

million in new investor funds in their unregistered securities offerings." (c) ¶ 7, "The United States Securities and Exchange Commission ('SEC') was an independent agency of the United States which was charged by law with protecting investors by regulating and monitoring, among other things, the purchase and sale of securities, including securities sold through PPMs. None of the securities sold by Mantria were registered with the SEC." (d) ¶ 9, "Defendants Troy Wragg, Amanda Knorr, and Wayde McKelvy raised approximately \$54 million from more than 300 investors nationwide in twelve fraudulent and unregistered securities offerings for Mantria and its related entities."

4. It is apparent that the "fraudulent securities" referred to in the above passages in the indictment necessarily include the ten PPMs described in the Gottschall declaration, as well as two other investments. While there are no other securities specified in the indictment, the figures in the indictment of (a) "twelve fraudulent and unregistered securities" and (b) of an alleged loss to the investors of \$54 million, ¶ 9, do not compute correctly without the initial investment involving McKelvy, Trust Deed Group I, and the first Mantria Financial PPM. It is not an exaggeration to say that, other than the indictment, the 12 most important documents in the case are the ten PPMs attached to the Gottschall declaration and the two additional documents which comport with the numbers of allegedly fraudulent securities and the total loss set out in the indictment.

5. From the return of the indictment and the appointment of counsel until sometime within the past month or so, the government attorney(s) have never suggested that any of the approximately 1.4 million documents with which they have provided the defense was inauthentic. In a later memo, McKelvy will identify what he believes may be the reason for the change of direction here, where the government is now arguing that 11 of the 12 securities are somehow inauthentic.

6. Although the government seemed to have been forthcoming with documents during much of the discovery period, counsel have had difficulty getting information from the government about the PPMs as exhibits. After having previously asked the same question on the phone and in writing, McKelvy's counsel, in an

email dated September 7, 2018, asked government counsel, "Please identify which PPMs the government intends to use as trial exhibits."

7. In response, government counsel stated in an email also dated September 7, 2018 - 17 days before trial - that "As I mentioned previously, I am not sure we are going to be exhibiting any of the PPMs. There is really no way to determine which PPMs were the 'final' version and which ones were drafts. I don't think any victim witness saw a PPM."

8. Following up again, defense counsel asked in an email dated September 12, 2018, "Will Kurt Gottschall be prepared to identify all of the PPMs he submitted to the district court in the civil case?"

9. On that same date, government counsel responded, "Not sure; we have not met with him yet."

10. In an apparent effort to clarify previous responses to the defense questions about the PPMs, government counsel stated in an email dated September 13, 2018, that:

The only PPM we intend to introduce at trial at this juncture is the [first] Mantria Financial PPM which was e-mailed to your client in November 2007, a copy of which is attached.

There is an authentication problem with the PPMs because there were multiple "final" versions of each PPM. We talked to Kurt about that issue and I don't think he is going to be able to authenticate a PPM unless it has an SEC bate-stamp on it (as opposed to a Mantria bate-stamp or a USAO bate-stamp). Many do not have that. So if you want to introduce a PPM through one of our witnesses, I would suggest that we get that worked out in advance of trial. Do not assume that it is coming into evidence merely because you found it somewhere in the discovery. We need to properly authenticate it to explain what it is and from where it came.

According to this email, the only PPM which the government now agrees is authentic is the first Mantria Financial PPM, which was issued in November 2007.

11. In an email dated September 14, 2018, defense counsel responded that we could satisfy (as to all ten of the PPMs referenced in Gottschall's declaration) the government's insistence that only "a PPM unless [with] an SEC bates-stamp on it:"

The PPMs we would use as trial exhibits were produced by the SEC and contain the SEC bates stamp, not the US Attorney's bates stamp.

12. Clearly, there was apparent confusion between government counsel and SEC attorney Gottschall, for the government to insist on documents only with "SEC bates-stamp[s]" on them, when on the face of attorney Gottschall's declaration, there were references to the SEC Bates-stamps for (the parts of) each of the ten PPMs attached to his declaration.

13. Without acknowledging that it had mischaracterized the Gottschall declaration as to the SEC's Bates-stamps, government counsel moved to its backup position, "There is no question that Mantria provided those files to the SEC in the civil litigation. The issue we have is that no one has ever seen this version of the PPMs before. If this version was not shown to a victim (or Mr. McKelvy), then we do not believe that they are relevant to this trial."

14. The government's initial position, regarding the appropriate Bates-stamps, is a question of authentication, which McKelvy believes has now been resolved. If these ten PPMs were not authentic, then attorney Gottschall's attaching (parts of) ten PPMs to his declaration is inexplicable. If attorney Gottschall does not identify and authenticate the ten PPMs in his direct testimony, then the defense will ask him to do that on cross. Moreover, if the government, with yet another explanation, asserts that the PPMs and the other two investments which make up the 12 investments central to the indictment and the calculation of the investors' loss, are not authentic, then the defense will file, among others, a motion to dismiss the indictment based on the Due Process clause.

15. The government's back-up argument - that the PPMs are not relevant because they had been shown to an investor victim, or to McKelvy - is unsupportable for several reasons, as set out below in ¶¶ 16-20.

16. First, McKelvy assumes that the government's assertions on this point are more complicated than the government states - the government presumably means that each of its investor witnesses does not recall some aspects of the version of the PPM in which he or she invested. While McKelvy assumes that the government is correct that there were one or more different versions of some of the PPMs, the investigations by the SEC and the FBI should have identified - and presumably did identify - which versions were distributed to the investors; if the government did not identify the versions which were distributed, then that is a failure of proof. Certainly, the government cannot ask that the Court, the jury, or McKelvy believe that the versions of the PPMs which were actually distributed could not be found among the vast numbers of documents produced in the discovery from various sources. Just because an investor witness does not recall particular aspects of the PPM in which he or she invested does not mean that that version of the PPM is irrelevant.

17. Second, the government appears to have made a fundamental mistake - confusing a substantive offense such as a false statement made in violation of 18 U.S.C. § 1001 - with a fraud scheme, such as the wire fraud and securities fraud schemes charged here. For a false statement case, the government would have to show to what individual or entity the statement was actually made, while for a fraud case, the government has to show the individuals or entities who were the intended victims of the fraud scheme.

18. Third, if the government believes that its investigation has been inadequate to identify the particular version of a PPM which was distributed to the victims, then that is not a relevance issue but a failure of proof issue.

19. Fourth, the government would seem to have impeached its above-stated position once again in filing its Trial Memo, Doc. No. 179. In that Memo, the government refers to PPMs (1) "to raise \$5 million in common stock for Mantria dated May 15,

2009," id. at 7-8 (multiple references); (2) "July 2008, Mantria Financial sought to raise \$70 million through a" PPM, id. at 11-12 (multiple references); (3) "[t]he [second] Mantria Financial PPM promised that about \$65 million of [investors] money would be used to make loans to borrowers to buy the land in Tennessee," id. at 12 (multiple references); (4) "in an e-mail dated April 7, 2009, after reviewing a proposed PPM [not otherwise identified], Flannery told Wragg and Knorr ... ," id. at 12; (5) "the Mantria Industries Biochar Receivables Factoring Program," presumably a reference to one of the three Mantria Industries PPMs, id. at 13; (6) "a PPM dated July 31, 2009, to raise \$3.75 million for 25% of the profits on Mantria Place Eternagreen Center," id. at 16-17 (multiple references); (7) "a PPM to investors dated May 1, 2009, Mantria Industries LLC attempted to raise \$12.2 million to build a waste-to-energy plant in Hohenwald, Tennessee," which is a reference to one of the three Mantria Industries PPMs, id. at 18; and (8) "On August 31, 2009, a similar PPM sought to raise another \$20 million for the Hohenwald plant," id. at 18.¹ The government cannot be heard to say that it is permitted to produce the above-mentioned - and perhaps more - PPMs but McKelvy is not permitted to introduce PPMs for his defense (see next paragraph below).

20. Fifth, moreover, because McKelvy's position in this fraud case is antagonistic to that of Wragg - McKelvy will provide substantial evidence that Wragg schemed to provide him with the same fraudulent information he (Wragg) had given to the investors, plus additional fraudulent information, the contents of the various PPMs in Mantria's files - including the ten PPMs identified by attorney Gottschall, as well as Trust Deed Group I

¹ At this point in the Trial Memo, McKelvy stopped counting the references to the PPMs.

and the first Mantria Financial PPM - are relevant to McKelvy's defense.

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 20, 2018

CERTIFICATE OF SERVICE

I hereby certify that I have served by electronic mail a true and correct copy of the foregoing Defendant's Memorandum Re: Authenticity and Relevance of Private Placement Memoranda (PPMs), upon Assistant U.S. Attorneys Robert J. Livermore and Sarah Wolfe:

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 20, 2018