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 RESPONSE TO GOVERNMENT'S DAUBERT MOTION

Defendant Wayde McKelvy, by his attorneys, Walter S. Batty, Jr. and William J. Murray, Jr., submits the Defendant's Response to Government's Daubert Motion, and states as follows:

As stated in the government's Motion to Exclude the Testimony of the Defendant's Proposed Expert Witnesses ("Daubert Motion"), Doc. No. 176, at 3-4,

> **On September 4, 2018, the defendant filed a motion styled "Defendant's Motion for Ruling on Applicability of Discovery Provision in Scheduling Order." In that motion, the defendant stated that he has retained three forensic accounting expert witnesses from an accounting firm who would "provide expert testimony in the defendant's case, as to such issues as defendant's statute of limitations defense and his lack of criminal intent. …**
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> **On September 10, 2018, the district court held a teleconference pertaining to the defendant's September 4, 2018 motion. During that teleconference, counsel for the defendant stated that his forensic accounting expert would testify indirectly, not directly, on the issues of the statute of limitations defense and the defendant's lack of criminal intent.**
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> **Moreover, the government contended that:**
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> **Consistent with [Fed.R.Evid.] 702, expert testimony may be admitted only if at least two preconditions are met. First, the proposed testimony must constitute "scientific,**

> technical, or other specialized knowledge" that "will assist the trier of fact" within the meaning of Rule 702, i.e., the evidence must be both "reliable" and "relevant." See [Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 589, 593 (1993)]. Second, the witness proffered to deliver that testimony must be qualified as an expert by virtue of his "knowledge, skill, experience, training, or education.…" General Electric Co. v. Joiner, 522 U.S. 136, 146-147 (1997); Salem v. United States Lines Co., 370 U.S. 31, 35 (1962).

Doc. No. 176 at 4.[1]

The government proceeded to argue that "[t]he proposed testimony [of one of the forensic accountants] should be excluded because the defendant has failed to establish that his witness is an expert in the statute of limitations or a defendant's criminal intent." Doc. No. 176, at 4.

With respect, McKelvy argues that counsel never stated, and does not take the position now, that any one or all of the forensic accountants at Marcum is or are expert in statutes of limitations or criminal intent issues. Rather, as counsel stated during the teleconference on September 10, 2018, the accountants would be testifying and providing exhibits on accounting matters, which information we argue will be relevant to the statute of limitations and criminal intent issues.

As the government knows, McKelvy previously raised, in his amended limitations motion and supporting memos, Doc. Nos. 105, 120, several issues concerning the applicability of the extended ten-year statute of limitations, 18 U.S.C. § 3293(2) – including whether Mantria Financial was a "financial institution" and whether it had been adversely affected by the fraud charged in the indictment. The government responded by arguing, among

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[1] The government does not mention that the Court, in its discussion of the scheduling Order, had agreed with the defendant that the reciprocal discovery provisions of Rule 16 were drafted as they were, mindful of Fifth Amendment considerations.

other things, that any such matters would need to wait until trial.

Likewise, McKelvy previously raised, in his offense motion and memos, Doc. Nos. 111, 126, several issues concerning the applicability of, among other things, the Third Circuit model instructions, including 6.18.1343 on the essential elements of an offense under 18 U.S.C. § 1343, the second element of which is "the participation by the defendant in the scheme charged with the specific intent to defraud; … " - citing United States v. Hannigan, 27 F.3d 890, 892 (3d Cir. 1994). As McKelvy also argued, citing United States v. Dobson, 419 F.3d 231, 237 (3d Cir. 2005), "[u]nwitting participation" is not a crime. Id. The government again responded by arguing, among other things, that any such matters would need to wait until trial.

The government argues that, to be able to offer evidence at trial, the Marcum experts would have to be experts in statutes of limitation and criminal intent. The government, however, has offered no case law in support of its argument. In McKelvy's view, this would be the same thing as arguing that for a fingerprint expert to offer admissible testimony, he or she would have to have expertise in the larger, legal issue – identification. McKelvy knows of no support for such an argument.[2] At the same time, McKelvy will be mindful of the restrictions set by the Federal Rules of Evidence.

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[2] The government's contention, in Doc. No. 176 fn 1, that if McKelvy is permitted to introduce expert testimony on the issues described above, the government in turn should be able to offer the view of the District Court in Colorado, in its ruling in the SEC civil case seeking an injunction against Mantria and individual defendants, is a remarkable one, which is unsustainable for at least three reasons: (1) McKelvy did not oppose the entry of such an injunction and other civil relief; (2) although the Court's finding was well-founded as to Troy Wragg and Amanda Knorr, there was, as here, no apparent evidence that McKelvy acted wittingly or with scienter; and (3) McKelvy was not represented by counsel in that case. In fact, this footnote demonstrates the truth of what McKelvy has been saying for almost three years – the government has no direct evidence of McKelvy's criminal intent.

Now, with the trial coming up, the Court has denied the government's request for an expert report for any expert the defense intends to call and the defense has agreed, in response to the Court's request, to furnish the government, after the government has rested, with copies of any exhibits, including charts or graphs, as to which a Marcum forensic accountant would be expected to testify.[3] Counsel represented that they would furnish the government with such exhibits three or four days prior to the Marcum witness's expected testimony.

McKelvy also stated during the teleconference that he would furnish the government with CVs of the Marcum witnesses. Counsel emailed these three CVs to government counsel on the evening of September 13, 2018. We believe that, based on these CVs as well as on any other information put forward at a Daubert hearing after the government rests, the Court will find any of the three Marcum witnesses well-qualified to testify as a forensic accounting expert.

At this point, the government has filed its Daubert motion before it knows the accounting evidence which McKelvy will seek to introduce in the defense case.

McKelvy requests that this Court defer consideration of the government's Daubert motion until such time, after the government has rested and after we have furnished the government with the expected exhibits, and the government has an opportunity to recast its position based on its understanding of what the Marcum witness expects to say.

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[3] **During the teleconference, counsel mentioned – as he had in prior communications with the government – that there was no Marcum report, because it would have taken extensive additional efforts to draft such a report and because counsel was hopeful that their view – that no "summary" needed to be filed under Rule 16 – would be accepted by the Court.**

WHEREFORE, McKelvy requests this Court to deny the government's Daubert motion.

Respectfully submitted,

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Dated: September 14, 2018

CERTIFICATE OF SERVICE

I hereby certify that I have served by electronic mail a true and correct copy of the foregoing Defendant's Response to Government's Daubert Motion, upon Assistant U.S. Attorneys Robert J. Livermore and Sarah Wolfe:

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Dated: September 14, 2018