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	**:**	

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW 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 these Proposed Findings of Fact and Conclusions of Law in Support of his Motion to Dismiss Counts 1-9 of the Indictment and to strike parts of Count 10, in conjunction with his Offense Memo.

Based on his Offense Memo, including proffers nos. 1-13, and pursuant to Fed.R.Crim.P. 12(d), McKelvy has requested this Court to enter the following Proposed Findings of Fact ("Findings") and Proposed Conclusions of Law ("Conclusions"). The Court will refer to McKelvy's proffers in the Amended Limitations Memo as Pr1., and will refer to the proffers in the Offense Memo as Pr2. McKelvy has noted, by using the marking [SUPPLEMENTAL], those Conclusions which are supplemental and were not sourced in McKelvy's Offense Memo, submitted on July 24, 2017.

McKelvy notes that, in an effort to narrow the issues for decision by the Court, he has modified some of details of the Findings and Conclusions, and omitted mention of some of the proffers in the Offense Memo.

I. PROPOSED FINDINGS OF FACT RE: DEFENDANT'S OFFENSE MOTION AND MEMO.

In the paragraphs below, McKelvy submits his Proposed Findings and Conclusions.

A. Proffers – Mantria and Mantria Financial - background.

1. The Court adopts by reference Pr. 1, 1-66, as set out in McKelvy's Amended Limitations Memo at pages 18-33, and the Proposed Findings filed in support of that Memo, Nos. 1-44, at pages 1-15.

2. The Court will continue its practice in the Offense Memo of referring to Mantria Corp. and all other Mantria entities as "Mantria" and will refer separately only to Mantria Financial. See McKelvy Pr2. 2.

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 one or more members of the accounting unit at Mantria. Pr2. 3.

B. Proffers – summary of the facts underlying the two fraud schemes and the "layers" of the fraud charged in the indictment – the case against Wragg and Knorr, as compared with the case against McKelvy.

4. With respect to the indictment and on the guilty pleas of Wragg and Knorr to all ten counts, the Court finds that McKelvy takes as true all of the factual and legal allegations in the indictment as they apply to the conduct of Wragg and Knorr. In summary, these two defendants knowingly participated together in a Ponzi scheme to defraud over 300 investors of a net amount of approximately $37 million.[1] Pr2. 4.

5. The Court finds that McKelvy has accepted as true, as he must for purposes of this motion, all the factual allegations in the indictment. Contrastingly, the Court finds that McKelvy denies, as legal conclusions, all the legal allegation in the indictment, including the allegation that Mantria Financial was a "financial institution" which was "affected" by the fraud,

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[1] The Court recognizes, without expressing any view on the merits, that McKelvy argues in his Offense Memo that the conduct of Wragg and Knorr, as set out in Proposed Findings 4, 6-7, constitute the first fraud scheme and/or the first layer of the fraud in this indictment, as those terms are used in McKelvy's Amended Limitations Memo.

within the meaning of 18 U.S.C. § 3293(2), and any allegations which concern his intent or state of mind. Pr2. 5.

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. Pr2. 6.

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/or Knorr made materially false statements and omitted material facts at the Speed of Wealth seminars to mislead prospective investors and induce them to invest in Mantria securities. Pr2. 7.

8. The Court recognizes, without expressing any view on the merits, that while McKelvy admits that he made numerous statements to investors, which he later learned were false, 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 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." Pr2. 8.

9. The Court recognizes, without expressing any view on the merits, that 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." Pr2. 10.

10. The Court recognizes, without expressing any view on the merits, that McKelvy, as stated above, 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. See Findings 11 and 12, below. As alleged in part of Count 1, ¶ 12,

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

Pr2. 11.

11. The Court recognizes, without expressing any view on the merits, that 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 papers - including appraisals, land "sales" reports and other "sales" documents - furnished by Wragg, he (McKelvy) admits, for the purposes of this motion, that he had not seen any documents showing Mantria's actual expenses. Cf. Overt Act 31(d).

McKelvy also admits, for the purposes of this motion, that 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 further 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, but denies that he did this in conjunction with Wragg and Knorr's scheme to defraud. Cf. Count 1, ¶ 12.[2] Pr2. 12.

12. The Court recognizes, without expressing any view on the merits, that 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

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[2] **Moreover, as McKelvy argues below, his admissions for purposes of this motion, as set out in Proposed Findings 5, 8-12, and his denials, as stated in those Proposed Findings, constitute the second layer of the fraud in this indictment.**

[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 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. Pr2. 13.

II. PROPOSED CONCLUSIONS OF LAW RE: McKELVY'S "TWO FRAUDS" OR "TWO LAYERS" ARGUMENT.

A. <u>The charges in the indictment and the positions of the parties</u>.

1. The parts of Counts 1-10 which are relevant to the defendant's Offense Motion are as follows:

<u>Count 1, ¶ 8</u> 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.

<u>Counts 2-8, ¶ 4</u>, 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 paragraphs.

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.

2. The indictment charges, in the Manner and Means section of Count 1, ¶ 9, that defendants Wragg, Knorr, and McKelvy participated in a Ponzi scheme to defraud over 300 investors in Mantria Corporation, which was then based in Bala Cynwyd, Pennsylvania. The indictment also charges that the gross amount of the loss by the investors was $54.5 million and that net amount of the loss was approximately $37.5 million. See Amended Limitations Memo at 5-6.

3. The indictment charges, in the Background section of Count 1, that McKelvy persuaded the investors to extend existing credit lines, whether in the form of credit cards, second mortgages, and/or loans against life insurance, and to use proceeds of these credit lines to invest in Mantria. See Amended Limitations Memo at 5-6.

B. The defendant's pre-trial motion to dismiss, for an alledged failure to state an offense, under Rule 12(b)(3)(A) – ripeness.

4. As McKelvy argued in the Offense 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). Offense Memo at 5.

5. First, any facts must be undisputed, United States v. Levin, 973 F.2d 463, 470 (6th Cir. 1992). Here, McKelvy has met that test because he has conceded that the factual allegations in the indictment are undisputed. Offense Memo at 5. As noted there, McKelvy disputes, as he is entitled to do, the legal allegations in the indictment, with two exceptions: (a) McKelvy admitted at Proposed Finding 11, for purposes of the Offense Motion, to having knowingly made a false statement at one of his Speed of Wealth seminars when he said 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. (b) McKelvy admitted at Proposed Finding 12, for purposes of the Offense Motion, to having knowingly made a false statement at one of his Speed of Wealth seminars when he said that prior investors had not "paid [him] a dime." SoW seminar, 5/21/09, at 42.

6. 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. Offense Memo at 5. Because McKelvy has represented that, in addition to his two admissions, he has selected for his proffers only information in the discovery to which he believes the government can agree in its response, without the need for determination at trial. Amended Limitations Memo at 15. Moreover, the government has an opportunity to propose modifications of any of McKelvy's assertions which might otherwise necessitate determination at trial. Pending receipt of the government's response to the Offense Motion, the Court accepts McKelvy's representation that there are no issues which need to be determined at trial.

7. Third, a trial of the disputed factual issues would not have "assisted the … court in deciding the legal issues," Levin, supra. Offense Memo at 5. This is a restatement of the second necessary condition for determination of a motion to dismiss pre-trial. The Court adopts its Conclusion at ¶ 6, above.

8. Fourth, the (factual) basis for the Offense Motion 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). Offense Memo at 5. Because the (factual) basis for the Offense Motion has been assembled by McKelvy from the discovery materials, the Court rules that it is "reasonably available," under Rule 12(b)(3)(A). Amended Limitations Motion at 8. The Court further rules that, pending receipt of the government's response to the Offense Motion, there has been no showing of "good cause to defer a ruling," under Rule 12(d).

9. Fifth, the defendant "must accept as true the factual allegations … in the indictment." United States v. Stock, 728 F.3d 287, 299 (3d Cir. 2013). Offense Memo at 5. See the Court's ruling at ¶ 5, above. Accordingly, the Offense Motion is ripe for a pre-trial ruling.

C. The impact of Huet, Stock, et al. – the first two tests.

10. 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 1-8 on both grounds. As explained below, at 19-20 McKelvy also challenges Count 9, the securities fraud conspiracy count, for similar reasons. Offense Memo at 16.

11. [SUPPLEMENTAL] The primary case on which Rankin relied for the statement of the law referred to in ¶ 10, above, was Russell v. United States, 369 U.S. 749 (1962). The first two tests in Huet are taken from Rankin, 870 F.2d at 112, quoting from Russell, 369 U.S. at 763-64. In Russell, these two tests were part of a single test and can be seen as complimentary to each other. In Russell, the Supreme Court held that two of the purposes of the constitutional requirements for a valid indictment, under the Fifth Amendment's Grand Jury and Due Process clauses, are (1) to inform the defendant of the "nature and cause of the accusation" and (2) to "inform the court of the facts alleged, so that it may decide whether they are sufficient

in law to support a conviction." Id. at 755, 768 & n. 15. See also United States v. Resendiz-Ponce, 549 U.S. 102, 108 (2007) (citing Hamling v. United States, 418 U.S. 87, 117 (1974)).

D. The impact of Huet, Stock, et al. – the first test.

12. Following the first test in Huet, the Court determines that Count 1 charges the three defendants with conspiracy to commit wire fraud, but does not attempt to describe the factual nature of the conspiracy, saying only that the defendants conspired to commit "wire fraud." In a case where it 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 ("Conspiracy – Membership in the Agreement"),[3] any understanding or agreement would not have been to commit "wire fraud," which is a legalistic and conclusory term, rather than a factual description of an agreement.

13. The allegation in Count 1 of the nature of the conspiracy was totally deficient, because the government must allege and prove, in terms that are understandable to a jury, that there was "an agreement among the alleged co-conspirators." See United States v. Camiel, 689 F.2d 31, 36-37 (3d Cir. 1982). If the government could simply allege that defendants entered into a conspiracy to commit "wire fraud," then the requirements of the CA3 Model Instructions on conspiracy, as well as Camiel and the many Third Circuit decisions similar to it, would be pointless. See also Offense Memo at 17-18, 21-22.

14. The Court determines, following the first two tests in Huet, that the wire fraud component of Count 1 and the charging paragraphs of the substantive wire fraud counts, Counts 2-8 ("the wire fraud allegations"), are facially insufficient because they do not, under the first test, "contain[] the elements of the offense intended to be charged." 665 F.3d at 594-95 (citations and quotation marks omitted). Instead, the wire fraud allegations contain only mere recitations of the

[3] Conceptually, the "scheme" in wire fraud indictments and the "plan" in conspiracy cases are virtually indistinguishable.

statutory elements, rather than a "sufficient factual orientation" for the defendant to be informed of the nature of the charges. See CA3 Model Instruction 6.18.1343; United States v. Hannigan, 27 F.3d 890, 892 (3d Cir. 1994); Stock, 728 F.3d at 292; Offense Memo at 15-17.

15. [SUPPLEMENTAL] Under the first Huet test, since the Counts 1-8 did not contain any "factual orientation" which would have permitted the jury to decide on which aspect of the overall wire fraud scheme McKelvy allegedly joined with Wragg and/or Knorr, with specific intent, these counts should be dismissed. As the Supreme Court stated in Russell v. United States, 369 U.S. 749 (1962), "To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the [Constitutional right to indictment only by] a grand jury was designed to secure." Id. at 770. Paraphrasing the formulation in United States v. Kay, 359 F.3d 738 (5th Cir. 2004), "the lack of detail" in the description of the scheme to defraud in the charging paragraphs is "a failure to specify what the crime was," rather than "an absence of detail as to how the crime was committed." Id. at 759.

16. A slightly different formulation of the tests in Huet and other Third Circuit cases, is provided in United States v. Yefsky, 994 F.2d 885, 893 (1st Cir. 1993), which stated that while the indictment may utilize words from the statute,

> **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." Offense Memo at 20-21.

17. The Court 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, such as the one here, would be atypical. Cf. USAM at section 1-1.100. Offense Memo at 21 & n. 9.

E. The impact of Huet, Stock, et al. – the second test.

18. Under the circumstances here – Counts 1-8 all charge three defendants; the charging paragraphs of these counts can be construed as charging no scheme to defraud or several schemes to defraud;[4] and, as explained below, there is evidence that there were two such schemes or dual schemes – McKelvy should have been able to request and obtain an instruction that the government was required to allege (and prove) the participation by McKelvy, together with Wragg and/or Knorr, in the same, common, overall, single, unitary, or overarching scheme, but that is impossible because there is no factual orientation of such a scheme in the charging paragraphs. See CA3 Model Instruction 6.18.1341-2; United States v. Dobson, 419 F.3d 231, 237 (3d Cir. 2005); Government of the Virgin Islands v. Greenidge, 600 F.2d 437 (3d Cir. 1979); Offense Memo at 15-20.

19. Because of the absence of a sufficient description of the wire fraud scheme in these counts, however, no such instruction is possible and these counts must be dismissed under the second Huet test, the necessity of "sufficiently appris[ing] the defendant of what he must be prepared to meet" as to the scheme to defraud. 665 F.3d at 594-95. Informing McKelvy of the charges he needs to be prepared to meet includes giving him the necessary information about the factual orientation of the particular scheme to enable him, among other things, to submit

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[4] Pending the government's response to the Offense Motion, it is possible to read Counts 1-8 as charging either no schemes to defraud or, if incorporation from the body of the indictment to the charging paragraphs is permitted under United States v. Panarella, 277 F.3d 678, 685 (3d Cir. 2002), several such schemes, as discussed below.

appropriate points for charge, based on the allegations in the charging paragraph(s). Offense Memo at 15-17.

20. Under the second Huet test, 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 specific conspiratorial agreement, as charged in Count 1, or on a common scheme to defraud, as charged in Counts 1-8. Put another way, if the government could choose to describe a scheme to defraud only in terms of the statutory elements, there would, among other things, never be a need in charging paragraphs for allegations of multiple parts of a conspiracy and/or multiple parts of a scheme to defraud – which the Court observes is a common practice - because a fact-free, one-size-fits-all allegation of a conspiracy or of a scheme, such as the allegations in the charging paragraphs, would be enough. The Grand Jury and Due Process clauses, however, mandate differently. Offense Memo at 19-20.

21. 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 rulings set out in the Third Circuit cases referenced above – otherwise, those rulings would be of no moment. Offense Memo 20-21 & n. 8.

F. Incorporation under Panarella.

22. In further support of its Findings at ¶¶ 10-12, above, the Court states that while, in some instances, it might be appropriate for the Court to accept a possible argument by the government that language in the body of the indictment should be incorporated into the charging paragraphs, cf. United States v. Panarella, 277 F.3d 678, 685 (3d Cir. 2002), such an argument would not be persuasive here because, unlike the charging paragraph in Panerella, the charging paragraphs here gave no cues either as to the nature of the alleged scheme, in terms of the many aspects of the scheme set out in the Manner and Means

section of Counts 1-8,[5] and because the charging paragraphs include no references which would suggest which paragraphs from the body would be incorporated. Offense Memo at 22-24.

23. In further support of its Findings at ¶¶ 10-12, above, the Court states that the only possible candidates in the body of the indictment for incorporation pursuant to Panarella – paragraphs 9-12 in the Manner and Means section of Count 1 – would not be suitable for incorporation, because of the absence of appropriate scheme language, such as "It was a part of the scheme that …" and "It was a further part of the scheme that …" in those paragraphs. Moreover, there is no way for the Court to be able to have surmised which, if any, of those four paragraphs the government would have chosen for inclusion in charging paragraphs. Offense Memo at 20-26. [SUPPLEMENTAL] Cf. Russell v. United States, 369 U.S. 749, 770 (1962) ("To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure").

24. Likewise, there is no possible way to divine what language the government's attorneys would have included in the charging paragraphs, if they had made the decision to do that. Moreover, there is no possible ground for permitting the government to have the proverbial "second bite" of the apple – having made the decision not to verbalize the parameters of the scheme in the charging paragraphs – the government should not be permitted now to reconsider its prior decision. Offense Memo at 24.

25. Moreover, 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. Among the reasons barring such an incorporation are: (a) the Manner and Means paragraphs did not utilize scheme language, such as "It was a part of the scheme that …" and "It was a further part of the scheme that …." (b) There was no

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[5] As noted above, Counts 2-8 incorporate 9 through 16 (Manner and Means) of Count 1.

allegation of scienter in ¶ 9. (c) As to two of these four paragraphs, ¶ 10 and ¶ 11, 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, and had to have known, as of the time, that McKelvy knew that Mantria was in financial distress or that he knew that Mantria was being operated as a Ponzi scheme. Offense Memo at 24-25.

26. The Court recognizes, that 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, the Court understands McKelvy's argument only to be that, in so far as one of the purposes of the indictment is to inform the defendant of the nature of the charge(s) against him, the government cannot point to the discovery – as voluminous as it is – to provide support for an argument that McKelvy must be taken as knowing the nature of the scheme with which he is charged. Offense Memo at 25 & n. 11.

27. Absent an analysis pursuant to Panarella which incorporated details from elsewhere in the indictment, 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. Offense Memo at 23.

G. Any incorporation of language from the body of the indictment, pursuant to Panarella, would amount to a constructive amendment here.

28. In further support of its Findings at ¶¶ 10-12, above, the Court states that, any such possible incorporation of any or all of the four above-referenced paragraphs in Count 1 of the indictment would have necessarily amounted to a constructive amendment of the indictment. See United States v. Sanders, 2017 WL 1097085 (3d Cir. 2017). Any such incorporation of language

would 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. Offense Memo at 27.

H. Under the second test of Huet, where there is a colorable assertion that there were two layers of the fraud charged, the Court would have to give a "culpable participation" instruction.

29. In his Offense Memo, McKelvy asks this Court to examine the applicability of Dobson, discussed more fully below, to fraud cases such as this one where there are arguably two separate layers of the offense. Offense Memo at 27.

30. As noted above, the second element of wire fraud found in the CA3 Model Instructions is "the participation by the defendant in the scheme charged with the specific intent to defraud." One version of the Model Instructions for this second element is the "culpable participation" instruction, which is generally applicable, but which also is required in some special circumstances, such as in the case here. Offense Memo at 28.

31. 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)(emphasis added);[6] see also United States v. Blood, 232 Fed.Appx. 199, 202-03 (3d Cir. 2007). Offense Memo at 28.

32. 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:

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[6] The Court in Dobson suggested that a "culpable participation" instruction was always appropriate. 419 F.3d at 237. This Court recognizes that McKelvy is arguing only that Dobson applies to instances where there are arguably "two layers" of a fraud.

> [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. Offense Memo at 28.

33. 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 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.[7] Offense Memo at 28-29.

34. 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, among other things, that Dobson had met the third requirement for plain error – that, at trial, there had been "an error … 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: that "'the error seriously affects the fairness, integrity, or public reputation of [the] judicial proceedings.'" Id. (citations and internal quotation marks omitted). Offense Memo at 30.

35. The Dobson Court's finding of plain error is a significant one which, although not directly relevant here – McKelvy is

[7] For purposes of these Findings, the Court will refer to Marsha Dobson, rather than her co-defendant husband Larry, as "Dobson."

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 a "culpable participation" instruction to be fundamental to fairness in federal prosecutions, where there are two levels of the fraud. 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 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"). Offense Memo at 19, 30.

36. 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.'" 419 F.3d at 238. The fact-free description of the scheme to defraud in the charging paragraphs against McKelvy arguably would 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." Although the posture of Dobson was different from the posture of the case here – Dobson raised her argument on appeal, following her conviction, while McKelvy is raising his argument pre-trial, there is no other appreciable difference between the cases. Offense Memo at 30.

37. 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). Offense Memo at 31.

38. 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. Offense Memo at 31.

39. 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. Offense Memo at 31-32.

40. As set out in the factual proffers in McKelvy's Offense Memo, at Nos. 1-17, and in the within Proposed Findings of Fact, at Nos. 1-17, 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. Offense Memo at 32.

41. Accordingly, the Court rules that Dobson is strong authority for granting McKelvy's Offense Motion. The language in the charging paragraphs in Counts 1-8 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), is persuasive here, as well.

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

42. The Court ruled 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 1-8 of the indictment, there would have to been such an allegation in the indictment's charging paragraphs. But here, there is no such allegation. Instead, the charging paragraphs in Counts 1-8 are totally devoid of any allegation of an "overarching fraud scheme." Accordingly, this Court will grant McKelvy's Motion to Dismiss Counts 1-8, for the reasons stated above. Offense Memo at 33.

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

43. The same Conclusions would apply to Count 9, the securities fraud conspiracy count. 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. Accordingly, this Court will grant McKelvy's Motion to Dismiss Count 9 for the reasons stated above. Offense Memo at 4.

K. The same Conclusions would apply to McKelvy's Motion to Strike Part of Count 10, the substantive securities fraud count.

44. 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, the Third Circuit rulings discussed above concerning the nature of fraud schemes apply as well to the "fraud" references in Count 10. Accordingly, all references to "fraud" in Count 10 will be stricken. Offense Memo at 33.

Respectfully submitted,

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Dated: August 4, 2017

CERTIFICATE OF SERVICE

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

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Dated: August 4, 2017