tennessee; because he believed what Wragg represented to him, both orally and in so-called "sales reports," as to the lots being sold; and because he believed in the green energy technology being marketed by Mantria. Without getting into detail, McKelvy states that there is support for these representations in the discovery materials.

10. Likewise, McKelvy specifically denies the legal allegations in Count 1, ¶ 11 (Manner and Means), that he intentionally joined Wragg and Knorr in knowing "that Mantria had virtually no earnings, no profits, and was merely using new investor money to repay earlier investors."

11. As stated above, McKelvy admits for purposes of this motion, that he violated, on two occasions, the allegations, quoted immediately below and contained in Count 1, ¶ 12, based on the evidence which had been gathered by the government's investigation as of the filing of the indictment. As alleged in part of that paragraph,

> **During these [Speed of Wealth] seminars, [McKelvy, Wragg, and Knorr] made materially false statements and omitted material facts to mislead prospective investors and induce them to invest in Mantria securities.**

Id.

12. McKelvy admits that one of the occasions referred to Pr2. 11, immediately above, is that he told prospective investors at one of his Speed of Wealth seminars that "I'm deeply involved in Mantria…. I look at [Mantria's] books. I know where all the money is going." SoW seminar, 5/7/09, at 96. McKelvy states that, even though these representations were partly accurate in

the sense that he had looked at scores of land "sales" reports and other "sales" documents which had been furnished to him by Wragg and which, in retrospect, falsified reports of such "sales," he (McKelvy) admits, for the purposes of this motion, that he had not seen any documents showing Mantria's actual expenses and that, accordingly, the above-quoted statements were partly "materially false," in violation of Count 1, ¶ 12, in that he did not know "where all the [Mantria] money was going." McKelvy also admits, for the purposes of this motion, that, as a sales technique, he was exaggerating his own expertise, in an effort to "induce [investors] to invest in Mantria securities," in violation of that paragraph of the indictment. Cf. Count 1, ¶ 12.[4]

13. McKelvy admits that the second occasion referred to Pr2. 11, above, is that he told prospective investors at one of his Speed of Wealth seminars that prior investors had not "paid [him] a dime." SoW seminar, 5/21/09, at 42. At that seminar, McKelvy engaged in the following dialogue:

> **MR. McKELVY: Any of you guys … think [that] these financial planners and these insurance guys … might just be looking out for themselves and not you? Wow. How much have I charged you so far? How much money have I asked you to give me?**
>
> **UNIDENTIFIED MALE SPEAKER: Not much.**
>
> **MR. McKELVY: None. Bruce, have you ever paid me a dime?**
>
> **UNIDENTIFIED MALE SPEAKER: No, not a dime.**
>
> **MR. McKELVY: I just make you guys money, sometimes.**

McKelvy admits, for the purposes of this motion, that these statements were "materially false," in violation of Count 1, ¶ 12, in that he knew that he had received substantial commissions from the sales of the investments. McKelvy also admits, for the

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[4] Moreover, as McKelvy argues below, based on his admissions for purposes of this motion, as set out in this paragraph (Pr2. 12) and in Pr2. 13, immediately below, as well as his denials in Pr11 and Pr12, below, his admitted conduct and his denials constitute the second layer of the fraud in this indictment.

purposes of this motion, that, as a sales technique, he was partly misrepresenting his motives – which were to make millions of dollars for his clients, but also to make millions of dollars for himself - in an effort to "induce [investors] to invest in Mantria securities," in violation of Count 1, ¶ 12.

C. Proffers – Corroboration for the two schemes, layers.

14. The grand jury investigation produced evidence which was consistent with McKelvy's denials that Wragg had shared with him any information about Mantria's true financial condition. For example, grand jury testimony showed that Wragg was secretive about the actual financial condition of Mantria Financial. For example, former Mantria CFO Daniel Rink testified that Wragg had a practice of maintaining confidentiality about Mantria's financial information – as Rink put it, Wragg "compartmentalized things." Rink, GJ 8/19/15 at 62. In explaining this point, Rink gave this example: "When it came to cash, I was basically told not to talk about cash with anybody [except Wragg, Knorr, and the people in accounting]." Id. at 62. Another example was that Wragg and Knorr were the only ones at Mantria who spoke with McKelvy. Id. at 63. At the same time, Wragg and Knorr "were the only people in the company who saw the big picture. Everybody else got to see [only] a slice of the picture." Id. Rink, GJ 8/19/15 at 3.

15. In addition, another instance of Wragg's secrecy about how Mantria handled its money came when Flannery testified in the grand jury that when he asked Wragg whether McKelvy was being paid to raise funds, he was told, sometime in 2008, that he (McKelvy) was an advisor on "how to structure the business" and "helping them but he wasn't getting paid any fees" and that no one else was getting any fees. Flannery, GJ 7/29/15 at 17, 55, 57. Rather, Flannery was told that "they had only paid one finder's fee … for bringing in an investor" and that this fee was about $2,500. Id. at 55-56. Flannery testified that he told Wragg that any fees in larger amounts would have to be reported in the Private Placement Memoranda ("PPMs"), but that no such fees had been reported as of the last week of September 2009, which was just before he learned of the SEC investigation. Id. at 56.

16. An example of Wragg's false boasts, as well as his secrecy, in conversations with co-workers about Mantria's financial status, came from Flannery. When asked about his knowledge of the apparent source(s) of Mantria's income, Flannery stated that, "up until right near the end, my understanding [from speaking with Wragg] was … that the returns [to the investors] were being paid from the sale of the lots. [I]t was represented to me that sales were going reasonably well. It wasn't until later on I learned that they were selling" the lots with the numerous discounts and buyer incentives. Flannery deposition at 53. As he further explained, he had later learned that Mantria was not making a profit on these sales, as he had previously been told, but was paying the investors with the money "loaned" to Mantria by the investments. Id. at 54.

17. Another example of Wragg's false boasts to co-workers about Mantria's financial success also came from Flannery. At the point when Flannery was doing his reviews of the PPMs in the summer of 2009, Mantria had moved to bigger offices, with approximately 15 employees. Flannery, GJ 7/29/15 at 52, 55. He was advised by Wragg that Mantria had been successful in raising money, that they were selling land, and that they were a "very successful business." Id. He said that his understanding was that they were "selling those lots like hotcakes." Id. at 55.

V. COUNTS 1-9 SHOULD BE DISMISSED BECAUSE, UNDER THE CIRCUMSTANCES HERE, THE CHARGING PARAGRAPHS OF THOSE COUNTS DO NOT MEET THE REQUIREMENTS FOR A "SCHEME TO DEFRAUD."

The pertinent parts of Counts 1-9 are described above at pages 1-2. In the charging paragraph of Count 1, the wire fraud conspiracy count, the indictment alleges that the three defendants committed wire fraud affecting a financial institution, without any articulation of the factual nature of an overall scheme.

The charging paragraphs of Counts 2-8, the seven substantive wire fraud counts, allege merely that, "in circumstances affecting a financial institution, … [the three defendants] devise[d] a scheme to defraud and to obtain money and property by means of false and fraudulent pretenses, representations and promises," without any articulation of the factual nature of an overall scheme.

In Count 9, the securities fraud conspiracy count, the charging paragraph alleges merely that the defendants conspired "to commit offenses against the United States, that is, securities fraud," without any articulation of the factual nature of an overall scheme.

A. Counts 1-9 should be dismissed under both the first and second grounds of Huet, et al.

There are two different grounds on which McKelvy bases his motion to dismiss for failure to state an offense. First, under United States v. Huet, 665 F.3d 588 (3d Cir. 2012), and the cases cited there, an indictment is facially insufficient if it fails to "contain[] the elements of the offense intended to be charged." Id. at 594-95 (citing United States v. Kemp, 500 F.3d 257, 280 (3d Cir. 2007) (quoting United States v. Rankin, 870 F.2d 109, 112 (3d Cir. 1989)); quotation marks omitted). Second, an indictment is defective if it does not "sufficiently apprises the defendant of what he must be prepared to meet." Id. McKelvy challenges Counts 1-9 on both grounds.

B. The second element of Counts 1-9 requires that the government show McKelvy's "witting" participation with Wragg and Knorr in the schemes alleged in those counts.

As stated in the Third Circuit Model Jury Instructions ("CA3 Model Instructions"), the essential elements of an offense under 18 U.S.C. § 1343, as charged in Counts 1-8, are: "(1) the existence of a scheme to defraud; (2) the participation by the defendant in the scheme charged with the specific intent to defraud; and (3) the use of [an interstate wire communication] in furtherance of the fraudulent scheme." Model Instruction 6.18.1343; see United States v. Hannigan, 27 F.3d 890, 892 (3d Cir. 1994); Dobson, 419 F.3d at 237. As the Court said in Dobson, "[u]nwitting participation" is not a crime. Id. Under the CA3 Model Instructions, the second element is also the same for mail fraud, bank fraud, or health care fraud.[5]

B. Count 1 should be dismissed because it does not set out in the charging paragraph the factual nature of the scheme.

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[5] There is no separate category in the CA3 Model Instructions for criminal securities fraud.

Count 1 charges the three defendants with conspiracy to commit wire fraud, but does not even attempt to describe the factual nature of the scheme, saying only that the defendants conspired to commit "wire fraud." Certainly, in a case where is incumbent on the government to prove that the three defendants "intentionally arrived at a mutual understanding or agreement, either spoken or unspoken, to work together to achieve … a common and unlawful objective," cf. CA3 Model Instruction 6.18.371D, any understanding or agreement was not to commit "wire fraud." Because Count 1 charges a conspiracy to commit wire fraud, the government must prove that there was "an agreement among the alleged co-conspirators." United States v. Camiel, 689 F.2d 31, 36-37 (3d Cir. 1982).

In addition, for the reasons stated below, Count 1, as with Counts 2-9, should be dismissed because it does not charge a scheme to defraud, in that the charging paragraphs merely recite the statutory elements for their respective violations and do not contain any "factual orientation" whatsoever for these allegations. See United States v. Stock, 728 F.3d 287, 292 (3d Cir. 2013). In effect, there was no scheme charged in Counts 1-9.

C. In wire fraud cases, the jury is to be instructed that they must agree on a common scheme to defraud, but here there is no legally sufficient allegation of the scheme in the charging paragraphs.

Without setting out a comprehensive analysis of this point, McKelvy can say that, in a case, as here, which charges more than one defendant with wire fraud or securities fraud, it is necessary to instruct the jury that, before returning a guilty verdict, they must agree that each defendant was guilty of participation in the same, common, overall, single, unitary, or overarching scheme. [6] See CA3 Model Instruction 6.18.1341-2

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[6] **Even though neither the CA3 Model Instructions nor the cited cases say explicitly that, when more than one defendant is charged for a fraud scheme, the government has to prove a common scheme, there are many ways in which frauds are similar to conspiracies, in that they both involve an agreed-upon plan. McKelvy would have requested such an unanimity instruction here, if a scheme had been sufficiently described in the indictment.**

(unanimity in fraud cases; same scheme); United States v. Camiel, 689 F.2d 31, 36-37 (3d Cir. 1982)(common, single, and unitary scheme); Dobson, 419 F.3d at 235, 239(overall, overarching scheme). Such an instruction is also necessary in cases where more than one scheme is charged in the indictment, id., or where, as here, there is evidence of more than one scheme. See Camiel, 689 F.2d 31, 36-37.

The CA3 Model Instructions, §§ 6.18.1343, 6.18.1341-2, require that, where a wire/mail fraud indictment contains allegations of more than one scheme:

> **[E]ach of you must agree with each of the other jurors that the same (scheme … to defraud) (scheme or plan to obtain money or property by means of false or fraudulent pretenses, representations, or promises) alleged in Count (No.) was, in fact, employed by (name). The jury need not unanimously agree on each scheme or plan, but, in order to convict, must unanimously agree upon at least one such scheme or plan as a scheme or plan that was knowingly used by the defendant.**

Because the CA3 Model Instructions state that the unanimity requirement extends to a particular scheme or plan charged in a fraud indictment, there is no apparent reason why this approach would not also apply in a case such as this one, where there are more than one defendant and, depending on the government and this Court's views of applicability of United States v. Panarella, 277 F.3d 678, 685 (3d Cir. 2002), discussed below, there are either no schemes to defraud set out in the indictment against McKelvy, or there are several such schemes.

If the government could choose the same approach to fraud indictments as it has here , there would be no way of telling whether the jurors add all agreed that there was proof beyond a reasonable doubt as to each defendant's participation in the same, common, overall, single, unitary, or overarching scheme. While it is not necessary for an indictment to contain "detailed" allegations, "an indictment that merely 'recites in general terms the essential elements of the offense' does not satisfy the second" prong of such cases as Huet, Kemp, and Rankin. See United States v. Stock, 728 F.3d 287, 292 (3d Cir. 2013) (internal quotation marks and citation omitted),

citing United States v. Panarella, 277 F.3d 678, 685 (3d Cir. 2002); Huet, 665 F.3d at 594-95. McKelvy makes his claim concerning the mere recitation of the statutory elements under both the first and second type of failures to state an offense set out in Huet, et al.[7]

Moreover, if the government could choose to describe the scheme only in terms of the statutory elements, there would, among other things, never be a need for allegations of multiple schemes, because a generic, one-size-fits-all allegation of a scheme, such as the allegations against McKelvy, would be enough.

D. An appropriate unanimity instruction is required not only due to Third Circuit decisional law, but also due to analogous authority in the Supreme Court.

Although Dobson, discussed below, is the best Third Circuit case which McKelvy has found which seems to so imply, he asserts that it is a violation of the Due Process Clause for a jury to return a guilty verdict without unanimously agreeing on the same scheme, at least when the defendant requests such an instruction. Cf. Richardson v. United States, 526 U.S. 813, 816 (1999) (jury must unanimously agree in a CCE case not only that the defendant committed some "continuing series of violations," but also about which specific "violations" make up that "continuing series").

In Richardson, the Supreme Court "conclude[d] that unanimity in respect to each individual violation is necessary," because, under the CCE statute, each such violation was an element of the offense. Id. at 817. The Court noted, however, that if the particular issue focused on a "means" to commit the offense, then there would be no unanimity requirement. Id. Accord, United States v. Yeaman, 194 F.3d 442, 453 (3d Cir. 1999). McKelvy argues that the second element of a wire fraud prosecution – participation, with specific intent, in the charged scheme to

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[7] Stock, Huet, Kemp, and Rankin all rely on Fed.R.Crim.P. 7(c)(1), which requires that an indictment "be a plain, concise, and definite written statement of the essential facts constituting the offense charged."

defraud, is analogous to a CCE individual violation, rather than to a "means" of committing the fraud.

E. Because Counts 1-8 do not contain sufficient allegations to "apprise[] the defendant of what he must be prepared to meet," but only recite the statutory elements, these counts should be dismissed.

In this section, McKelvy argues that the second ground under Huet, et al. – that the indictment must "apprise[] the defendant of what he must be prepared to meet" – is at least as strong as the first ground for supporting his position.

McKelvy argues that Counts 1-9 should be dismissed under this second prong of Huet, et al., because it is impossible for the defense, as a part of their preparations for trial, to submit an appropriate instruction on the second element of wire fraud, even before considering the related argument below, concerning Dobson and arguably two layers of the fraud.

As stated in Huet, "[N]o greater specificity than the statutory language is required so long as there is sufficient factual orientation" to permit a defendant to prepare his defense and invoke double jeopardy." 665 F.3d at 594-95 (emphasis added), citing among other cases, United States v. Panarella, 277 F.3d 678, 685 (3d Cir. 2002). It cannot be over-emphasized that "an indictment that merely 'recites in general terms the essential elements of the offense' does not satisfy the second" prong of such cases as Huet. United States v. Stock, 728 F.3d 287, 292 (3d Cir. 2013) (internal quotation marks and citation omitted), citing Panarella, 277 F.3d at 685. The language of the charging paragraphs in Counts 1-9 cannot possibly meet the "sufficient factual orientation" test, as set out in Huet, Stock, Kemp, and Panarella, et al., as these charging paragraphs include only the statutory language, and no "factual orientation" whatsoever.[8]

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[8] At the same time, the courts "should uphold the indictment 'unless it is so defective that it does not, by any reasonable construction, charge an offense.'" Willis, 844 F.3d at 162, citing United States v. Vitillo, 490 F.3d 314, 324 (3d Cir. 2007) (internal quotation marks omitted). But this general rule is necessarily qualified by the conditions set out in the Third

Likewise, the Court in Panarella also stated, following Government of the Virgin Islands v. Greenidge, 600 F.2d 437 (3d Cir. 1979), that just because an indictment or information tracks the language of the statute allegedly violated, does not keep the court from granting a motion to dismiss for failure to state an offense. Panarella, 277 F.3d at 684-85. McKelvy asserts that these rulings are on point here.

A slightly different formulation of the second prong of Kemp and similar cases is provided by the First Circuit in United States v. Yefsky, 994 F.2d 885, 893 (1st Cir. 1993), which stated, relying on the two Supreme Court cases cited there, that while the indictment may incorporate the words of the statute to set forth the offense,

> **the statutory language "'must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged.'" Hamling [v. United States], 418 U.S. 87, 117–18 (1974),… (quoting United States v. Hess, 124 U.S. 483, 487 … (1888)).**

994 F.2d at 885. This ruling is cited with approval by the U.S. Attorney's Manual, when it stated that a "[mail or] wire fraud indictment should contain a reasonably detailed description of the particular scheme the defendant is charged with devising to ensure that the defendant has sufficient notice of the nature of the offense." USAM at section 971, "Sufficiency of Indictments."[9]

As discussed below, because of the government's decision to draft the charging paragraphs in terms just of the statutory elements, there is no way for the Court to instruct the jury, in a way which would be comprehensible to them, that they must agree on a common scheme to defraud charged in Count 1, ¶ 8;

Circuit cases referenced above – otherwise, those rulings would be of no moment.

[9] McKelvy is not citing the USAM in an effort to give the appearance of a legal duty on the government's part as to the drafting of the charging paragraphs. but only to point out that the Department of Justice has adopted the above-quoted passage as standard practice and that indictments which did not follow this practice would be atypical. Cf. USAM at section 1-1.100.

Counts 2-8, ¶ 4; and Count 9, ¶ 2. Put another way, if the government could satisfy the cases cited above about the necessity of such a finding by the jury, by letting the government articulate the scheme for the first time at trial rather than in the indictment, it would moot the Model Instructions and the myriad of cases on this point.

F. The charging paragraphs of Counts 1-9 should not be read to incorporate language from the body of the indictment.

Generally speaking, district courts are bound to consider the allegations in the charging paragraph explicitly; "a court should 'not strain to interpret a defective indictment to be in conformity with [the mail or wire fraud statutes].'" Panarella, 277 F.3d at 690 n. 7, quoting United States v. Olatunji, 872 F.2d 1161, 1166 (3d Cir.1989).

The Court in Panarella went on to state that, when ruling on a defendant's motion to dismiss for failure to state an offense, the court should sometimes consider the language of the indictment or information "as a whole," rather than just the charging paragraph. Panarella, 277 F.3d at 690 n. 7. McKelvy argues that the critical language in Panarella is that the Third Circuit there determined that the charging document should be "interpret[ed] … as incorporating by reference the other facts specifically alleged in the body of the [charging document]." Id.

The Court in Panarella interpreted the charging paragraph of the superseding information as "incorporating" the facts alleged in the body of the information as to the duty of Pennsylvania State Senator Joseph Loeper to disclose "his financial relationship with Panarella" due to Loeper's having "tak[en] discretionary action that directly benefitted Panarella's business." 277 F.3d at 696.

The Third Circuit's analysis in Panarella was clearly correct, in that the language of the description of the scheme in the charging paragraph – which is where scheme language is traditionally utilized in fraud cases - was sufficiently broad to incorporate the details elsewhere. As stated by the Court, the charging paragraph of the superseding information alleged that:

> **On or about September 8, 1997, in the [EDPA] defendant Panarella … knowing that an offense against the United States had been committed, namely, wire fraud in violation of 18 U.S.C. §§ 1343 and 1346, knowingly and willfully assisted … [Pennsylvania State Senator Joseph] Loeper … in order to hinder and prevent Loeper's apprehension, trial and punishment by editing the response from [an individual known as] S.R. to [an unidentified] reporter so as to continue to conceal the financial relationship between Panarella and Loeper, in violation of Loeper's duty to provide honest services.**

277 F.3d at 684. As the Court set out the issue raised by Panarella, it was whether "the federal wire fraud and honest services fraud statutes apply to the particular facts alleged in the superseding information." Id. As such, in responding affirmatively to the defendant's argument, the Court had to take into account the relevant "particular facts" in the body of the information. Id. at 685-86.

While Panarella is authority for a contention that general but factually oriented language setting out an overarching scheme in a charging paragraph can sometimes be interpreted as incorporating details from the body of the indictment, McKelvy cannot conjure up any rationale for arguing, as the government would seem to have to do here, that language simply tracking statutory terms, but containing no semblance of factual orientation, can be interpreted as incorporating details from other parts of the indictment.

Absent incorporated details, there is no arguable basis from which the government could claim that the charging paragraphs in the indictment provide any factual orientation from which the jury could find a common scheme. The absence of such language necessarily means that the indictment does not sufficiently apprise McKelvy of what he must be prepared to meet by way of proposed jury instructions, and Counts 1-8 should be dismissed.

G. Even if there were a basis for incorporating in the charging paragraph language from the body of the indictment, there is no logical basis on which to permit the Court to choose an allegation of the scheme.

Even if there were some basis in the charging paragraphs in Counts 1-9 for an argument that those paragraphs incorporated other allegations in the indictment, there is no logical way to construct such an incorporation as to the requisite common, single, unitary, and/or overarching scheme. This is true for two reasons:

First, unlike the indictment in Panarella, there is no conceivable hint in the ten charging paragraphs as to which other language should be incorporated and, likewise, there is no possible way to divine what language the government's attorneys would have included if they had made the decision to do that. Moreover, the government should not be permitted the proverbial "second bite" of the apple – having made the decision not to verbalize the parameters of the scheme in the charging paragraph – the government should not be permitted now to reconsider its prior decision.[10]

Second, the only passages in the indictment which would conceivably be candidates for incorporation into the charging paragraph are paragraphs 9-12 (Manner and Means), each of which presents serious impediments to being adopted as charging language:

> **¶ 9. [The three defendants] raised approximately $54 million from more than 300 investors nationwide in twelve fraudulent and unregistered securities offerings for Mantria and its related entities.**

Paragraph 9, however, is not arguably an allegation of the overarching scheme because it is not phrased in scheme language and does not allege any scienter on the part of the defendants.

> **¶ 10. In order to induce prospective investors to invest in Mantria, [the three defendants] made materially false statements and omitted material facts to mislead investors**

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[10] It should be noted that it is not atypical for indictments to allege, in the charging paragraph, more than one part of the scheme, e.g., "It was a part of the scheme that …" and "It was a further part of the scheme that …." In such cases, as noted above, district courts instruct the jury that they have to unanimously agree on the part or parts of the scheme were violated.

> **as to the true financial status of Mantria, including grossly overstating the financial success of Mantria and promising excessive returns.**

Even if ¶ 10 included scheme language (it does not follow the standard "It was the part of the scheme," and "It was a further part of the scheme"), the only words in this paragraph which reflect the kind of scienter necessary to charge a scheme – that the defendants acted "to mislead investors" – suffers from a major flaw as a possible candidate for incorporation: the government's attorney had to be aware that there was no evidence, as of the filing of the indictment, that McKelvy had any such intent or that he knew that his statements were false as to Mantria's true financial status.[11]

> **¶ 11. While [the three defendants] claimed that Mantria made millions of dollars selling real estate and "green energy" products, they knew that Mantria had virtually no earnings, no profits, and was merely using new investor money to repay earlier investors.**

Even if ¶ 11 included scheme language (it does not follow the standard "It was the part of the scheme," and "It was a further part of the scheme"), the only words in this paragraph which reflect the kind of scienter necessary to charge a scheme – that the defendants "knew" that Mantria was in financial distress – suffers from a major flaw as a possible candidate for incorporation: the government's attorney had to be aware that there was no evidence, as of the filing of the indictment, that McKelvy had any such intent or that he knew that his statements were false as to Mantria's true financial status or that he knew that Mantria was being operated as a Ponzi scheme.

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[11] In making his references to the absence of evidence at the time of the indictment, McKelvy is not challenging the sufficiency of the evidence supporting the indictment, which is prohibited by Costello v. United States, 350 U.S. 359, 363 (1956), as noted by McKelvy in his Amended Limitations Memo at 38. Rather, McKelvy's argument only concerns the sufficiency of the allegations in the indictment.

> **¶ 12. Most of the investors were introduced to Mantria through [McKelvy] and his company, Speed of Wealth. [McKelvy] caused Speed of Wealth to advertise on the radio, internet, and other media outlets to lure the general public to seminars he offered. During these seminars, [the three] defendants … made materially false statements and omitted material facts to mislead prospective investors and induce them to invest in Mantria securities. Early investors who received extravagant returns in Mantria securities were used to provide "testimonials" to induce additional investors to invest in Mantria securities.**

Because ¶ 12 concerns only the Speed of Wealth seminars, it is not arguably an allegation of a common scheme, but is rather what the government says it is – part of the alleged manner and means of the scheme.[12]

Paragraph 12, however, suffers from a second major flaw as a possible candidate for incorporation: the government's attorney had to be aware that there was no evidence, as of the time of filing the indictment, that McKelvy knowingly participated with Wragg and/or Knorr in the larger scheme of making fraudulent misrepresentations as to Mantria's financial status. Accordingly, this paragraph – the only one which was supported by evidence at the time of the indictment – suffers directly from the lack of an allegation of a common, single, unitary, and/or overarching scheme, covering both Wragg and McKelvy, which had any apparent support as of that time.

H. <u>Any belated selection by the government or the Court of appropriate language of an overall, common, single, unitary and/or overarching scheme for the charging paragraph would work an impermissible amendment</u>.

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[12] As McKelvy concedes in the Proposed Findings of Fact in support of his two frauds/two layers argument, the phrase in this paragraph which reflects the kind of scienter necessary to charge a scheme – that the defendants [intended] "to mislead prospective investors" about the investments in Mantria – is broad enough to include both McKelvy's false statements as to his commissions and his false statements as to the depth of his knowledge about the books regarding these investments.

McKelvy argues that any such effort at an "incorporation" argument would be unsupportable and leaves as the only alternative that such an effort now would be an illegal amendment, which would prejudice the defendant. Because such an amendment would not be a formal one, it would be considered a "constructive" amendment. As stated by the Third Circuit in United States v. Sanders, 2017 WL 1097085 (3d Cir. 2017):

> **A constructive amendment occurs when a defendant is deprived of his "substantial right to be tried only on charges presented in an indictment returned by a grand jury." United States v. Syme, 276 F.3d 131, 148 (3d Cir. 2002)(quoting United States v. Miller, 471 U.S. 130, 140 … (1985)).**

2017 WL 1097085 at *1.

For the government to (possibly) assert, after the indictment has been filed, that the mere recitation of statutory language in the ten charging paragraphs, as set out above, can now be expanded and/or clarified, by incorporation of language from the body of the indictment would be to raise "a substantial likelihood that the jury [might] convict[] the defendant for an offense differing from the offense the indictment returned by the grand jury actually charged," under United States v. Daraio, 445 F.3d 253, 259–60 (3d Cir. 2006), as cited in Sanders. This is because, as McKelvy has argued, the "mere recitation" language in the indictment should not be altered by "the evidence and jury instructions at trial [to] modify essential terms of the charged offense." 2017 WL 1097085 at *1.

I. Under Dobson, where there was a colorable assertion that there were two layers of the fraud charged, the Court would have to give a "culpable participation" instruction, if the charging language had included factual orientation for the scheme.

Just as McKelvy asks this Court to examine the charging paragraphs in the indictment to determine if they provide the description of the common, overall, single, unitary, and/or overarching scheme required by the Third Circuit cases discussed above, he also requests that the Court review the applicability of Dobson, discussed more fully below, in fraud cases where there are arguably two separate layers of the offense.

As noted above, the second element of wire fraud found in the Model Instructions is "the participation by the defendant in the scheme charged with the specific intent to defraud." One version of this second element is the "culpable participation" instruction, which is generally applicable, but which also is required in some special circumstances, such as here.

The formulation of the "culpable participation" version of the second test is that, first, the government must demonstrate that a defendant participated in a fraudulent scheme, and, second, the defendant had "knowledge of the illicit objectives of the fraudulent scheme and willfully intend[ed] that those larger [overarching or overall] objectives be achieved." United States v. Dobson, 419 F.3d 231, 239 n.8 (3d Cir. 2005);[13] see also United States v. Blood, 232 Fed.Appx. 199, 202-03 (3d Cir. 2007).

The Dobson case relies partly on the Third Circuit's decision in United States v. Pearlstein, 576 F.2d 531, 545 (3d Cir. 1978). As the Third Circuit said in United States v. Blood, 232 Fed.Appx. 199 (3d Cir. 2007), summarizing the facts and rulings in Dobson:

> **[I]n Dobson, … a [culpable participation] instruction was given to the jury as to the essential elements of mail fraud. We vacated Dobson's conviction, finding it based on an incomplete charge. [Dobson, 419 F3d] at 241.**

Blood, 232 Fed.Appx. at 202. The reason for the Court's concern in Blood and Dobson was that, as articulated in Dobson, "Unwitting participation in a fraudulent scheme is not criminal under § 134[3]." 419 F3d at 237.

The Blood decision then sets out the facts in Dobson:

> **[Defendant Marsha] Dobson was a salesperson for a company called Universal Liquidators ("UL"), which purported to locate and resell surplus and liquidated merchandise. UL**

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[13] Earlier in the opinion, the Court suggested that a "culpable participation" instruction was always appropriate. 419 F.3d at 237. McKelvy is stressing his argument concerning the applicability of Dobson to those instances where there are arguably "two layers" of the fraud.

> **charged individuals a fee to become brokers who would be able to purchase discounted merchandise and resell it at a substantial profit. UL, however, had no relationships with any of the manufacturers mentioned in its marketing materials, nor did it have the means to assist brokers in the location or resale process. In short, UL was a fraud.**

Blood, 232 Fed.Appx. at 202-03.[14]

The Court in Blood also described defendant Dobson's role:

> **Dobson was one of UL's sales representatives and solicited potential brokers by presenting brochures and other marketing materials which fraudulently held out UL as having the means to facilitate sales. Although Dobson testified that she was unaware that UL, overall, was a fraud or that its marketing materials were bogus, she admitted to making several false representations to prospective brokers in order to increase her sales total.**

232 Fed.Appx. at 203. Blood then described the instruction to the jury which was an issue in the Dobson appeal:

> **Dobson was charged with mail fraud and the District Court instructed the jury that in order to convict her, they had to find that she knowingly devised or participated in a scheme to defraud [and] acted with specific intent to defraud …. Dobson was convicted.**

232 Fed.Appx. at 203(emphasis added). As Blood states, Dobson presented a "two layers" argument to the Court of Appeals.

> **On appeal, Dobson challenged the jury instruction. She asserted that there were two layers of fraud present in her case: her own misrepresentations, and UL's overarching fraudulent scheme, of which … she claimed she was unaware. Dobson argued that because the jury instruction did not distinguish between these two layers, the jury may have convicted her for furthering the overarching scheme by**

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[14] **In the Dobson case, the indictment also charged her husband, Larry Dobson, as a part of the conspiracy to commit mail fraud. For purposes of this memo, we will refer to Marsha Dobson as "Dobson."**

> **relying only on the evidence regarding her own self-generated misrepresentations. This ambiguity, in Dobson's view, was error, and to remedy it, Dobson asked that we vacate her conviction. We agreed.**

232 Fed.Appx. at 203.[15]

In Dobson, the Third Circuit ruled that it was plain error for trial counsel not to preserve an objection on the "culpable participation" issue. The Court noted that, in finding that the district court committed "plain error," it found that Dobson's arguments had been persuasive that, at trial, there had been: "(1) an error; (2) that [was] plain; and (3) that affected [her] substantial rights." 419 F.3d at 235 (citations and internal quotation marks omitted). The Court in Dobson also ruled that the defendant's argument had met the fourth requirement: "If all three conditions are met, an appellate court may in its discretion grant relief, but only if 'the error seriously affects the fairness, integrity, or public reputation of [the] judicial proceedings.'" Id. (citations and internal quotation marks omitted).

The Dobson Court's finding of plain error is a significant one which, although not directly relevant here – McKelvy is pursuing this argument in the district court, rather than belatedly on appeal – this finding necessarily leads to the conclusion that the Court of Appeals considers such an instruction to be fundamental to fairness in federal prosecutions. While not an exact match, one of the types of error which lead to a finding of "plain error" is Constitutional error, as reflected in the Richardson case.

Dobson stated that the district court's instruction "nowhere advised the jury that it could convict [of mail fraud] only on finding that Dobson in fact knew of UL's fraudulent scheme. It directed the jury to determine "whether the defendant knowingly devised or participated in a scheme to defraud." But the indictment against McKelvy permitted the jury to do exactly the same thing – to permit a conviction even if he did not "in fact kn[o]w of [Mantria]'s fraudulent scheme."

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[15] **As the Court said in Blood, "Dobson's statements … were separate and distinct from UL's overarching scheme." Id. at 203.**

Dobson cited Pearlstein as the source of the appropriate "culpable participation" instruction.

> **In vacating Dobson's conviction we relied on our decision in United States v. Pearlstein, 576 F.2d 531, 545 (3d Cir. 1978), where we held that, to be convicted of mail fraud, it is not sufficient for the Government to prove merely that the defendant took part in a fraudulent scheme, but rather that he did so knowingly and "in furtherance of the illicit enterprise." We reasoned that when two layers of fraud are at issue, the relevant inquiry is not whether the defendant made any fraudulent statements, but whether the fraudulent statements he did make were in furtherance of the overarching fraudulent scheme. Id. at 537. … [W]e held that when the jury is confronted with dual layers of fraud, the District Court must instruct it to find that the defendant "culpably participated" in the overall scheme.**

Blood, 232 Fed.Appx. at 203 (emphasis added).

Put differently, the Third Circuit in Dobson ruled that the instruction in the district court was ambiguous: the jury "could have referred either to culpable participation in (1) UL's fraudulent scheme (i.e., the selling of brokerages that [Dobson] knew to be worthless) or to (2) [her] questionable sales tactics (e.g., her claim that the UL opportunity allowed her to buy 'a horse ranch in Montana')." 419 F.3d at 238. Dobson vacated the defendant's conviction; as stated in Blood, the Court in Dobson ruled that "the jury may have convicted her for furthering the overarching scheme by relying only on the evidence regarding her own self-generated misrepresentations." Blood, 232 Fed.Appx. at 203.

As to the second layer, "the evidence regarding her own self-generated misrepresentations," Blood, supra, the Court in Dobson emphasized that Dobson had engaged in extensive fraudulent conduct of her own:

> **The trial evidence also showed that, in marketing the UL "opportunity" to prospective brokers, Dobson was not always truthful about the scope of her involvement with UL. Most pertinently, Dobson did not tell potential brokers that she was an employee of UL whose job it was to sell broker**

> **positions; instead, she told them that she herself was a broker. Indeed, according to the testimony of one trade-show attendee, Dobson held herself out as a very successful UL broker who, among other things, had made enough money to buy "a horse ranch in Montana." App. at 170. Dobson further regaled prospective brokers with stories, examples, and details regarding the deals that she had supposedly negotiated for sizeable profits. None of this was true.**

419 F.3d at 235.[16]

As set out in the proffers in McKelvy's Proposed Findings of Fact and Conclusions of Law, the admitted conduct of Wragg and Knorr is the first layer and the admitted conduct of McKelvy, together with his denials of knowing about the underlying fraud of the value of the Mantria investments, support McKelvy's argument that he would have qualified for a "culpable participation" instruction under Dobson, had the indictment contained a factually oriented description of the scheme in the charging paragraphs.

Accordingly, McKelvy has strong authority in Dobson. While the government may argue that the cases are different in that Dobson raised her claim on appeal, after the district court had instructed the jury, he asserts that the language in the charging paragraph in his indictment puts him in virtually the same position as Dobson was, because there is no viable way to patch together an appropriate instruction. What the Court found to be "plain error" because it was an "error [which] seriously affect[ed] the fairness" of the proceedings, 419 F.3d at 235 (citations and internal quotation marks omitted), should be persuasive here, as well

J. McKelvy asserts that the rationale of Dobson and Pearlstein require that the indictment be dismissed because it contained no allegation of an "overarching fraudulent scheme."

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[16] **In Blood, the Third Circuit rejected the defendant's argument based on Dobson and affirmed the conviction, saying that Blood's "misrepresentations were in furtherance of the one and only scheme to defraud." Blood, 232 Fed.Appx. at 203.**

McKelvy argues that because the facts, as stated in the proffers above, present "two layers of fraud," it follows that for the district court to be in the position of being able to instruct the jury on the "overarching fraud scheme" contained in Counts 1-9 of the indictment, there has to be such an allegation in the indictment's charging paragraphs. But here, there is no such allegation. Instead, the charging paragraphs in Counts 1-9 are totally devoid of any allegation of an "overarching fraud scheme." McKelvy argues that, accordingly, this Court should dismiss Counts 1-9, for the reasons stated above.

VI. BASED ON THE ABOVE ARGUMENTS AS TO COUNTS 1-9, THIS COURT SHOULD STRIKE THE SCHEME LANGUAGE FROM COUNT 10.

Although there are differences between wire fraud, as charged in Counts 1-8, securities fraud conspiracy, as charged in Count 9, and substantive securities fraud, as charged in Count 10, McKelvy argues that the Third Circuit rulings discussed above concerning the nature of fraud schemes would apply in all of these situations and, accordingly, that the "fraud" references in Count 10 should be stricken.

Respectfully submitted,

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Dated: July 24, 2017

CERTIFICATE OF SERVICE

I hereby certify that I have served by electronic mail a true and correct copy of the foregoing Memorandum in support of the defendant's Motion to Dismiss Counts 1-9 of the Indictment, and to Strike Part of Count 10, for Failure to State an Offense, upon Assistant U.S. Attorney Robert J. Livermore:

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