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The Honorable Joel H. Slomsky
United States District Court
Eastern District of Pennsylvania

**Re: United States v. Wayde McKelvy**
**15-CR-398-3**
**Government's Supplemental Trial Brief on Certain Defense Witnesses**

Dear Judge Slomsky:

On October 4, 2018, defense counsel reported in Court that they were considering calling Donna Jarock (formerly Donna McKelvy) and John Seanor to testify in the defense case-in-chief. The government provides this legal brief in support of some likely objections to their proposed testimony. The government is not requesting a ruling on these issues now, but believes that the Court would benefit from some case law in advance of these likely government objections to the proposed testimony.

## I. The Witnesses

1. Donna Jarock (formerly Donna McKelvy) is the defendant's ex-wife. During the offense conduct, she worked for the defendant as his office manager. She assisted the victims process the paperwork to invest in Mantria. However, their marriage was estranged and divorce proceedings officially commenced in 2009. In October 2009, Ms. Jarock provided sworn testimony in the SEC civil investigation, the transcript of which totaled 248 pages. Ms. Jarock subsequently provided supplemental information to the SEC. The FBI in Denver and the FBI in Philadelphia both interviewed Ms. Jarock on separate occasions. As a result, the government has a firm understanding of her likely testimony.

2. John Seanor worked for Mantria as the director of systems sales. Seanor testified before the grand jury and has been interviewed by the government on numerous occasions. In summary, Seanor will testify that Mantria never sold any biochar systems because they had no system to sell as the technology had not been perfected. Seanor had virtually no contact with the defendant, Wayde McKelvy.

## II. Discussion

To date, the defense has been introducing evidence at trial, largely unopposed, through cross examination of the government's witnesses. However, cross examination of a government witness and direct examination of a defense witness contain important distinctions rooted in the Constitutional framework. The Sixth Amendment to the Constitution guarantees the right of an accused in a criminal prosecution "to be confronted with the witnesses against him." Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Davis v. Alaska, 415 U.S. 308, 316 (1974). The exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination. Greene v. McElroy, 360 U.S. 474, 496, 79 S.Ct. 1400, 1413, 3 L.Ed.2d 1377 (1959). As a result, trial judges are entrusted with "broad discretion" to allow defense counsel to probe the veracity of the government's witnesses. Davis, 415 U.S. at 316.

In this case, the government admitted various out-of-court statements into evidence including: (a) statements made by an opposing party pursuant to F.R.E. 801(d)(2)(A); (b) statements made by an opposing party's agent or employee pursuant to F.R.E. 801(d)(2)(D); or (c) statements made by a co-conspirator in furtherance of the conspiracy pursuant to F.R.E. 801(d)(2)(E). Consequently, the Court permitted defense counsel broad discretion to probe the veracity of the government's witnesses on cross examination by, inter alia, introducing e-mails and other evidence written by the government's witnesses.

The trial is now moving from the government's case-in-chief to the defendant case-in-chief. In presenting evidence, the defendant axiomatically must comply with the Federal Rules of Evidence. Taylor v. Illinois, 484 U.S. 400, 409 (1988) ("The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence.") (citing United States v. Nixon, 418 U.S. 683, 709 (1974)). Under the Federal Rules of Evidence, all evidence presented must be relevant under F.R.E. 401, the defendant is not permitted to introduce hearsay in violation of F.R.E. 801, and all evidence submitted must be properly authenticated under F.R.E. 901.

## III. The Proposed Testimony

In reviewing the prior testimony of Donna Jarock and John Seanor, the government strains to find any relevant and admissible testimony which would be helpful to the defense. There are many points in these witnesses' prior testimony which are not admissible.

(1) The state of mind of Donna Jarock and/or John Seanor is not relevant to this case. Wayde McKelvy is charged with making false statements and material omissions to fraudulently induce the victims to invest in Mantria. Whether Donna Jarock or John Seanor knew or believed that Mantria was a Ponzi scheme or a legitimate business during their employment with Mantria does not shed any light on this issue. Under the law, evidence of their state of mind is not admissible. See United States v. Furst, 886 F.2d 558, 576 (3d Cir. 1989); see also, Knit With v. Knitting Fever, Inc., 742 F. Supp. 2d 568, 582 (E.D. Pa. 2010) (discussing the state of mind

exception to the hearsay rule and holding that "the declarant's state of mind must be relevant to an issue in the case").

The facts of this case are very similar to the facts in Furst. In Furst, the defendant was charged with embezzlement and related offenses. The defendant tried to elicit the state of mind of his assistant/office manager in order to suggest that the defendant also did not have the requisite state of mind to commit the charged offenses. 886 F.2d at 576. On appeal, the Court affirmed the trial court ruling excluding such testimony by finding "we do not comprehend what [the assistant's] state of mind had to do with that of Furst for a person acting under the direction of another might not have the same information as his supervisor." Id.

This Court should apply the same analysis here as the Third Circuit applied in Furst. As their trial testimony will show, the information available to Donna Jarock and John Seanor was vastly different than the information available to the defendant, Wayde McKelvy. The state of mind, knowledge, and intent of these witnesses is irrelevant. During trial, the government will object to any such testimony offered as to Donna Jarock and/or John Seanor's state of mind.

(2) Neither Donna Jarock nor John Seaner can testify to the state of mind of Wayde McKelvy. The government has objected and will contain to object to any questions of this nature and the government urges the Court to continue to sustain those objections. See United States v. Polishan, 336 F.3d 234 (3d Cir. 2003); United States v. Anderskow, 88 F.3d 245, 249 (3d Cir. 1996).

(3) Any statements, either written or oral, made by Troy Wragg or Amanda Knorr to Donna Jarock and/or John Seanor are hearsay and inadmissible. The government was able to offer statements made by Troy Wragg and Amanda Knorr against Wayde McKelvy pursuant to FRE 801(d)(2)(E). That evidentiary rule is not available to the defendant. "[A] statement by a coconspirator of a party during the course and in furtherance of the conspiracy" is one type of "[a]dmission by party-opponent" defined as nonhearsay, but only if "offered against" the party. Fed.R.Evid. 801(d)(2)(E). United States v. Kapp, 781 F.2d 1008, 1014 (3d Cir.1986). The statement of a co-conspirator offered by another co-conspirator is not admissible. United States v. Milstein, 401 F.3d 53, 73 (2d Cir. 2005).

(4) Any statements, either written or oral, made by Donna Jarock and/or John Seanor to Troy Wragg and Amanda Knorr are equally hearsay, irrelevant, and inadmissible under the same legal precedent.

(5) Any statements made by Wayde McKelvy to Donna Jarock and/or John Seanor are also hearsay. As the Court has previously ruled in connection with McKelvy's SEC statements, the defendant's self-serving out-of-court statements are inadmissible. See United States v. Kapp, 781 F.2d 1008 (3d Cir. 1986) (affirming district court's ruling that tape recording of a conversation between a codefendant and government informant that defendant considered exculpatory on the issue of his knowledge of illegality was inadmissible because it was not offered "against a party" as required by Rule 801(d)(2)). See also United States v. McDaniel,

398 F.3d 540, 545 (6th Cir. 2005) ("Rule 802(d)(2) [ ... ] does not extend to a party's attempt to introduce his or her own statements through the testimony of other witnesses" . . . to hold otherwise would allow defendant to do "an end run around the adversarial process by, in effect, testifying without swearing an oath, facing cross examination, or being subjected to first hand scrutiny by the jury").

The defendant has previously tried to perform an "end run" around this hearsay rule by arguing that his statements should be admitted to show his state of mind. However, the state of mind exception to the hearsay rule is limited. As the Supreme Court has previously stated, "[t]here are times when a state of mind, if relevant, may be proved by contemporaneous declarations of feeling or intent." Shepard v. United States, 290 U.S. 96, 104 (1933). However, the scope of this exception must be limited to prevent it from devouring the rule. United States v. Hernandez, 176 F.3d 719, 726–27 (3d Cir. 1999). "Statements that are considered under . . . the 'state of mind' exception, cannot be offered to prove the truth of the underlying facts asserted." Stelwagon Mfg. Co. v. Tarmac Roofing Sys., Inc., 63 F.3d 1267, 1274 (3d Cir.1995); Blackburn v. Aetna Freight Lines, Inc., 368 F.2d 345, 348 (3d Cir.1966), (holding "[i]t is too well settled to require discussion that a declaration of a state of mind or intention is admissible to prove that the declarant actually had such intention.")

Three requirements must be satisfied for a statement to be admissible under the state of mind exception to the hearsay rule: (1) the statement must be contemporaneous with the mental state sought to be shown; (2) there must be no circumstances suggesting a motive for the declarant to misrepresent her thoughts; and (3) the declarant's state of mind must be relevant to an issue in the case. Knit With v. Knitting Fever, Inc., 742 F. Supp. 2d 568, 582 (E.D. Pa. 2010) (citing Phillips v. Potter, No. CIV.A.07–815, 2009 WL 3271238, at *3 (W.D.Pa. Oct. 9, 2009) and 5 Jack A. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence § 803.05 (2007)).

In this case, the defendant cannot meet these requirements for any statements he made to Donna Jarock and/or John Seanor. McKelvy is clearly offering these statements to prove the truth of the underlying facts asserted, otherwise, they would be irrelevant. Moreover, McKelvy had every motivation to hide his criminal conduct, his criminal knowledge, and his criminal motivation from his soon-to-be ex-wife and a business associate with whom he had very little dealings. These out-of-court statements are the epitome of hearsay and should be excluded.

## III. Conclusion

As noted above, the government does not see any admissible testimony from Donna Jarock and/or John Seanor which could conceivable be helpful to the defense. The government is not asking for a ruling on the matter at this time, but the government will rely on the legal analysis set forth above if the defendant attempts to offer inadmissible evidence.

Sincerely,

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/s/
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cc: Walter Batty, Esq.
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