

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

UNITED STATES OF AMERICA	:	
v.	:	CRIM. NO. 15-398
WAYDE MCKELVY	:	

**GOVERNMENT’S RESPONSE TO DEFENDANT WAYDE MCKELVY’S
MEMORANDUM RE: AUTHENTICITY AND RELEVANCE OF PRIVATE
PLACEMENT MEMORANDA**

The United States of America, by its attorneys William M. McSwain, United States Attorney for the Eastern District of Pennsylvania, and Robert J. Livermore and Sarah M. Wolfe, Assistant United States Attorneys, respectfully responds to the defendant’s pleading styled “Memorandum Re: Authenticity and Relevance of Private Placement Memoranda (PPMs).”

I. Facts

The defendant’s memorandum concerns a simple issue regarding the admissibility of evidence. The defendant seeks to introduce into evidence certain PPMs that were attached to SEC attorney Kurt Gottschall’s declaration filed in the civil securities fraud case in Colorado. These documents were provided by Mantria to the SEC during the discovery process in that civil case. Notably, Gottschall never represented to the district court that Mantria had in fact sent these versions of the PPMs to the victims, but merely indicated that Mantria had provided them to the SEC in discovery.

The problem with admitting those PPMS in this criminal case is that they are not necessarily the same PPMs that Mantria provided to the investors and defendant WAYDE MCKELVY as part of the fraud scheme. For example, on November 2, 2007, co-defendant

TROY WRAGG e-mailed defendant WAYDE MCKELVY and others the “final” version of the Mantria Financial PPM dated November 1, 2007. However, Mantria did not provide this PPM to the SEC in civil discovery, but rather provided a different Mantria Financial PPM dated July 1, 2008. In a second example, victim John Marvin received a PPM entitled “Sale of 25% of Profits Interest Mantria - Place CDI Center” dated May 1, 2009, but Mantria did not provide that PPM to the SEC. Rather, Mantria provided a different PPM to the SEC, was entitled “Sale of 25% Profits Interest – Hohenwald Eco-Industrial Center” also dated May 1, 2009. Other victims received other PPMs that had different dates and different information from the PPMs that Mantria provided to the SEC in civil discovery. Thus, the PPMs attached to Gotschall’s declaration are different than those received by the victim investors and/or by the defendant MCKELVY.

Part of the confusion stems from the fact that the offerings involved in this case were not typical securities offerings. In a typical securities offering, there is one final version of the PPM that is reviewed and approved by the attorneys and then sent to investors. Unfortunately, Mantria did not involve typical securities offerings – to the contrary, it involved securities fraud. The government’s evidence at trial will establish that there were multiple versions of the PPMs: some were sent to the investors, some were not; some were sent to the SEC, some were not; some were written and reviewed by Mantria’s attorney, Christopher Flannery, many were not. Thus, the fact that Mantria provided certain PPMs to the SEC in civil discovery does not mean that those PPMs were used to solicit investors. In reality, there were multiple versions of the PPMs, containing different names, dates, and other important information about the terms of the security offering. Therefore, in determining whether a particular PPM is admissible at trial, it is

critical to understand where it came from – whether it be from a victim, from Mantria as provided to the SEC in civil discovery, or from some other source.

II. Discussion

For a document to be introduced into evidence, the document, at a minimum, must be authenticated under F.R.E. 901 and relevant under F.R.E. 401. The party seeking to admit the document – in this instance, the defendant – must establish what the document is and why it is relevant.

The issue here is whether the PPMs defendant seeks to admit are relevant. That determination depends on who received/viewed the document. If a particular PPM was sent to a victim and/or to defendant WAYDE MCKELVY, then that PPM is relevant and admissible. If a particular PPM was not sent to a victim nor to defendant MCKELVY, then that PPM has no relevance to this case and is inadmissible. To admit an irrelevant PPM would mislead the jury, as it may contain different information than what was provided to the victims and/or defendant MCKELVY. The Court and the parties have a legal and ethical obligation not to mislead the jury. Thus, no party should represent or imply that a certain PPM was provided to a victim or to defendant WAYDE MCKELVY if that is not the case.

In sum, if the PPMs provided by Mantria to the SEC in civil discovery were not previously provided to a victim or to defendant MCKELVY, then they have no relevance to this trial and should not be admitted into evidence. The defendant must first establish the proper foundation – authenticity and relevance – before those documents can be admitted into evidence. Otherwise the Court and the parties would be suggesting to the jury that these PPMs were used to solicit investors or inform the defendant when that may not be the case.

III. Conclusion

For these reasons, the defendant must establish the authenticity and relevance of any offered exhibit, including each PPM attached to the Gotschall declaration. If the defendant fails to make that showing for a particular PPM, it is inadmissible.

Respectfully submitted,

WILLIAM M. McSWAIN
United States Attorney

/s/

 ROBERT J. LIVERMORE
 SARAH M. WOLFE
 Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served upon the following:

Walter Batty, Esq.
William Murray, Esq.
Counsel for WAYDE MCKELVY

/s/
ROBERT LIVERMORE
Assistant United States Attorney