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 LIMITED ACCEPTANCE OF AND PROPOSED CORRECTIONS TO THE GOVERNMENT'S PROPOSED JURY INSTRUCTIONS

Defendant Wayde McKelvy, by his attorneys, Walter S. Batty, Jr. and William J. Murray, Jr., submits the following Limited Acceptance of and Proposed Corrections to the Government's Proposed Jury Instructions, and states as follows:

As to the great majority of the Government's Proposed Jury Instructions, McKelvy makes no objection, in so far as they are taken from Third Circuit Model Instructions. Put differently, McKelvy has no objection to any of the government's Proposed Jury Instructions, unless noted here or in his proposed supplemental instructions, which will be filed separately. As to the government's Proposed Jury Instructions discussed below, McKelvy submits the following proposed corrections and objections:

Page 15 -- 3.10 Elements of the Offenses Charged

In the three elements of wire fraud, the substitution of the words "specific intent" for the word "intent," in the second element.

Source: Third Circuit [CA3] Model Instructions, comment, "the Third Circuit has … clarif[ied] the intent requirement," citing, inter alia, United States v. Hannigan, 27 F.3d 890, 892 (3d Cir. 1994); see also, United States v. Catarro, 2018 WL 3949042 (3d Cir. 2018); United States v. Copple, 24 F.3d 535, 544 (3d Cir. 1994).

Page 28 - 4.19 Credibility of Witnesses - Witness Who Has Pleaded Guilty to Same or Related Offense, Accomplices, Immunized Witnesses, Cooperating Witnesses

You have heard evidence that certain witnesses are alleged co-conspirators [specifically, Troy Wragg and Amanda Knorr], have made a plea agreement with the government, or have received a promise from the government that they will not be prosecuted [specifically, Daniel Rink, Christopher Flannery, John Seiner, and Cary Widener].

McKelvy requests that the Court include the particular names placed in brackets in the first paragraph from this proposed instruction, as set out above.

The failure to disclose information may constitute a fraudulent representation if the defendant was under a legal, professional or contractual duty to make such a disclosure, the defendant actually knew such disclosure ought to be made, and the defendant failed to make such disclosure with the intent to defraud

Page 37 -- 6.18.1341-1 Wire Fraud – "Scheme to Defraud or to Obtain Money or Property" Defined

McKelvy objects to the language in the third full paragraph on page 48:

> **The failure to disclose information may constitute a fraudulent representation if the defendant was under a legal, professional or contractual duty to make such a disclosure, the defendant actually knew such disclosure ought to be made, and the defendant failed to make such disclosure with the intent to defraud.**

The reason for the defendant's objection is that the government has not alleged that McKelvy had "a legal, professional or contractual duty to make … a disclosure" concerning the land Mantria was marketing in Tennessee or concerning his commissions.

As stated in United States v. Schiff, 602 F.3d 152, 162 (3d Cir. 2010), "Absent a duty to disclose, silence is not fraudulent or

'misleading under Rule 10b-5.' Basic Inc. v. Levinson, 485 U.S. 224, 239 n. 17 (1988)."

Page 46 - No Model Wire Fraud – Statute of Limitations

Three of the paragraphs of this proposed instruction require corrections. In the first of these three paragraphs, McKelvy notes these corrections in bracketed language.

> **The term 'to affect' [delete: includes a broad range of action. "To affect"] means to influence, change, or to produce an effect upon. A scheme affects a financial institution if the scheme exposed the financial institution to a [add: substantial] new or increased risk of loss. A financial institution need not have actually suffered a loss in order to have been affected by the scheme.**

Sources: The language on "a broad range of action" should be deleted, because there is no doubt that the types of financial institutions and the types of risks of loss at issue in this case would be covered, if the facts support their applicability. As such, this phrase is superfluous and/or confusing.

As to McKelvy's second proposed correction, he requests that the Court add the word "substantial" because that is one of the glosses on the risk of loss analysis, as articulated in United States v. Ghavami, 2012 WL 2878126, *6 (S.D.N.Y. 2012), aff'd sub nom., United States v. Heinz, 790 F.3d 365 (2d Cir. 2015), cert. denied, 136 S.Ct. 801 (2016). See also, United States v. Rubin/Chambers, Dunhill Ins. Services (CDR), 831 F.Supp.2d 779, 783-84 (S.D.N.Y. 2011); United States v. Carollo ("Carollo I"), 2011 WL 3875322, *2 (S.D.N.Y. Aug. 25, 2011), citing United States v. Ohle, 678 F.Supp.2d 215, 228-29 2010), aff'd, 441 F.App'x 798 (2d Cir. 2011). Cf. McKelvy Amended Limitations Memo, Doc. No. at 45.

In the second and third of these three paragraphs, McKelvy notes the proposed corrections in bracketed language

> **Financial institutions include [federally-insured] banks, [federally-insured] credit unions, and mortgage lending businesses [which meet the requirements of the law]. A mortgage lending business means an organization which**

> **finances or refinances any debt secured by an interest in real estate, including private mortgage companies and any subsidiaries of such organizations, and whose activities affect interstate or foreign commerce.**

Source: These corrections are common-sense ones, based on the applicable statue, 18 U.S.C. § 3293(2).

> **Even if the financial institution was an active participant in the fraud, it still [can] qualif[y] as a financial institution.**

Source: United States v. Serpico, 320 F.3d 691, 695 (7th Cir. 2003), as discussed in McKelvy's amended limitations memo, Doc. No. 105, at 42-43.

Page 49 -- No Model Securities Fraud: The Statutory Purpose

McKelvy objects to all of the paragraphs in this section of the government's proposed instructions for two reasons: First, statutory purpose can sometimes be relevant to judicial interpretations of the law, but is never pertinent to a jury's considerations. As far as jury instructions are concerned, the Court interprets the law, rather than the jury. Secondly, even if there was some authority for the government's proposal, it would not be applicable here because the central points of this proposed instruction relate to registered securities, not unregistered securities, as is the case here.

Page 52 - 52 -- No Model Securities Fraud: First Element -- Fraudulent Act

In the second full paragraph on 53, the government's proposed instruction states:

> **If you find that the government has established beyond a reasonable doubt that a statement was false or omitted, you must next determine whether the fact misstated was material under the circumstances. A material fact is one that would have been significant to a reasonable investor's investment decision. This is not to say that the government must prove that the misrepresentation would have deceived a person of ordinary intelligence. Once you find that there was a material misrepresentation or omission of a material fact,**

> **it does not matter whether the intended victims were gullible buyers or sophisticated investors, because the securities laws protect the gullible and unsophisticated as well as the experienced investor.**

McKelvy has two objections to this paragraph. First, he objects to the government's definition of "a material fact" because it omits language important to the Supreme Court and to the Second Circuit Court of Appeals. The language utilized by those courts is: an "omitted fact is material if reasonable investor would view it to have 'significantly altered the total mix of information made available.'" United States v. Stitsky, 536 Fed.Appx. 98 (2d Cir. 2013), quoting Basic Inc. v. Levinson, 485 U.S. 224, 231–32 (1988); see also United States v. Scarfo, 2013 WL 632228, *3, (D.N.J. 2013) (quoting Basic Inc.). In a more recent Second Circuit opinion, the Court stated the standard this way:

> **Materiality requires proof only that a reasonable investor would deem the content of a misstatement a substantial factor to be considered in the making of the particular investment decision…. [I]n a criminal prosecution under Section 10(b), [the government must prove the elements of] materiality, intent to defraud, and a connection to a securities transaction….**

United States v. Litvak (Litvak II), 889 F.3d 56, 65 (2d Cir. 2018).

McKelvy objects to the next two sentences in the government's proposed instruction quoted above - "This is not to say that …" and "Once you find …" - because the formulations in those two sentences seem to be at odds with the "reasonable investor"

standard in the quotations from the Supreme Court and the Second Circuit.

Respectfully submitted,

/s/ Walter S. Batty, Jr.
Walter S. Batty, Jr., Esq.
101 Columbia Ave.
Swarthmore, PA 19081
(610) 544-6791
PA Bar No. 02530
tbatty4@verizon.net

/s/ William J. Murray, Jr.
William J. Murray, Jr., Esq.
Law Offices of
William J. Murray, Jr.
P.O. Box 22615
Philadelphia, PA 19110
(267) 670-1818
PA Bar No.73917
williamjmurrayjr.esq@gmail.com

Dated: September 17, 2018

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 Limited Acceptance of and Proposed Corrections to the Government's Proposed Jury Instructions, upon Assistant U.S. Attorney Robert J. Livermore:

Robert J. Livermore, Esq.
U.S. Attorney's Office
615 Chestnut Street
Philadelphia, Pa 19106
215-861-8505
Fax: 215-861-8497
Email:
robert.j.livermore@usdoj.gov

Sarah Wolfe, Esq.
U.S. Attorney's Office
615 Chestnut Street
Philadelphia, Pa 19106
215-861-8505
Fax: 215-861-8497
Email:
SWolfe@usa.doj.gov

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

Dated: September 17, 2018