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	:	

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR A NEW TRIAL PURSUANT TO FED.R.CRIM.P. 33

Defendant Wayde McKelvy, by his attorneys, Walter S. Batty, Jr. and William J. Murray, Jr., submits this Supplemental Memorandum in Support of Defendant's Motion for a New Trial, Pursuant to Fed.R.Crim.P. 33.

I. SUMMARY OF SELECTED EVIDENCE OF TRIAL.[1]

A. Investor witnesses.

1. Dee Holl. Holl testified that she invested her life savings into Mantria investments and that she calculated her losses at about $170,000. Tr. 9/25/18 at 142. She had some contacts with Wragg, more with McKelvy. McKelvy urged her to obtain credit cards and other forms of credit, so that she could use the proceeds to invest at higher rates of return in Mantria investments. Id. at 66. McKelvy introduced Holl to Brooke Faine, over the phone, and Faine told her that the businesses being conducted by Mantria were profitable and that the values of these investments were secured by the value of Mantria's land in Tennessee. Id. at 67-68, 88, 90.

Holl said, "Faine was going to open … credit cards in my name … to have those credit card companies issue me checks so that I could invest that in Wayde's opportunities." Tr. 9/25/18 at 74.

[1] For reasons explained below, McKelvy will not have a separate section of this summary on Flannery's testimony, but will rather incorporate some of it into our arguments.

Holl did not explain the process, but Faine apparently did what she was told he could do – open credit cards in her name.[2]

McKelvy encouraged Holl to start a business and to open credit cards in the name of business. Tr. 9/25/18 at 75. She defaulted on a debt of $30,000 which she owed on the credit cards. Id. at 86. She did not identify any FDIC insured banks associated with these credit cards. Holl testified that she lost her job, lost her entire savings, and lost her ability to repay the credit card debt. Id. at 86.

Holl stated that she understood that a commission was paid to Speed of Wealth ("SOW") and that she understood that SOW was operated by Wayde McKelvy and Donna. Tr. 9/26/18 at 49-50. Holl further testified that even though she participated in approximately 50 webinars, she never asked Wayde how much of a commission he received. Id. at 50. She did not know whether McKelvy was repeating, in good faith, information he had received from Wragg or anyone else within Mantria. Id. at 48.

2. John Marvin. Marvin invested approximately $1 million in Mantria. Tr. 9/26/18 at 90, 99. Marvin had heard that the SEC had investigated the TRACS investment club; McKelvy told him that he had been cleared by the SEC. Id. at 98. He understood that Mantria investments were secured by property in Tennessee and that McKelvy was receiving some kind of commission. Id. at 94, 101-02, 104. When asked if a 12.5% seemed reasonable, Marvin said that that was "pretty high." Id. at 124. Marvin testified that McKelvy was accessible and he felt he could ask McKelvy questions about the investments, but Marvin never asked McKelvy about the commission payments. Id. at 113-14.

Marvin stated that he does not know what Wragg was telling McKelvy. Tr. 9/26/18 at 105-07, 123-24. After Marvin heard about the SEC investigation of Mantria, he was assured by McKelvy on the phone that everything would be fine. Id. at 99.

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[2] Although McKelvy is not familiar with a procedure by which an individual opens credit cards in the name of another person, McKelvy accepts Holl's account as an accurate one.

3. Phil Wahl. Wahl testified that he invested a total of approximately $300,000 in Mantria. 9/26/18 at 154. He used proceeds from credit cards to invest in Mantria. Id. at 166-67. Wahl said that he has paid off some of the credit cards and is in the process of paying off the debt on others. Id. at 165-66. He identified the FDIC-insured banks which had issued the credit cards,[3] but did not state or imply that he had defaulted or was close to defaulting on any of these cards. Id. at 167-70.

Wahl stated that he was aware of commission payments to McKelvy, but he never questioned McKelvy about these payments. Tr. 9/26/18 at 193-94. Wahl stated that he would have wanted to know, before he invested, the percentage rate which was paid to McKelvy in commissions. Id.at 163-64.

Wahl stated that he believed what Amanda Knorr had told investors, including himself, about green energy technology. Tr. 9/26/18 at 178-79. He understood from Wragg that the value of the land – which was being used as collateral, was substantial and was supported by appraisals. Id. at 195. He relied on what Wragg said about the land's substantial value. Id. at 195.

4. Charles Carty. In November 2008, Carty attended a seminar in Denver on investments, where Wragg, Wayde McKelvy, Donna McKelvy, and Amanda spoke. Tr. 9/28/18 at 145. At this seminar, Wragg and McKelvy advocated raising money from retirement accounts, credit cards, and HELOC. Id. at 146-47. All investments were to be secured by raw land in Tennessee. Id. at 150. At this seminar, he liked what he learned about the value of the land and about biochar. Id at 154. With the investments being secured by land, he believed that he could not go wrong. Id. at 155.

Of the $40,000 he invested in Mantria, $25,000 came from a HELOC with the federally-insured Minnequin Credit Union. Tr. 9/28/18 at 157. From his Mantria investment, he received $6,668 in interest, on which he relied to pay back the HELOC. Id. at 160-61. To come up with the $40,000 investment, he also took cash

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[3] The names of these banks were: Comerica Bank, Chase, CitiBank, and Barclays Bank. McKelvy concedes that these banks were federally-insured during 2007-09.

advances from a Minnequin credit card. Id. After his Mantria investments failed, Carty paid back $500 a month on the HELOC; he then refinanced his house and rolled the HELOC into the refinancing. Id. at 162. Carty said that he paid off the HELOC.

5. George Anderson. George Anderson (who is unrelated to J.P. Anderson, the receiver) attended two SOW seminars and participated in several webinars. Tr. 9/28/18 at 172. He heard McKelvy speak at the first seminar. Id. at 172. McKelvy spoke about a range of topics, including the advantages of arbitrage – using borrowed money to make investments at higher rates of return. Id. at 173-74. McKelvy also mentioned Mantria and its valuable real estate. Id. at 173. McKelvy did not mention whether he was aware of any problems with the land. Id. at 174.

Anderson did not meet Wragg at any of the seminars, but he heard him present at online webinars, mostly about land opportunities in Tennessee and about the safety of the investments' being secured by land. Tr. 9/28/18 at 176-77. Anderson stated that, based on McKelvy's and Wragg's presentations, he invested $75,000 in Mantria. Id. at 178. Of this $75,000, some drawn on a HELOC from Wells Fargo.[4] Id. at 182. Anderson said that he refinanced his house and covered his HELOC that way. Id. at 182. Anderson never stated nor implied that he had defaulted or was close to defaulting on any loan. Id. at 182.

Anderson read to the jury from an email which McKelvy had sent to him and other investors, G-GA5. Tr. 9/28/18 at 187-88. Anderson read that one of the Mantria investments earned a steady 17% return. Id. at 188. He also read from Mantria marketing materials that Mantria had three different communities under development at that time. Id. Moreover, he read from another section of these materials that Mantria Place was located in a beautiful area, close to Chattanooga, and that Mantria Place would include a golf course and a restaurant with a chef from the Michelin guide book. Id. at 188-90.

[4] McKelvy concedes that Wells Fargo was federally-insured during 2007-09.

Anderson quoted a SOW PowerPoint, G-GA6, which states, "Guaranteed Payout Regardless of Profitability."[5] Tr. 9/28/18 at 191-92. Anderson did not mention this statement as being one of the several representations he had focused on. Id. at 173-74.

Anderson reviewed an email from McKelvy, G-GA9, in which McKelvy stated, "I have built a multimillion dollar business starting with one credit and with a credit limit of $30,000 only four years ago."[6] Tr. 9/28/18 at 194. In addition, Anderson reviewed an email from McKelvy, G-GA21, which email had been sent approximately nine days after McKelvy's SEC deposition on October 22, 2009, in which McKelvy stated that, "It's not too late for waste industry sales." Id. at 197-98.

Finally, Anderson said that he had signed a "Very Important Points" ("VIP") form given to him by McKelvy's assistant Donna McKelvy, in which he acknowledged that a commission would be paid to a SOW "specialist" and that he understood that McKelvy would receive a commission. Tr. 9/28/18 at 206-07. Anderson also said that he understood that McKelvy represented that the arrangement was that the commission would not reduce the amount of his (Anderson's) investment. Id. at 207. Anderson also said that the participated in several webinars after he became aware that McKelvy would receive a commission, but that he never asked McKelvy any questions about the commission. Id. at 208.

6. Bruce Kalish. Kalish served for 24 years in the Air Force, working in accounting and finance positions, and has been doing military contracting since 2005. Tr. 10/1/18 at 80-81. Kalish's initial impression of McKelvy was that he was a well-studied "old boy" for people with extra money for retirement. Id. at 83-84. McKelvy recommended that investors utilize available equity from a variety of sources, including equity in your home or an IRA and, in that way, "being your own bank." Id. at 84.

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[5] McKelvy denies that he was the author of this statement, although he concedes that much of the language in this PowerPoint is his jargon, "Be the Banker," "Plug in Steroids."

[6] The government never introduced any evidence to show that McKelvy's assertion on this point was false.

In August 2009, Kalish went on bus tours of Mantria locations in Tennessee with Wragg and Knorr. Tr. 10/1/18 at 90-91. He saw that some of the land had been developed and was told that the first two houses were being built. Id. at 91. On that trip, Kalish also went to the "grand opening" of the biochar plant in Dunlap. Id. He estimated that approximately 250-300 people attended. Id. at 91-92. He was told by Wragg and Knorr that this plant was not operational yet, but that he should "just stay with us," because "we've got orders" and "we're almost there." Id. Although the green energy technology was unproven, he was told it was "coming along" and was impressed. Id. at 107.

Kalish toured the Carbon Diversion, Inc. ("CDI") facility in Hawaii during the summer of 2009. During the tour, Kalish saw a large pile of tires; he understood that the tries could be converted into biochar. Tr. 10/1/18 at 99.

Kalish said that he decided to purchase investments because he was told that the sales lots were collateral for the investments, which he thought that was a good idea. Tr. 10/1/18 at 90. He also had been told that the value of the collateral was based on appraisals.

Kalish said that no one told him that his investment in Mantria would be used to pay off prior investors and that he would not have invested if he had known.[7] Tr. 10/1/18 at 104-05. Kalish also said that no one had told him that McKelvy was getting a 12.5% commission on the investments, but he did not say whether he would have invested if he had known this. Id. at 104. Kalish presumed McKelvy was receiving commission payments. Id. at 112. Kalish attended several seminars/presentations in person, many GoToMeetings and went to McKelvy's office between 15 and 30 times, but he never questioned McKelvy about the commission payments. Id. at 114-16. Kalish did say that it concerned him that he needed money to send his three boys to college, while McKelvy's daughter had received a new Honda CR-V and seemed to have a lot of spending money. Id. at 104.

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[7] Based on the description by Kurt Gottschall of a Ponzi scheme, this omission, as argued below, was not a material one.

7. Carla Madrid. Madrid graduated from the University of Missouri with a degree in accounting. Tr. 10/2/18 at 180. She worked for over 20 years in the accounting field. Id at 179-80. Madrid stated that she had invested about $290,000 in Mantria, of which she lost about $260,000 to $270,000. Id at 203.

Madrid identified G-CM19, as an email from McKelvy dated October 27, 2009, in which he said that he was looking to find a new direction for SOW and that he did not want to be "under the microscope." Tr. 10/2/18 at 198. She said that the email said that "unpleasant surprises have popped up," without any specific explanation of what he meant. Id. at 198-99.

Madrid identified G-CM6 as an email from McKelvy dated November 3, 2009, pitching green energy. Tr. 10/2/18 at 200. This email stated that Mantria would be able to produce much more energy than first projected. Id. at 200-01. She also learned in November that the SEC was investigating Mantria – her reaction was that she was both shocked and confused. Id. at 201-02.

Madrid stated that while she knew that McKelvy was receiving commissions, McKelvy never told her that he was getting a 12.5% commission and, if he had, she would not have invested.[8] Tr. 10/2/18 at 202-03. Madrid acknowledged that she attended several live presentations and webinars during which McKelvy took questions; Madrid never asked McKelvy about his commissions. Id. at 224.

Madrid read a document titled Mantria Investor FAQs 12/05/09, G-CMN21, which was prepared in part by Chris Flannery and which appears to have been provided to her by Wragg/Mantria[9] two or three weeks after the SEC had notified Wragg, Knorr, and McKelvy that they were under investigation. The FAQ provides that Mantria had sufficient collateral in the land to cover the investments. Tr. 10/2/18 at 234-36.

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[8] Madrid acknowledged that, if her investment in the Mantria 25% Sale of Profits Interest offering had achieved the predicted returns, she would have made a lot of money. Id. at 237-38.

[9] G-CM21 contains a handwritten note "From Troy Wragg" in the upper left-hand corner. Tr. 10/2/18 at 228.

8. Joe Piccione. Piccione works as a financial analyst for the U.S. attorney's office, having worked for the IRS for 35 years, 25 of them as a revenue agent. In his capacity as a revenue agent, he worked on criminal investigations with the FBI. He identified G-JP1 as his chart showing how much money had been invested in Mantria. His chart, which included a listing of the names of Mantria's offerings, showed a total of $54.5 million. Tr. 10/3/18 at 219-25, 229.

Piccione stated that the financial records he reviewed covered only 2008 and 2009. For those years, he found no money going into Mantria from sales of biochar, systems, or real estate. He calculated that McKelvy received $6,246,000. He also introduced copies of FDIC insurance certificates for Citibank, Citizens Bank, JPMorgan Chase, Chase Bank, Barclays Bank and Wells Fargo Bank. Tr. 10/3/18 at 225-27.

On cross, Piccione agreed that part of his work with the IRS concerned individuals who were attempting to hide ill-gotten gains by not reporting them on their federal tax returns. He did not recall seeing McKelvy's 2008 tax return in the discovery. When he was shown D-SG3, which showed income, as gross receipts, in the amount of $ 3,292,822 on what appears to be a Schedule C. Tr. 10/3/18 at 229-41.

B. Real estate witnesses.

1. Dr. George Dixson. Dr. Dixson stated that Wragg had financial problems and was unable to pay him the $1.6 million he owed him for the land in Tennessee. Tr. 9/26/18 at 77. Dixson had no interactions with McKelvy. Id. at 74. He never told McKelvy about any issues with the land, such as the lack of potable water and the fact that land had been used as an artillery range. Id. at 75. Dixson did not know what representations Wragg may have made to McKelvy about the land. Id.

2. Kelly Dishman. Dishman served as the Mayor of Van Buren County from 1998-2002 and 2006-2010. Tr. 9/26/18 at 126. He was familiar with Wragg and Mantria because some of Mantria's land was located in Van Buren County. To his knowledge, there was no potable water on Mantria's land. Id. at 129. Even very deep wells would not produce water suitable for residences. A developer would have to spend $30-$35 million to bring in

potable water, by means of a water purification plant, but that there was no federal funding for that. Id. He said that there had been a military artillery range in parts of Mantria's land and that there was still dangerous ordnance underground. Id. at 131. Dishman stated that he had never met or talked with McKelvy about the water issues and had not told him that part of the land had been used as an artillery range. Id. at 143, 145-46.

Dishman testified that Hawk's Bluff, which was close to the Mantria lots, went "belly up" due to problems with the water, after trying to sell lots at $39,000 each. Tr. 9/26/18 at 136. Dishman stated that he was told by the Register of Deeds that there were numerous transfers in the Mantria areas, with prices in the range of $100,000 per lot, which prices were "off board," because there was no potable water there. Id. at 141-42.

3. Tisa Dixson. Dixson, Wragg's sister and Dr. Dixson's former daughter-in-law, said that Wragg had put her in charge of the sales of Mantria's subdivisions sometime in 2007. Wragg had grand plans to develop the land in Mantria's subdivisions, but these plans were never realized because there was not enough money for supplying water or electricity. Tr. 9/27/18 at 11-12.

Dixson tried to get people interested in buying the land. Tr. 9/27/18 at 14. In 2008, after MFL opened, she gave tours of the subdivisions to potential buyers, but then interest trailed off. Id. Some people bought sight unseen. Id. She described the buyer incentives once MFL opened, which resulted in a boost in sale prices, from $50,000 per acre up to as much as $200,000. Id. at 20. Even though Dixson supervised marketing Mantria's sales lots, she said that the prices they were getting, once MFL was a part of the package, were "outrageous," in that the "going rate" for the raw land was $500-$1,000 per acre. Tr. 9/27/18 at 20. For her sales efforts, she did not receive commissions but did get bonuses from Wragg. Id. at 59.

Dixson did not attribute to McKelvy what she and her brother knew of the problems with the land, noted above. To the contrary, she stated that in conference calls with McKelvy and Wragg to which she was a party, Wragg never talked about problems with the land. Tr. 9/27/18 at 38.

Although she did not recall seeing McKelvy at the Mantria developments in Tennessee, she said that, as part of the sales efforts there, Dixson had six salespeople working on her team. Tr. 9/27/18 at 54,59. She said that she conducted tours for potential buyers, by taking people to areas under construction, who would see bulldozers, dump trucks, stakes on lots, and trenches for utilities along gravel roads.[10] Id. at 56-59.

Dixson said that Knorr was in charge of MFL, to make it appear that it was a woman-owned business, but Dixson was not aware of any special benefits of this. Tr. 9/27/18 at 60. Finally, Dixson confirmed that in an interview by an FBI agent, she (Dixson) had said that Wragg was "a habitual liar" and that he tried to make things look better than they were. Id. at 53-54.

4. Carl Scott. The testimony of Carl Scott, the Director of Licensing for the Tennessee Department of Financial Institutions ("TDFI"), is summarized in the Rule 29 Supplemental Memo at 5-7. In the (partial) transcript of his testimony, Scott did not mention McKelvy; moreover, we proffer that, in the notes of both co-counsel, there is no mention of McKelvy.

5. John Paul Anderson. Anderson was the receiver appointed by the U.S. District Court in Colorado, as a part of the bankruptcy proceedings there. Tr. 9/27/18 at 124. Anderson testified that he had hired an appraiser in Tennessee, who advised that the fair market value in 2010 of some of Mantria's properties was approximately $22,000 per acre and that for other of these properties, they were worth $15,000 per acre. Id. at 162-63.

Anderson stated that, as he proceeded with the receivership, he learned that the Mantria subdivisions were unmarketable, despite the appraisals. Tr. 9/27/18 at 141-43. He was, however, able to raise $6 million for the investors. He was able, among other things, to sell the Dunlap plant, including the specialized machinery, for a net gain of $175,000. Id. at 134.

C. SEC attorney Kurt Gottschall. As to McKelvy's Retirement TRACS investment clubs and related entities, which were the subject of an SEC formal investigation in 2007, Gottschall said

[10] This was consistent with Flannery's and McKelvy's testimony about what they saw on their guided tours of the developments.

that he supervised this investigation; that among the SEC's concerns were that the investors had "pooled" investor money; that one of the investments had "questionable collectability;" that McKelvy "was making certain [high-risk] investment recommendations;" that he might have been involved in "securities offerings which should have been registered under the federal securities laws," noting that the SEC does not attempt to discipline those who make "foolish investment decision[s];" and that McKelvy had not registered as a broker/dealer. Tr. 9/27/18 at 168, 171-72, 173, 175.

At the conclusion of its formal investigation of McKelvy and his investment clubs in 2008, the SEC decided to take no action. Tr. 9/27/18 at 180. The SEC did, however, refer this matter to the Colorado State Securities Regulator, which is called the Colorado Division of Securities.[11] Id. The SEC sent McKelvy a "termination letter," G-KG3. Id. at 181. An additional multi-page document that was sent with the "termination letter" (G-KG4), which was a statement that any termination "will be purely discretionary … [and] must in no way be construed as indicating that the party has been exonerated or that no action may ultimately result from the staff's investigation of that particular matter." Id.

In conjunction with the SEC's formal investigation, Gottschall stated that the SEC "typically … [require individuals who] sell securities … [to] either be … a broker" or to be affiliated with a broker, as part of its investor protection mission. Tr. 9/27/18 at 172-73.

When discussing the registration requirement, Gottschall explained, as to the SEC's formal investigation of McKelvy's investment clubs:

> If the SEC [enforcement division] decided … [that someone under review] likely should have been registered, we would make a recommendation to the SEC to bring an enforcement case against them.

[11] McKelvy infers from this that the state agency sent agents to attend McKelvy's seminars on May 7 and May 21, 2009.

Tr. 9/28/18 at 103.

Gottschall stated that, during the latter part of 2009, the SEC opened its investigation of Mantria, Wragg, Knorr, McKelvy, SOW, and Donna McKelvy. Tr. 9/27/18 at 185-86, 189. He stated that "arbitrage" is known in SEC nomenclature as trading on margin, which is risky, because gains and losses can both be amplified. Id. at 191. Also, he agreed, in response to a leading question from the government, that Mantria's PPMs were "securities." Id. at 193.

Gottschall provided his definition of a Ponzi scheme. Tr. 9/27/18 at 198-99. The SEC concluded that the Mantria investments constituted a Ponzi scheme because (1) new investor funds were used to pay old investors; (2) while Mantria was representing to the investors that it had been extremely profitable, in fact, they had been running pronounced deficits, so its investors were relying on misleading information; and (3) unlike the start-up days for Apple Computer, Mantria did not disclose that it was not profitable to its investors. Id.

Gottschall related that the SEC, based on its investigation, filed an emergency lawsuit in federal court in Colorado, seeking and obtaining a TRO to, among other things, freeze the bank accounts of the various defendants and order them to stop raising funds from investors. Tr. 9/27/18 at 200-01. In addition, the SEC sought an accounting of the personal assets of the individual defendants, including McKelvy. Id. at 202.

Gottschall identified and read extensively – perhaps every word – from G-KG1, KG29, and KG2, McKelvy's affidavits on his finances. Tr. 9/28/18 at 24-29, 31-37, 39-44 (a total of 16 pages). In the three affidavits describing his financial condition, McKelvy said that he had spent, over the years 2008-09, millions of dollars in cash on women (he sometimes referred to them as "escorts"), binge drinking, partying, and gambling in Denver, Los Angeles, Las Vegas, and Dallas. Id. at 28-29. He detailed these references by referring to his bank statements. Id. 30. McKelvy also stated that his lavish spending occurred because he wanted to be "a big shot" and that this spending reflected a "pattern of stupidity by me." Id. at 29, 37.

Gottschall testified that the SEC's goal was to determine what McKelvy had done with investors' money.[12] Tr. 9/28/18 at 24. Without saying that McKelvy had been candid in his admissions in his affidavits, Gottschall stated that McKelvy had "provided substantial information" concerning his spending. Id. at 81. He did not know of any false statements made by McKelvy in his statement of assets in the affidavits. Id. at 136.

Gottschall said that the SEC's Rule D requires filing forms for some exemptions from various statutory requirements concerning offerings. Tr. 9/28/18 at 122. Gottschall also stated that the issuer – in this case either Mantria or the Mantria entity involved, i.e., MFL or MI - was required to file a Form D with the SEC for each offering. Id. at 125-28.

Gottschall reviewed D-231 and testified that the language "a commission is paid to the Speed of Wealth Specialist" informed the investor that SOW was receiving a commission in connection with the investment. Tr. 9/28/18 at 140-41.

D. Mantria witnesses.

1. Amanda Knorr. Direct and re-direct.

a. Background. Knorr and Wragg were undergraduates at Temple University. She graduated from Temple in 2006 with a degree in biological anthropology. Wragg graduated from Temple in 2005. Knorr and Wragg dated while they were at Temple and later lived together. Tr. 10/1/18 at 126-28.

Wragg started Mantria in 2005 and, on behalf of Mantria, purchased land in Tennessee from his sister's father-in-law, Dr. George Dixson. Wragg's purchase of the land was "contingent" in that he had to give it back to Dr. Dixson if it did not sell. Another aspect of the agreement with Dr. Dixson was that Wragg would pay him $4,000 for each plot sold. Tr. 10/1/18 at 128-30.

Knorr started working on developing Mantria's land in Tennessee in August 2006. Knorr visited the Mantria developments on

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[12] In its complaint against Mantria and the four individual defendants, including McKelvy, the SEC did not refer to any evidence that McKelvy knew that his commissions were, in fact, investor proceeds, rather than company profits.

several occasions. Wragg created several subdivisions from this land and Knorr started setting up work in these subdivisions in 2006. The land was wooded and had no water or electricity. Wragg planned to have water pumped up the side of the mountain where the developments were located. Later, Wragg was unable to raise the money to bring the necessary water or electricity into the developments. Tr. 10/1/18 at 130-35.

In addition to bringing in such basics as water and electricity, Wragg planned to incorporate such "amenities" to the Mantria communities as stores, an amusement park, and a golf course. But he was unable to fulfill those plans because he did not have enough money. Once the financial crisis came in 2007, they were "pretty much" not able to sell any lots. Tr. 10/1/18 at 135-36.

Because of the downturn in the real estate market, Wragg discussed with Knorr the possibility that Mantria might have to go into bankruptcy. Knorr advised Wragg to "go bankrupt and … do something different." But Wragg decided that "he wouldn't let it fail." Tr. 10/1/18 at 136-37.

Before Wragg met with McKelvy, in the second half of 2007, Mantria was making money from land sales. After these sales declined, Wragg failed to find money through "financial investment places" and friends. Tr. 10/1/18 at 159-60.

At Mantria, Wragg was the Chief Executive Officer ("CEO"), "the boss," and she was the Chief Operating Officer ("COO"), the "number-two" executive. Tr. 10/1/18 at 70.

b. Wragg solicited McKelvy's aid. Wragg was put in touch with McKelvy through a mutual contact, Jeff Wallin. Wragg solicited McKelvy's help in finding investors for Mantria. Knorr testified (twice) that she believed that Mantria would go bankrupt without McKelvy. Tr. 10/1/18 at 165; Tr. 10/2/18 at 17. Knorr and Wragg had heard that McKelvy had a group of investors with whom he was working, but that these prior "investments weren't doing well." As she understood it, Wragg's offer to McKelvy was that, if he brought his group to invest in Mantria, Wragg "would make them whole." Tr. 10/1/18 at 159-65.

c. Dealings between Wragg and McKelvy; 12.5% commission; SEC broker-dealer license. Knorr stated that Wragg told her that

McKelvy was "his mentor" because he (McKelvy) was older – Wragg was about 25 and McKelvy was in his late 40s – and that they sometimes spent "hours" on the phone with each other. She knew that Mantria paid McKelvy a 12.5% commission on funds he raised and "understood" that McKelvy wanted a higher fee. Tr. 10/1/18 at 163-68; Tr. 10/2/18 at 10-11, 16-17. Knorr said that she told Wragg that the 12.5% rate "was too steep," but Wragg had said that he needed to keep the rate where it was because Mantria would go bankrupt without McKelvy and his investors. Id. at 165.

Knorr identified G-AK10, an email from Wragg to McKelvy and Knorr, dated May 15, 2008, concerning Wragg's request that McKelvy get a license to market securities. Wragg advised McKelvy that he could take a series 39 test, which was easier than a Series 24 exam. Tr. 10/2/18 at 11-14.

d. Mantria Financial. Wragg and Knorr created MFL, to "issu[e] mortgages for people to buy the land in Tennessee." She had to fill out an application to get approval from officials in Tennessee to operate MFL. She identified G-AK16 as such an application and stated that she had signed this (third) application. Tr. 10/1/18 at 137-40, 145. Knorr identified G-AK14, an announcement in an on-line publication dated March 27, 2008, which stated that MFL was the "world's first green mortgage bank"[13] and stated that MFL had obtained a "State Regulated Lending License in Tennessee."[14] Tr. 10/1/18 at 143-40.

Knorr identified G-AK15, a screen shot of MFL's website which stated that financing was available for all purchasers of Mantria lots and that "Getting a home loan couldn't be easier." Tr. 10/1/18 at 144-45.

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[13] Although not referred to during the trial, this announcement included a statement that MFL "is a minority-owned business, with 51% controlled by … Knorr." G-AK14.

[14] As noted in McKelvy's Supp. Rule 29 Memo at 5-7, TDFI's Carl Scott stated that MFL's first application for a license as a financial institution was submitted on November 13, 2007 and that this application was granted, with the issuance of such a license on February 5, 2008. This license was in effect until June 30, 2008. Although no image of the second application was in evidence, it was in effect July 1, 2008 – June 30, 2009.

e. Appraisals. Knorr said that Wragg selected appraiser Ray Bryant to value Mantria's land. She also stated that Wragg "picked the value of the land," that the appraiser "[b]asically signed off on it," and that the appraisals were "ginned up." Tr. 10/1/18 at 145-46; Tr. 10/3/18 at 108.

f. Buyer incentive programs. Knorr stated that there were buyer incentives in two slightly different Mantria programs, the Mantria "3.0" program, attached to her email dated November 6, 2007, G-AK6, and the Mantria "Pricing Solution" program, G-AK8. Tr. 10/1/18 at 146. As to the 3.0 program,[15] it offered:

-- Credit of two years of mortgage payments.

-- Buyers' bonus (cash back) of 5%.

-- No money down, no closing costs or property tax payments for two years.

The 3.0 program meant that the "buyer" paid nothing and got a bonus of cash back. Knorr stated that the Pricing Solution program was similar, except that it did not have the 5% buyer's bonus. Tr. 10/1/18 at 148-58; Tr. 10/2/18 at 6-10.

When asked if Rink had told her that Mantria was losing money on every land sale, Knorr answered, "Yes." Tr. 10/3/18 at 9. When asked what she did with that information, she replied that, "There wasn't much I could do." Id. When Knorr challenged Wragg on this point, he responded that "eventually [these transactions] would make money."[16] Tr. 10/1/18 at 147.

Knorr said that Wragg had advised McKelvy about the 3.0 program in an email dated November 6, 2007. G-AK6. The 3.0 and Pricing Solution programs were offered first to the investors and to Mantria employees. Some of the "buyers" included SOW investors. Tr. 10/1/18 at 148-58.

g. PPMs. Wragg drafted and Flannery reviewed the Mantria PPMs. Others reviewed the PPMs, but Wragg had the last say. Wragg

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[15] See also Mantria Financial PPM 11/1/07, D-4, at 191-94.

[16] When McKelvy testified, he said that he realized that the buyer incentive programs [Bill – Page cite?] Wragg's answer was similar to the response he made to Knorr, as set out above.

sent out the PPMs to the investors and posted them on the Mantria website. Tr. 10/2/18 at 19-20.

h. Shift to green energy. Knorr stated that when "the real estate … market completely crashed and we weren't selling any lots," Wragg decided to switch Mantria's efforts to focus on green energy. Initially, Wragg and Knorr decided to invest a couple hundred thousand dollars in Carbon Diversion, Inc. ("CDI"), a green energy technology company which made "biochar" (a specialized form of carbon). CDI was located in Hawaii and was operated by Michael Lurvey. Tr. 10/2/18 at 27-29.

At first, Wragg and Knorr wanted Lurvey to build a green energy system for Mantria, but Lurvey never did that. Instead, Mantria tried to develop that technology on their own. Construction of the biochar plant at Dunlap, Tennessee, was their first effort in this undertaking. They later planned to build a second plant in Hohenwald, Tennessee, due to the disadvantages of the Dunlap location. She said that she visited the grand opening of the Dunlap plant (in August 2009), where she saw a number of investors and McKelvy. She said she saw "the cannisters" (referred to elsewhere as autoclaves) at Dunlap, but they were not functioning. Tr. 10/2/18 at 18-19, 29-30.

i. Knorr told McKelvy about "problems" at Dunlap. She stated that, on the weekend of the groundbreaking at Dunlap, she and McKelvy visited the Hohenwald site. Knorr said that, in one of the weekly Mantria conference calls, Wragg "patched in" McKelvy and that McKelvy heard about "construction problems" at Dunlap. She stated that she recalled that Tisa Dixson commented, from reviewing her notes, on these problems. Tr. 10/2/18 at 31-33.

j. McKelvy made statements which were not true, but Knorr did not correct him then or later. Knorr stated that she attended "the meetings in Denver and the conferences held other places," without getting into any detail as to the timing of such gatherings. Tr. 10/1/18 at 162-63. She said that he sometimes said things that she knew were not true, but that she never confronted McKelvy or spoke to him about statements made in his presentations which were untrue. Tr. 10/2/18 at 35-36.

k. Knorr challenged Wragg on statements he made which were inaccurate. Knorr said that she did challenge Wragg about his

statements about Mantria's successes which were untrue; his reply was that such successes might occur in the future. Tr. 10/2/18 at 35-36.

l. Proceeds of scheme used for McKelvy commissions, investors, "buyer incentives," "unnecessary employees." When asked where the $54 million – which had been raised from the investors – had gone, Knorr said that much of it had gone to pay back the investors; to pay the in commissions to McKelvy; to meet the "very high" salaries of Mantria's approximately 60 employees (Dan Rink was making $20,000 per month) on Mantria's staff; expenses relating to the land "sales," including the buyer incentives and the commissions for Mantria's real estate salespeople of 6%. Tr. 10/2/18 at 37-38.

Knorr said that the costly payroll was due to Wragg's ego; he had wanted a big company and, as a result, hired unnecessary people. Although she had tried to persuade him that the payroll expenses – which they sometimes had trouble meeting – were too high, Wragg would tell her that all these people were needed. Tr. 10/2/18 at 38-41.

m. Knorr's guilty plea agreement. Knorr identified G-AK20, her guilty plea agreement. In this agreement, she stated that she would plead guilty to all ten counts and cooperate fully with the government. As part of her agreement, Knorr admitted that she, together with Wragg and McKelvy, was guilty of conspiracy to commit wire fraud and conspiracy to commit securities fraud. In the future, she can only be prosecuted for perjury. As part of her agreement, she agreed to give information on Wragg, McKelvy, and anyone else of whom she had knowledge. She also agreed that she "will not falsely implicate any person." Tr. 10/2/18 at 48-50.

Knorr said that, as part of the agreement, she agreed that the crimes to which she pled guilty victimized 250 investors, who lost a total of $54 million. She also understood that the government will make her cooperation known to the Court at sentencing and, if the government believes that she has cooperated fully, move for a downward departure. Also, the government can recommend a sentence to the Court. The total maximum sentence could be 240 years' imprisonment. Knorr stated that she pled guilty because she had been "lying to people to

raise this money," because she hoped to receive a "more lenient sentence," and because "it's the right thing to do. The investors … should have the answers." Tr. 10/2/18 at 51-57.

Knorr cross-examination.

n. Daily Sales Reports ("DSR") to McKelvy. See Supp. Rule 29 Memo at 36-37.

o. Knorr did not tell McKelvy that Mantria was "on the verge of bankruptcy." See Supp. Rule 29 Memo at 37.

p. Wragg's message to McKelvy: "everything was good at Mantria." See Supp. Rule 29 Memo at 37.

q. Wragg's and Knorr's lies to McKelvy about $14.3 million in revenues in Mantria's year-end 2008 report. See Supp. Rule 29 Memo at 37-38.

r. Knorr admitted three times that McKelvy's "knowledge about Mantria came from Wragg and [herself]." See Supp. Rule 29 Memo at 38.

s. Knorr signed Mantria Financial's third application to TDFI, which had false entries. See Supp. Rule 29 Memo at 7-9.

t. 12.5% commission and Flannery. Wragg told Knorr, Dan Rink, and "a lot of" others at Mantria not to tell Flannery about the commission payments to McKelvy. Tr. 10/2/18 at 63-64. Knorr followed Wragg's instruction. Id. Likewise, he told her not say anything to Steve Granoff about these payments. Id.

Because attorney Flannery had said (late in 2009) that Mantria could not pay "commissions" to McKelvy, Wragg changed the description for the payments to "referral fees," but Mantria's practice of making these payments remained. Tr. 10/2/18 at 18.

u. Shift to green energy: Volpe's forecasts. See Supp. Rule 29 Memo at 41-42.

v. "Billion Dollar Contract" with CDI. See Supp. Rule 29 Memo at 42.

w. Wragg and Knorr trumpet: CNN; return on investment of 421%; trash to cash; "opening … biorefineries … in Dunlap;" Al Gore's book; "patent pending," "game-changer." See Supp. Rule 29 Memo at 42-43.

x. Wragg's forecasts, Volpe's forecasts. See Supp. Rule 29 Memo at 43.

y. Ribbon-cutting at Dunlap; Wragg's email to McKelvy about meeting with Ivory Coast president. Knorr stated that, when groundbreaking took place at Dunlap in August 2009, the plant was not yet finished. Tr. 10/3/18 at 59. Volpe's forecast for 2009 was that 49,000 tons of biochar would be produced at Dunlap and at Hohenwald, but those forecasts did not come true. Id. at 60. Volpe's projections of operating profits – $9.8 million for 2009, growing to $184.6 million in 2013 – also did not turn out to be true. Id. at 63-65.

Knorr identified D-245, an email from Wragg to McKelvy and Donna, with a copy to Knorr, dated September 21, 2009. Tr. 10/3/18 at 69-70. In this email, Wragg stated that he had had an "incredible success" at the Waldorf Hotel in New York City with the President of Ivory Coast, who said that he would attend the opening of the Dunlap plant, but Knorr did not remember whether the official did attend the ribbon-cutting. Id. at 71-73. She told McKelvy that the official had told Wragg that this technology could be a "a big deal for that country." Id. at 73-74. In the email, Wragg told McKelvy that the President would visit the two plants in Tennessee and that Wragg and Knorr would later travel to Ivory Coast. Id. If the technology worked, they would buy 38 biochar-producing systems at $7 million per system. Id. at 73-74. Wragg also said, "[f]rom the President's own mouth 'we need to get moving right away!'" Id. at 73.

z. Mantria claims half a billion dollars in potential sales. Knorr identified D-246, an email dated October 10, 2009,[17] from Wragg to McKelvy, Donna McKelvy, and a copy to Knorr. Tr. 10/3/18 at 76. In that email, Wragg said that Mantria now has over half a billion dollars in potential sales. Id. at 77. Knorr

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[17] **The date of this email was about six months after the two emails above, D-252 D-92, which were sent out on May 14, 2009.**

also identified an attachment to D-246, which sets out potential customers and potential revenue. Id. at 77-78. Because this spreadsheet came from Rink's laptop and concerns Mantria, Knorr said that this document appears to have come from someone in Rink's department. Id. at 78-79.

This list of potential systems sales includes contacts in Sri Lanka, Italy, and the Philippines. Tr. 10/3/18 at 80, 82. These countries were interested in Mantria's green energy products and technology, to help them with both trash disposal and electricity production. Knorr agreed that this document – which was emailed to McKelvy - made it appear that the product is commercially viable, in that "most of [the listings] have [notes such as] "awaiting site visit," "feedstock." Id. at 82-83. Knorr agreed that this list of "half a billion dollars" in "Potential Sales" was another instance of Wragg's having made false representations to McKelvy, this time "shortly before" Wragg was advised of the SEC's investigation. Id. at 81, 85.

2. Daniel Rink.

Direct and re-direct. Daniel Rink, a lawyer and CPA, became Mantria's full-time CFO on July 1, 2007.[18] Tr. 9/28/18 at 216-20. In that capacity, Mantria paid him $20,000 a month. Id. at 220. He hired a controller (Steve Granoff) and "people under [him];" took over cash management of the firm; supervised preparation of tax returns; and acquired insurance coverages. Id. at 220-21.

Mantria was not profitable during any of his time there as CFO. Tr. 9/28/18 at 221. Moreover,

> With the exception of three or four land sales [in late 2007 or early 2008] that were accomplished for cash, the rest of the [bills] were [paid] by … investor funds.

Id. at 221-22.

Concerning sales of the homesites, once "management … identif[ied] buyers," the buyers would go through an application process with MFL. Tr. 9/28/18 at 224. After an application was

[18] McKelvy will not include in this summary of Rink's testimony non-controverted evidence from other government witnesses.

approved, funds would be transferred from MFL for title insurance and real estate commissions. Id. at 224-25.

Under the terms of the sales agreements and the incentive programs offered by MFL, "Mantria was losing cash on every single sale." Tr. 9/28/18 at 226-27. Rink brought this fact to Wragg and Knorr, telling them that it was "a crazy way of doing business," but Wragg told him to "keep doing it." Id. at 228.

Starting in late 2008, Wragg shifted Mantria's focus to green energy projects; land development was "very limited." Tr. 9/28/18 at 232. There were "a variety of people" involved in this phase of Mantria's operations. Id. at 233. Mantria invested a total of approximately $4.7 million in CDI. Id. at 233-34.

Mantria also started work on a plant to produce biochar at (Dunlap) Tennessee. Id. at 234. Rink then determined that CDI was not paying its suppliers and confirmed that CDI had "pocketed" approximately $700,000 of the money invested by Mantria. Id. at 235-36. In July 2009, Mantria dissolved the relationship with CDI and found others whom they believed could finish the Dunlap plant for them. Id. at 237. Regarding the green energy initiative, "People were hired, potential customers were canvassed, [but] no sales were made." Tr. 9/28/18 at 229.

Even though Mantria was having trouble paying its bills, Wragg told Rink that the company had to hire people to finish the Dunlap plant and, as a result, needed to hire more employees in HR. Tr. 9/28/18 at 240.

When asked to describe Wragg's relationship with McKelvy, Rink stated:

> From my perspective [it was] clandestine in the sense that that was a relationship … [which] was handled solely between [Wragg] and [Knorr] and then Mr. McKelvy …. A lot of that work and communications I believe was done on the weekend or after hours.

Tr. 10/1/18P at 4.[19] Rink explained his belief that Wragg and McKelvy "communicat[ed]… on the weekend" because Wragg would

[19] The "P" in this citation is to the partial transcript, ordered during the trial, of this part of Rink's testimony.

often tell him on Monday of plans for a new offering, which had not been discussed the prior Friday. Id. at 4-5. Rink felt that Wragg considered McKelvy to be a "rock star." Id. at 5.

Rink identified G-DR1 as a PPM for MFL. Tr. 10/1/18P at 7. This PPM included a warning that:

> The notes are highly speculative, involve a high degree of risk and should not be purchased by persons who cannot afford the loss of their entire investment.

Id. at 7-8.

Rink identified G-DR2, a list of wire transfers from Mantria to McKelvy. Tr. 10/1/18P at 17. He testified that this list showed transfers on September 3, 2009, in the amount of $34,375; on September 10, 2009, in the amount of $37,458.57; and on September 18, 2009, in the amount of $40,625, as what was then being referred to as McKelvy's marketing fees (functionally the same thing as a commission). Id. at 18-21.[20]

Rink cross-examination. When asked what the function of MFL was to be, Rink stated:

> It was my understanding that [MFL] was going to be set up as a mortgage company under the laws of … Tennessee and that it would actually finance real estate transactions.

Tr. 10/1/18P at 49. Rink was aware that GM had an in-house lender, GMAC.

Rink was aware that the TDFI had set an equity requirement for all such lenders (of $25,000), but stated that "it was going to be difficult [for MFL] to generate an equity position." Tr. 10/1/18P at 51-52. He noted that MFL would have difficulty maintaining an equity level (of $25,000) because there were only losses on the real estate transactions. Id. at 52-53.

Rink identified D-206 as an email, which apparently was sent on September 3, 2008, from himself to Wragg, Knorr, and Granoff.

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[20] These were three of the wire transfers listed in the overt acts in Count 1 (conspiracy) and in Counts 2-7 (wire fraud). Rink also testified about four other similar wire transfers. Id. at 20-22.

Tr. 10/1/18P at 55-56. In this email, Rink stated that MFL had a "negative net worth" and that "the problem will continue to grow unless we come up with some solutions." Id. at 56. Rink stated in the email that, if MFL could not maintain this requirement, it would be "out of business." Rink identified D-206, a draft MFL balance sheet dated September 3, 2008, showing a negative net worth "of about $165,000." Id. at 57-58.

Rink read from D-206, his email to Wragg, Knorr, and Granoff:

> We could likely solve the [minimum net worth] issue for this year by having additional contributions pledged and handled as a receivable …. Another way is not to raise additional debt, but rather equity.

Tr. 10/1/18P at 60-61. As Rink said at trial, the draft financial statement was inaccurate in that it "did not reflect the fact that pledges had been made [as] to future subscription agreements, future investments." Id. at 61. Rink did not explain why these supposed pledges were not reflected on the books. Id. Rink also did not offer an explanation why his email did not mention the "actual pledges" he put forward at trial.

Rink distinguished Mantria from a Madoff-style Ponzi scheme because

> We had employees, we had land, we were spending money on developing the land, … there were real operations. So from my standpoint, Mantria appeared to be a quote legitimate operation as opposed to a fake one.

Tr. 10/1/18P at 66-67.

As to appraisals, Rink said that that it was his "understanding that each parcel was separately appraised by a third-party appraisal company that was based in Tennessee." Tr. 10/1/18P at 67. Rink was shown the pages in D-4 (the first MFL PPM) which, at 76-83, had Bryant's summary appraisals dated August 7, 2007, of eight Mantria developments, totaling approximately $39 million. When asked about these summary appraisals, Rink said, "I have no reason to dispute that number …. I had no reason to doubt an appraisal by a third-party person." Id. at 71.

Rink said that he had attended a two-day "team-building" event in Tennessee when team members would "go out and look at some of the land." Tr. 10/1/18P at 71-72. In the development he visited, he saw "a road that had been cleared from a wilderness." Id. at 72. Other than seeing that parcels had surveyors' sticks, he said that it did not look like much had been done. Id. at 73.

After Wragg acquired a "huge" parcel, covering 5,000 acres and displayed on "color coded maps," Wragg told Rink that there would be "thousands" of homesites, townhouses, and a post office there. Tr. 10/1/18P at 73-76. Rink acknowledged that Bryant had appraised this development, Mantria Place, at $21.7 million, as of June 2008. Id. at 75-76, D-5. When added to the approximately $39 million for the eight developments referred to above, that totaled a value of approximately $60 million. Tr. 10/1/18[21] at 4.

Returning to D-206 (above), Rink's email dated September 12, 2008, to Wragg, Knorr, and Granoff, he (Rink) acknowledged that his email said that he considered the value of the land, which was used as collateral to cover "the amount of the outstanding balance of the mortgages," to be "sufficient" for that purpose. Tr. 10/1/18 at 5, 8-12. He said that he had been advised of the value of the land by Wragg. Id. at 11. Rink noted that McKelvy was not copied on emails concerning MFL. Id. at 29.

Rink identified D-211 as an email from himself to Wragg and Knorr, dated May 19, 2009, concerning MFL's financial statement for 2008. Tr. 10/1/18 at 29-30. In this email, Rink stated:

> In order to have an ending equity in excess of 25,000, we added a subscriptions receivable amount for 4.5 million. This yields about … $300,000 in equities.

Rink requested Wragg and Knorr to "consider this carefully as we need to do something like this [subscriptions receivable]," because "[w]ithout this, the equity deficit would be something like $4 million." Id. at 31. Rink acknowledged that in this email, he had stated that this was necessary to bring a deficit of $4 million into a positive net worth. Id. at 31-32. After reviewing this email, Rink said that his prior references to

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[21] The references to Tr. 10/1/18 without a "P" are to the remainder of Rink's testimony, which was transcribed separately.

"actual pledges" had been mistaken; rather, pledges were just an option. Id. at 32.

Although year-end adjustments are a "not uncommon" accounting practice, Rink's only explanation for the entry in May 2009 of a $4.5 million subscription receivable on MFL's 2008 financial statement was that, "There could [have been] a time lag between when the subscription was given and when the actual subscription was [received]." Tr. 10/1/18 at 34-35. But Rink agreed with counsel that this would be acceptable [only] if "the accountant involved … believe[s] that there is a real likelihood that that receivable will be paid." Rink agreed there was no reference in D-211 to any such pledges' having been made. Id. at 36, 37.

Rink identified D-217 as an email, dated July 7, 2009, from himself to Wragg, Knorr, Granoff, and Deborah Martin.[22] Tr. 10/1/18 at 37-38. In this email, Rink discussed the need for meeting the $25,000 net worth requirement. Id. at 38. The focus of the emails in this chain was the revised Mantria Group financials. Id. at 39-42. But Rink never offered what he said was needed – evidence of "fact[s] [showing that] there was a basis for" relying on a hypothetical "pledge." Cf. Id. at 35.

When asked about G-SG1, the renewal application (signed by Knorr on May 19, 2009) by MFL to TDFI for a license for a third year, July 1, 2009 to June 30, 2010, he said that the application included MFL's financial statement for the year ending December 31, 2008. Tr. 10/1/18 at 49-52. This financial statement included an entry for a "Subscription receivable [from] Mantria Corporation" in the amount of $4.5 million. Id. This statement shows a positive equity of $330,000. Id. at 52-53.

When asked if this receivable related to pledges from investors about which he had previously testified, Rink answered that that was what he recalled and that the investments would have been into MFL. Tr. 10/1/18 at 53. But Rink said that he could not explain the reason that the financial statement showed that the subscription was from Mantria Corporation. Id. Based on this concession, Rink admitted that his previous testimony about the pledges "may not have been correct. … I mean, I can't debate

[22] Deborah Martin was the "chief of staff" for Wragg and Knorr, who was hired in 2009.

that's what it says; it does conflict with my earlier recollection." Id. at 54-55.

Rink knew that, in 2009, Wragg hired Robert Volpe to work on biochar sales and also hired John Seaner to work on system sales; they worked independently of each other. Tr. 10/1/18 at 62-63. Rink acknowledged telling an FBI agent that, after Volpe and Seaner were hired, "letters of intent were coming in and lots of businesses wanted to buy carbon systems." Id. at 63. Although there were "no cash revenues," Rink saw that "there was substantial business activity" in 2009 on the green energy products. Id. at 76. After originally denying that he had received a non-target letter, Rink acknowledged that he was being called "solely [as] a witness." Id. at 77-78.

3. Robert Volpe. Volpe testified that he met with Wragg about a position as Vice-President of Sales with Mantria in the beginning of March 2009. Tr. 10/3/18 at 144. Volpe understood Mantria was a waste-to-(renewable) energy company, which was an exciting area at that time. Id. at 143. Volpe viewed Mantria as a start-up company. Id. at 145.

Wragg's Lies. Volpe said that Wragg was someone who embellished potential sales, that Wragg lied about many things, and that Wragg lied to him from the start. Tr. 10/3/18 at 181-82. Volpe concluded that Wragg was trying to give the impression that Mantria was successful by hiring so many employees. Id. at 204.

Land sales. Volpe stated that Wragg told him that the real estate side of Mantria was profitable. Id. at 145. Volpe said that Rink similarly assured him that the real estate side of Mantria was profitable – that it had revenue. Id. at 173.

Market for Biochar. Volpe testified that he understood that the Biochar business was new, that Mantria made an investment in CDI in Hawaii, and that Mantria was producing Biochar. Tr. 10/3/18 at 145. Volpe stated that when he began working at Mantria, he conducted an analysis of the market for Biochar; he noted that there were many products where Biochar is used, including making steel and as a soil enhancement. Id. at 148. Volpe said that he saw a large opportunity for selling waste energy systems and that there were many markets for Biochar. Id. at 147.

Volpe stated that he devised the MI marketing plan (D-100) that Knorr emailed to McKelvy on May 14, 2009. Tr. 10/3/18 at 191-92. Volpe stated that he knew that Mantria was making presentations to potential investors to raise money for MI. Id. at 194. Volpe testified that he made sure to include references – including the Department of Energy and the White House – for the information he included in the plan. Id. at 196-97. This plan stated that:

-- "Mantria has the leadership, technology and resources necessary to pursue this differentiation strategy and position for success." Id. at 198.

-- "Mantria Industries is opening the first CDI biorefineries in the … [U.S.] in Dunlap, Tennessee in May of 2009 and completing a second site in October of 2009 in Hohenwald." Id. at 199-200.

-- "With only partial year production, it has been forecasted for 2009 that 49,140 tons of biochar will be produced at the two Mantria Industries sites." Id. at 200.

-- "Addition biorefineries will be added that will increase production of 920,010 tons in 2013." Id. at 201.

Volpe stated that he had no reason to disbelieve what Wragg was telling him when he was preparing the plan. Id. at 200.

Volpe stated that he was not aware that Wragg was providing the forecasts in the spreadsheet, D-247, to McKelvy, for use with the investors, until after the fact. Tr. 10/3/18 at 19-20, 183-86, 202. Volpe said that his forecasts were based on those in Mantria's prior models, which had been prepared by Wragg; on information he saw on the mantriacentral.com website; from information from the Department of Energy; and information from the U.S. Department of Agriculture. Id. at 196-97. Referring to his (Volpe's) sales forecasts, D-247, Volpe said that he had prepared this approximately two weeks after he had arrived at Mantria. This forecast was based on information from Wragg and sales models on mantriacentral.com. Id. at 185-86.

Volpe testified that D-247 was set up to show projected revenues at the 100% yield suggested by Wragg and in a worst-case scenario of 60%. Tr. 10/3/18 at 188. D-247 forecast total revenues for bio-products of $8.5 million for 2009 as worst-case

scenario. Id. at 188. The worst-case scenario for 2010 provided revenue of $45.6 million. Id. at 188.

Letters of intent. Volpe stated that in May 2009 Wragg told him that there was a letter of intent with the state of New York to put a system in every county in New York. Tr. 10/3/18 at 205.

Dunlap plant. Volpe stated that what he was told when he was hired in March 2009, was that the Dunlap facility was going to open in about three or four months. Tr. 10/3/18 at 145-46. Volpe stated that he understood Dunlap to be a large-scale waste energy plant producing Biochar and that Mantria would build plants in Hohenwald, Tennessee and Carlsbad, New Mexico. Id. at 146. He was told that the plants were within months of full production, which would be many tens of thousands of tons of Biochar. Id. at 146-47. He also said that he was told that Mantria was able to produce Biochar in Hawaii. Id. at 175.

Dunlap ribbon-cutting. The Dunlap plant was not producing Biochar when the ribbon-cutting took place in early August 2009, but it looked like it was. Tr. 10/3/18 at 153, 159. All the equipment was in place and all plumbing was complete - it looked like a working facility. Id. at 160. During the ceremony, Wragg made it sound like it was operational. Id. at 160.

Volpe stated that Wragg, during the ribbon cutting ceremony, said that the Dunlap plant was operational. Tr. 10/3/18 at 178. Volpe testified that, at the trial, he was still unsure if the plant was operational. Id. He did not learn that the plant was not operational and that Wragg had been lying until a few days after the ribbon-cutting. Id. at 179.

Volpe stated that he accompanied the ambassador from Ivory Coast during the ribbon cutting ceremony. Tr. 10/3/18 at 176. The ambassador was interested in systems that could process trash and different farming feedstocks. Id. at 177. Volpe stated that he never told the ambassador that the plant was not operational. Id. at 179.

Ivory Coast President. Volpe stated that Wragg told all of the Mantria employees about his meeting with the president of the Ivory Coast in New York and that the country wanted to purchase

39 systems, with a selling price of about three to five million per system. Tr. 10/3/18 at 180.

Hohenwald. Volpe testified that he visited the Hohenwald plant either just before the SEC action or months later. Tr. 10/3/18 at 160. He said that it was a more appropriate site than the Dunlap facility, because it had rail access, but was just an empty building. Id. at 160-61.

Mantria's status. Volpe said that he learned about Mantria's financial problems in October 2009, during a meeting in which Rink spoke about needing to cut spending. Tr. 10/3/18 at 167.

SEC Investigation. Volpe said that Wragg told him that the SEC investigation was only affecting the real estate division of Mantria, not MI, the waste-to-energy side. Tr. 10/3/18 at 169.

4. Steven Granoff. Granoff testified that he has worked as an accountant since 1967 and has been a Certified Public Accountant since 1972. Tr. 8/30/18 at 6. Granoff said he initially worked for Mantria as an outside accountant and then served as a part-time controller and accountant for Mantria. Id. at 7.

At one point, Wragg asked Granoff to do a cost analysis of the green energy side of Mantria's business. Tr. 8/30/18 at 16. Granoff said that when he raised an issue about the biochar business with Wragg and Rink. Wragg became angry with Granoff; the cost analysis project was then reassigned to other Mantria employees, including Gary Wragg. Id. at 18-19, 104.

MFL application for TDFI. Granoff stated that the handwriting on a renewal application for MFL (D-SG1) was his and that he played a role in in preparing the application. Tr. 8/30/18 at 74, 88. Granoff said that he completed D-SG1 for renewal of MFL's license with Tennessee. Id. at 74-75. D-SG1 contained an entry for accounts receivable of $9.4 million; Granoff said that he did nothing to confirm that amount of receivables; he just got the amount from MFL's books. Id. at 79.

Subscription receivable. Granoff reviewed D-SG1 and D-SG2 and said that, in order to get to a partners' equity greater than $25,000, a subscription receivable was added. Tr. 8/30/18 at 87. Granoff confirmed that without the subscription receivable, MFL would not have the equity of $25,000. Id. Granoff said that in

his years as an accountant since 1967, he never had a client utilize a subscription receivable to create equity. Id. at 88.

MFL no receivable for mortgages. Granoff identified D-SG10 as a financial statement for MFL for the eight months ended August 31, 2008. Tr. 8/30/18 at 92. Granoff identified the long-term liability of approximately $11 million to pay investors, but there was no line item for mortgages receivables. Id. at 93-94. Granoff confirmed that if MFL had been lending money, this would have been reflected on the financial statement as an asset – mortgage receivable. Id. at 94-95. Granoff agreed that if there was any mortgage activity up to August 31, 2008, it would have been listed as an asset on D-SG10. Id. at 95.

MFL loss on income statement. Granoff testified that the income statement portion of D-SG10 showed a loss of $1.8 million, which was offset by a capital contribution of $1.86 million. Tr. 8/30/18 at 96.

Land sales. Granoff stated that he believed that the lot sales were real. Tr. 8/30/18 at 100. He only learned the lot sales were not real after the SEC investigation. Id. at 101.

McKelvy tax return. Granoff testified that he prepared Wayde McKelvy and Donna McKelvy's tax returns for 2008 (D-SG3); Granoff said that the return included income of $3.3 million of commission payments from Mantria. Tr. 8/30/18 at 106.

Ownership interests in Mantria Corp. Granoff identified the Schedule K-1 of the Mantria 2007 and 2008 tax returns (D-SG4 and SG-6) which showed that Wragg owned 51% of Mantria and Knorr owned 49% of Mantria in 2007 and that Wragg and Knorr each owned 50% of Mantria in 2008. Tr. 8/30/18 at 108-09.

Ponzi scheme. Granoff testified that he did not believe that Mantria was a Ponzi scheme until after the SEC filed its complaint against of Mantria. Tr. 8/30/18 at 111.

II. LEGAL STANDARDS. The legal standards for a new trial motion under Rule 33 are set out in United States v. Bado, 2017 WL 2362401, *2 (E.D.Pa. 2017):

> [Rule] 33 permits the court to "vacate any judgment and grant a new trial if the interest of justice so requires."

> **Fed. R. Crim. P. 33. "A new trial should be ordered only when substantial prejudice has occurred," and the interest of justice so requires. United States v. Georgiou, 777 F.3d 125, 143 (3d Cir. 2015) (quoting United States v. Armocida, 515 F.2d 29, 49 (3d Cir. 1975)), cert. denied, 136 S. Ct. 401 (2015).**
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> **To order a new trial on the ground that the jury's verdict is contrary to the weight of evidence, the Court must determine "that there is a serious danger that a miscarriage of justice has occurred — that is, that an innocent person has been convicted." United States v. Salahuddin, 765 F.3d 329, 346 (3d Cir. 2014) (quoting United States v. Johnson, 302 F.3d 139, 150 (3d Cir. 2002)), cert. denied, 135 S. Ct. 2309 … (2015). "Thus, '[m]otions for a new trial based on the weight of the evidence are not favored. Such motions are to be granted sparingly and only in exceptional cases.'" United States v. Brennan, 326 F.3d 176, 189 (3d Cir. 2003) (quoting Gov't of V.I. v. Derricks, 810 F.2d 50, 55 (3d Cir. 1987)). "When evaluating a Rule 33 motion, the district court 'does not view the evidence favorably to the Government, but instead exercises its own judgment in assessing the Government's case.'" Salahuddin, 765 F.3d at 346 (quoting Johnson, 302 F.3d at 150).**

Moreover, as the Court stated in United States v. Buckman, 2017 WL 3337154 (E.D.Pa. 2017)

> **Defendant bears the burden of demonstrating that the interest of justice requires the grant of a new trial. United States v. Amirnazmi, 648 F. Supp. 2d 718, 719 (E.D. Pa. 2009). Rule 33 Motions should be granted "only in exceptional cases." United States v. Silveus, 542 F.3d 993, 1005 (3d Cir. 2008). Exceptional cases include those in which trial errors "so infected the jury's deliberations that they had a substantial influence on the outcome of the trial." United States v. Thornton, 1 F.3d 149, 156 (3d Cir. 1993) (citation omitted). The decision to grant or deny a new trial is within the [court's] sound discretion. United States v. Vitillo, 490 F.3d 314, 325 (3d Cir. 2007).**

Id. at *3. See also United States v. Allinson, 2018 WL 3618257, *5 (E.D.Pa. 2018).

III. THE ALLEGATIONS AND ARGUMENTS IN McKELVY'S SUPP. RULE 29 MEMO ARE ADOPTED BY REFERENCE. For purposes of his Rule 33 motion, McKelvy adopts by reference the allegations and arguments in his Supp. Rule 29 Memo, but are to be taken as substituting the standard for Rule 33 motions.

IV. THE VERIDCT WAS AGAINST THE WEIGHT OF THE EVIDENCE.

A. Scope of argument. While McKelvy understands that the scope of a Rule 33 motion is limited, as set out above, he believes, as the Court stated in Johnson, that there is a serious danger that a miscarriage of justice has occurred — that is, that an innocent person has been convicted."

B. Introduction.

1. No direct evidence of criminal intent. While McKelvy understands that circumstantial evidence can be enough to support a conviction, including issues of criminal intent, he repeats now what he has said several times before – that there was no direct evidence, from the most likely sources, Wragg and/or Knorr, or otherwise, that he had the requisite criminal intent for any of the crimes alleged in the indictment.

2. Troy Wragg did not testify. Although Troy Wragg plead guilty pursuant to a cooperation agreement, which included a possible downward departure under USSG 5K 1.1, he did not testify for the government. After the government negotiated this plea with Wragg, after the government had furnished the defense with a copy of Wragg's 302 which was labelled as his "proffer," and after the government listed Wragg as a witness on its witness schedule in November 2017, there was no testimony from the one person who was in the best position to testify as to whether or not McKelvy was a culpable participant in any of the conduct alleged in the ten counts of the indictment.

V. THERE WAS HARDLY A SHRED OF EVIDENCE FROM KNORR OR ANYONE ELSE TO SUPPPORT THE CONVICTIONS.

A. The jury's verdict was contrary to the weight of the evidence; there is a substantial danger that an innocent man has been convicted. As stated above, the standard on a Rule 33 new trial motion is whether, considering the evidence as a whole, "the jury's verdict is contrary to the weight of evidence," in that "there is a serious danger that … an innocent person has been convicted." Bado, supra, citing Johnson. 2017 WL 2362401 at *2.

Knorr, the sole "cooperating" government witness who testified, gave no relevant incriminating testimony against McKelvy, as discussed below, other than if her testimony about the email which was sent to McKelvy by Wragg concerning the 3.0 program is considered out of context. Tr. 10/1/18 at 146, discussed supra at 16-17.

As for the remaining government witnesses, other than Gottschall and Flannery - whose testimony also will be discussed below - there was no relevant incriminating evidence. To the extent that the evidence was arguably incriminating, it was found in McKelvy's trial and prior testimony; because McKelvy could only guess at what the government believes is the most important aspects of McKelvy's trial and prior testimony, he will not expand now on his treatment of substantial parts of McKelvy's testimony in his Supp. Rule 29 Memo.

1. Knorr. The great majority of Knorr's testimony either consisted of the considerable – even overwhelming - evidence showing that Wragg, Gary Wragg, (arguably) Bryant, herself, and perhaps others, were guilty of all ten counts or evidence favorable to McKelvy. The only areas of her testimony which were arguably relevant to McKelvy's guilt were: (a) Knorr's testimony, when considered together with the testimony of the investors and of the government's two securities "authorities," Gottschall and Flannery, that McKelvy violated the part of the indictment which charged him with having made material omissions, in his presentations to potential investors, of the 12.5% commission payments he was receiving; (b) Knorr told McKelvy about "problems" at Dunlap; (c) McKelvy received an

email about the 3.0 program;[23] and (d) she heard McKelvy made numerous statements to the investors which were not true.

a. Knorr gave substantial evidence that Wragg, herself, Gary Wragg (arguably), Bryant, and perhaps others, were guilty of the charges in the indictment, but almost no incriminating evidence against McKelvy. The dominant part of Knorr's testimony was that she, Wragg, Gary Wragg, Bryant, and perhaps others were guilty of the crimes charged. To the extent that the government needed to prove the core of the conspiracy and fraud counts, this testimony was relevant. But Knorr's testimony on these points was so extensive that, in effect, it was largely part of a "straw man" strategy, in that such evidence was incontestable but misdirected, the only logical purpose for which must have been to imply to the jury that because others were guilty, McKelvy must have been guilty. Cf. United States v. Jannotti, 673 F.2d 578, 626 (3d Cir. 1982)(in banc)(Aldisert, J., dissenting); United States v. Standefer, 610 F.2d 1076, 1110 (3d Cir. 1979)(Gibbons, J., dissenting). As will be argued below, a similar strategy was pursued with a number of other witnesses.

Put differently, McKelvy argues that, because at least 95% of Knorr's testimony concerned the guilt of individuals who were not at trial, it was analogous to prejudicial "spillover" evidence under such cases as United States v. Camiel, 689 F.2d 31, 36 (3d Cir. 1982)(Aldisert, J.), aff'g, 519 F.Supp. 1238 (1981)(Green, J.). Or, to use an analogy to football, at least 95% of her testimony was misdirected, away from McKelvy on to easier targets.

b. Knorr on commissions. Knorr's testimony about the 12.5% commissions to McKelvy was not relevant unless the government's securities authorities, Gottschall and Flannery, had supported the government's argument that McKelvy had a "legal duty" to disclose these commissions. Otherwise, such evidence was not relevant, any more than would have been evidence that an insurance broker had not told his clients about the rate of his commissions. McKelvy will examine Gottschall's and Flannery's testimony as to any evidence which might support a "legal duty" claim.

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[23] As to Knorr's allegations summarized at (b) and (c) above, they have been discussed in the Supp. Rule 29 Memo at 46-47, 38.

2. Gottschall. Veteran SEC attorney Gottschall gave testimony which, unfortunately, can be considered as troubling, if not incompetent. For an attorney who has worked for the SEC for 19 years and who otherwise seemed to choose his words carefully, to testify that the "securities" in this case were the PPMs raises the question, "What was he thinking?" To say that PPMs were "securities" is exactly the same as saying that a prospectus is the same as a stock certificate or other form of security. Likewise, this testimony raises the question of whether Gottschall should be considered an authority on securities. As such, all of Gottschall's testimony should be examined, with additional caution, to determine whether it is supported by SEC statutes or regulations. (At the same time, some of Gottschall's evidence supports McKelvy's positions, as argued below.)

Gottschall had no probative testimony on the issue of whether or not McKelvy had a duty to disclose his commissions, other than by way of saying that (a) the PPMs were "securities" and (b) that the SEC "typically … [require individuals who] sell securities … [to] either be … a broker" or to be affiliated with a broker, as part of its investor protection mission. Tr. 9/27/18 at 172-73. Because Gottschall's testimony that PPMs were "securities" was totally wrong, this claim cannot serve as a foundation for an argument that McKelvy was required to be a broker; such a claim also suffers from the several infirmities noted immediately below and in the defendant's Supp. Rule 29 Memo at 25-31. In any event, when weighing the evidence for purposes of the Rule 33 motion, the Court should consider Gottschall's testimony only with great care and caution and only to the extent it is supported by relevant statutes and other evidence.

Moreover, the government was put on notice that Gottschall's testimony on the equivalence of PPMs and "securities" was incorrect when Flannery gave his flat-out contradiction, even if in just a half-sentence. The government was bound, in our view, to re-call Gottschall or to ask for stipulation from the defense, to correct his (Gottschall's) testimony on this point.

-- TRACS formal investigation. There is no doubt, from the summary of Gottschall's testimony above at 10-12, that many of

the government's assertions at trial had been similarly at issue during the SEC's formal investigation. But the government contended that it was improper for McKelvy to defend, based on the many similarities between the issues in the investigations and the issues in this case, because of language in G-KG4, a multi-page (and single-spaced), which was the SEC's statement about procedures relating to the commencement and termination of a formal investigation. In this document, the SEC stated, "any termination 'will be purely discretionary … [and] must in no way be construed as indicating that the party has been exonerated or that no action may ultimately result from the staff's investigation of that particular matter.'" Tr. 9/27/18 at 181.

Despite the serious-sounding warning in G-KG4, Gottschall put it much differently, when discussing the registration requirement issue in the formal investigation:

> **If the SEC [enforcement division] decided … [that someone under review] likely should have been registered, we would make a recommendation to the SEC to bring an enforcement case against them.**

Tr. 9/28/18 at 103.

McKelvy also responds that it is, of course, the government's burden to show the defendant's criminal intent, in the context of the events leading up to and during his work for Mantria. Part of McKelvy's experience was the termination letter, after an investigation of many issues which have similarities to those raised here. Regardless of the cautionary language in G-KG4, the government's burden, as articulated in the Court's Instructions set out in the Supp. Rule 29 Memo, remain strict requirements for proof beyond a reasonable doubt. McKelvy contends that the government never met the requirements of these several Instructions.

3. <u>Flannery</u>. For different reasons, Flannery's testimony should also be considered as not worthy of being weighed in the government's favor for purposes of this motion. Flannery stated that he had worked as an attorney in securities matters for 30 years and spoke readily on a broad range of topics. While some of what Flannery said was incontestable, again, as any given contested point, his testimony is not creditable.

-- Form D. The evidence is clear that Flannery advised Wragg that, to avoid getting into reams of paperwork and unnecessary expense, it would be advisable for Mantria to use PPMs, instead of the much more complicated process of using registered securities. As Flannery stated, this approach is an acceptable one, pursuant to what he referred to as "Reg D." As to a "Reg D" private offering, it is uncontestable that such an offering must be made to "accredited" investors and can also be made to a limited number, 35, of "non-accredited" investors. (There are other restrictions on "Reg D" offerings.)

Flannery testified that he knew that "Private placements don't have to be registered with the SEC; [there is] an exemption [under Reg D]." Tr. 10/4/18 at 109. He said that even though PPMs are not required to be registered, the SEC does require the filing of Form Ds. Id. at 110-11.

Before being asked,[24] Flannery apparently anticipated that he would be asked whether he had filed the requisite Form D, and stated, "That's not a required filing …; at that time, it was not required." Tr. 10/4/18 at 111. In response to counsel's question, "Really?", the witness said, "Really.… It was not required." Id. Later, in response to the same question, Flannery reversed himself, saying, "It was supposed to be filed, yes, …, within 15 days of closing" under Rule 506. Id.

Flannery identified D-240, a blank Form D. This form requires the issuer to provide its principal place of business; the industry group; the issuer's size; the particular exemption under which the offering is being issued; the sales compensation; the total dollar amounts of the offering and of the sales commissions; and the use of the proceeds of the offering that are supposed to go to executive officers, directors or promoters.[25] Tr. 10/4/18 at 112-15. Without being

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[24] Counsel had asked the government, at least two weeks before trial, if the SEC had any records of any Form Ds having been filed as to any of the Mantria offerings; the government responded that there were no such filings. Gottschall, who testified six days before Flannery, answered several questions about this issue.

[25] Gottschall gave similar testimony. See Tr. 9/28/18 at 123-26.

prompted, Flannery then qualified his answer by saying that the Form D for the years 2007-09 was "[s]imilar, but not the same" as the version identified as D-240. Id. at 113. Flannery agreed that the "sales compensation" blank was on the Form D in 2007-09, but stated, without explanation, that this category applied only when the seller was a broker/dealer. Id. at 114. The from is to be filed by the issuer, whether Mantria, MFL, or MI. Id. at 115-16.

When asked if he had filed the Form D for the (approximately 11) PPMs he had drafted, Flannery said, "No, I didn't," and amplified this answer by saying, "Because I didn't, I made a mistake." Tr. 10/4/18 at 116. After mentioning that SEC attorney Gottschall had testified that he had done a search of the SEC "EDGAR" database and found no Form D filings for any of the Mantria PPMs, counsel asked whether, when Flannery was with his law firm (Astor Weiss) before moving to Mantria in-house, he submitted invoices for his services. Flannery answered, "Sure." Id. Flannery identified D-54, invoices submitted in his name to Astor Weiss for his legal services to Mantria. Id. at 117-18. The initial invoice included his time for his trip to Tennessee sometime prior to October 11, 2007. Id. at 118. There is a later entry for July 1, 2008, "Prepare final Form D for final LLC." Id. at 119. Flannery said that this invoice was in connection with his work on the MFL LLC, dated July 1, 2008. Id. As he recalled, he "made the mistake" of not "fil[ing] any Form Ds for these guys" on any of the (about 12) PPMs he submitted. Id. at 119-20.

To summarize his testimony set out in both of our memos, Flannery testified that because he knew that all of the investors' money was coming from Colorado and because "nobody raises money for free," he asked Wragg repeatedly if he could go to Colorado to sit in McKelvy's seminar, but "was refused" by Wragg, Tr. 10/4/18 at 28-30; he (Flannery)first denied that he was required, as the issuer's attorney, to file Forms D for each of the (about 12) PPMs he drafted, which set out, among other things, the commissions for sales of the exempt offerings, id. at 226; "at that time [he was drafting PPMs for Mantria], it was not required," id. at 111; Flannery then, after first attempting to qualify the application of the rule to instances where the seller was a broker/dealer, reversed himself, saying, "[the Form

Ds were] supposed to be filed, yes, …, within 15 days of closing" under Rule 506, demonstrating a grasp of the rule then in effect, id.; he provided the following explanation for not filing the required forms, "Because I didn't, I made a mistake." Id. at 116.

McKelvy submits that, whatever Flannery's reason may be – and there is at least one which is immediately apparent - for not filing the Form Ds, ignorance was not one of them. Although there is only one invoice to Astor Weiss for preparing a Form D, that came at some point before July 1, 2008, the SEC's requirements were no different for that date then they were for any other date. "Because I … made a mistake" is not even the beginning of an explanation for someone who is so verbose that he testified, seemingly fluidly, for a day and a half. Based on what we will, politely, refer to as Flannery's reticence to explain this apparent misconduct – through a pattern of approximately 11 failures to file the appropriate forms, in a matter where he was drafting PPMs seeking millions of dollars and realized that the investors were located in Colorado – the only two possible inferences are either incompetence or mendacity. In either case, Flannery's testimony, while in some cases – such as his contradiction of Gottschall as to whether the PPMs were securities – his testimony was seemingly accurate, the government should not be permitted to rely on any aspect of this testimony to support its position on McKelvy's post-trial motions.

As argued regarding Gottschall's testimony, Flannery's answers to questions on his repeated failures to contemporaneously file the Form Ds – and also his failure to file such forms after Wragg's admission to him about commission payments to McKelvy – raised troubling questions about the veracity of his (Flannery's) testimony. Flannery's failures to file raised questions about his competence and integrity; Flannery's testimony adds a new dimension – questions about his bias. McKelvy requests that this Court, in deciding whether the guilty verdicts were against the weight of the evidence, credit Flannery's testimony only with great care and caution and only to the extent that it is supported by documented SEC requirements and procedures.

And as argued above with respect to Knorr's testimony, much of what Flannery said was misdirected – much of it being both self-promoting and (understandably) defensive concerning his numerous "mistakes." His references, for example, to his having muted the phone, during one of Wragg's webinars, after waving his hand to tell Wragg that he needed to back off a particular claim, was an interesting story, but even if true, could not make up for his admission to incompetence concerning the failures to files the Form Ds. Tr. 10/4/18 at 174.

-- Duty to disclose commissions. Although McKelvy concedes that if the government had shown not only that McKelvy should be held accountable as a "broker" and if the government had shown that McKelvy knew that he was accountable as a "broker" – neither of which is the case – then the government would also be able to be able to argue that, as a result, he had a duty to disclose the fact that he was getting a commission, as well as the rate of such commission. However, in the absence of such showings by a preponderance, much less beyond a reasonable doubt, there has been no showing that McKelvy had a legal duty to disclose his fees, beyond a reasonable doubt. Cf. Instructions at 41.

4. The government did not prove what it said it could and its response to McKelvy's Motion to Strike. McKelvy filed a pre-trial Motion to Strike Surplusage from the Indictment, and a supporting memo.[26] Doc. No. 136. In the memorandum supporting this motion, McKelvy argued that several passages in the indictment were irrelevant and prejudicial. Specifically, he argued that the italicized passages in the following sentence, as alleged in Count 1, ¶ 2 (Background), "*Despite the fact that he* [McKelvy] routinely sold securities during the duration of the conspiracy, *defendant McKelvy has never been licensed to sell securities,*" should be stricken, because they were not relevant to any aspect of the government's case. Doc. No. 136 (Memo) at 3, 6-7.

McKelvy also requested that the following sentence be stricken from Count 1, ¶ 7 (Background): "Federal securities law also

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[26] McKelvy does not here challenge the Court's ruling on his motion to strike surplusage, but rather is challenging the sufficiency of the evidence at trial supporting the government's allegations as to why the motion should be denied.

generally required those selling securities to the general public to be licensed." Doc. No. 136 (Memo) at 3.[27] Moreover, McKelvy moved to strike the phrase "in an attempt to evade SEC regulations" from Count 1, ¶ 3. Finally, in his proposed Order, McKelvy requested that the phrase "unregistered securities" be stricken from Count 1, ¶¶ 2, 4 (twice), 5, 9.

McKelvy argued in his memo that the above-cited allegations were implicit allegations, as made explicit in the SEC's Motion, of a violation of 15 U.S.C. § 78o (a)(1), noting that Section 78o is a civil regulatory statute, which covers, as stated in its title, the "registration and regulation of brokers and dealers." SEC Motion at 15-16.

In addition to arguing non-relevance, McKelvy also argued that proof of the challenged allegations would be unfairly prejudicial. Doc. No. 136 at 8. McKelvy asserted that he was concerned that these allegations charged what the jury might believe to be a separate criminal violation, even though styled as "Background." Just as the civil regulatory statute underlying these allegations – section 78o(a)(1) – is phrased in straightforward language setting out requirements and prohibitions, these allegations might make it seem to the jury that McKelvy's alleged failure to observe these requirements and prohibitions automatically meant that he had violated the charges in the indictment, without any need to show criminal intent. Id.

As McKelvy argued, if the government had chosen the straightforward route, it would have included in the indictment charges that McKelvy had violated section 78o(a)(1), by (1) including language charging a criminal violation of section 78ff and to provide a citation to sections 78o(a)(1) and 78ff, under Rule 7(c)(1); (2) any such charge would have had to include an allegation that such a violation was done "willfully;" (3) and the government would have had to meet its burden of proving any such violation beyond a reasonable doubt. Memo at 8.

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[27] As we noted there, the SEC does not use the word "licensed" in this context. Rather, as the SEC stated in its Motion for Summary Judgment in SEC v. Mantria Corp. ("Mantria"), No. 09-cv-02676 (D. Colo.), McKelvy and the other defendants were alleged to have been "unregistered broker-dealers." Id. at 2.

In its Response, Doc. No. 137, the government argued that, "for the securities fraud offenses, the government must show that the defendant acted 'willfully, knowingly and with the intent to defraud,'" citing Sand's Federal Jury Instructions. Memo at 5. Again citing Sand, the government argued that it was required to show that the defendant had acted "with bad purpose either to disobey or to disregard the law" and to show that the defendant was "not acting in good faith." Id.

As to its view of the applicable facts, the government contended, in the form of a proffer, that McKelvy's not having sought [registration as a broker] to sell securities and was attempting "to evade SEC scrutiny" is probative of both his intent and lack of good faith. Doc. No. 137 at 6 (emphasis added). Further, "[o]ne reason [McKelvy and his co-conspirators, Wragg and Knorr] hid [the 12.5% commission payments to McKelvy] was because McKelvy was not licensed to sell securities and it was illegal for him to accept such a commission." Id. Moreover, "The fact that McKelvy's commission was illegal was a point which was regularly discussed between McKelvy and his co-conspirators." Id. Finally, the government claimed that "Wragg and … Flannery, implored McKelvy to get [registered as a broker] to sell securities so he could receive these commissions legally." Id.

The Court endorsed the government's position as to the need to show criminal intent. Op., Doc. No. 151, at 2-3. The Court ruled that the allegations in the indictment, as set out above, were relevant to the case because they related to the government's need to prove criminal intent. Id. at 8-9. Specifically, the Court stated:

> **In the instant case, language stating that Defendant was not licensed to sell securities, that he attempted to evade SEC regulations, and that federal securities laws generally require a license to sell securities to the general public is relevant to proving the required intent for each charge in the Indictment. Defendant's lack of a license to sell securities, like loss, is relevant to proving his specific intent to defraud. [citation omitted]. Moreover, this language is relevant to proving that Defendant "intentionally chose not to register with the SEC or obtain the proper licenses because he was afraid that the SEC would learn of and crack down on his fraudulent conduct."**

> (Doc. No. 137 at 7.) In this regard, the Government claims that Defendant intentionally sought to remain undetected by the SEC. The Government submits that it will use this evidence at trial to prove that Defendant knew his tactics were in violation of law and that his actions were not taken in good faith.

Doc. No. 151 at 8-9.

Moreover, the Court ruled that it would deny McKelvy's motion to strike the references to "unregistered" securities because this is a "descriptive term [which] will clarify for the jury the type of securities sold and the specific conduct alleged." Id. at 13.

McKelvy challenges the following assertions in the government's Response as to the reasons for denying the strike motion.

-- The Mantria investments which McKelvy "sold" were "securities." The government did not prove that these investments were "securities." The government's contention that the PPMs were "securities" has been shown to have no substance.

-- "McKelvy has never been licensed to sell securities." As to the "securities" aspect of this allegation. The government's contention that McKelvy should have been registered as a "broker" has been shown, above, to have no merit.

If the government could not prove that McKelvy acted as a "broker," then it follows that the allegations in the indictment and in the testimony that McKelvy should have been "licensed" – meaning "registered" as a broker are without any foundation.

Moreover, the government also proffered that it could prove:

-- that McKelvy's not having sought [registration as a broker] to sell securities and was attempting "to evade SEC scrutiny" is probative of both his intent and lack of good faith. Doc. No. 137 at 6 (emphasis added). McKelvy responds that the government's assertion puts the proverbial rabbit in the hat, in terms of proving criminal intent. The government well knows that it was required to prove evasion, rather than what McKelvy did, which was avoidance of SEC regulations.

-- that "[o]ne reason [McKelvy and his co-conspirators, Wragg and Knorr] hid [the 12.5% commission payments to McKelvy] was because McKelvy was not licensed to sell securities and it was

illegal for him to accept such a commission." Id. McKelvy responds that the government has not shown, beyond a reasonable doubt, that he believed he was selling "securities" or that he needed to be a registered broker.

-- that "The fact that McKelvy's commission was illegal was a point which was regularly discussed between McKelvy and his co-conspirators." Id. McKelvy responds that neither the SEC (after he provided sworn testimony in June 2007), nor Flannery told him that it was illegal him to receive commission payments.

-- that "Wragg and … Flannery, implored McKelvy to get [registered as a broker] to sell securities so he could receive these commissions legally." Id. McKelvy responds that he did not believe he was selling securities and that neither Wragg nor Flannery told him it was illegal for him to receive commission payments.

5. There was voluminous evidence that McKelvy was just as much of a victim of Wragg's and Knorr's lies as were the investors. McKelvy received a barrage of emails and other information from Wragg, Knorr, a Mantria employee in the real estate sales office in Tennessee (DSRs), Volpe, John Seaner, CNN.com, Mantria PPMs (much of the contents of which had been approved by Flannery), and others, all of whom were "bullish" about Mantria's past performance and future prospects. McKelvy saw active construction taking place at Mantria's land in Tennessee, saw its offices in Bala Cynwyd, got emails which included copies to as many as ten Mantria employees, knew that Wragg had flown in a private jet, and saw a man he was told was an official from the Ivory Coast at the Dunlap ribbon-cutting.

Based on the government's evidence, each of the following Mantria employees who knew more than McKelvy did about Mantria's inner workings testified that they did not know that Mantria was being operated as a Ponzi scheme: CPA/CFO Rink, CPA/Controller Granoff, General Counsel Flannery, and Mantria VP Volpe, among others.

6. The appraisals which McKelvy saw totaled over $100 million worth of land in the Mantria developments, more than enough to serve as collateral for the investments. The $100 million figure for the appraisals which McKelvy recalled was actually lower

than the appraisals introduced at the trial, which totaled over $220 million. Although Tisa Dixson said that she knew, because she lived in the area where Mantria had its subdivisions, that Bryant often inflated appraisals, she never spoke with McKelvy on this. Knorr said that Bryant's appraisals looked "professional" to her.

7. The government's suggestion that McKelvy and Wragg created a protective "paper trail" in their emails was misleading. In its closings, the government gave a sophisticated argument in that it covered, again to use a sports analogy, many of the bases. But, while most of its arguments had a factual foundation, there was one striking example of an instance where there was no factual basis – the argument that the emails between Wragg and McKelvy intentionally were "papering the appearance" of the legitimacy of his involvement in the Mantria investments. Tr. 10/12/18 at 85.

To the extent that McKelvy understood the government's closing argument on this point, its contention was without a factual foundation in that, for McKelvy and Wragg to have created a phony cover story, it would have meant that (a) Wragg was self-destructive because it would be easy to prove that he constantly lied, (b) McKelvy had the sophistication to realize that he was being lied to but that he needed to concoct protective covering with Wragg, and (c) that Knorr was holding back at trial her knowledge of any such concocted attempt at self-protection when she testified for the government.

8. Real estate witnesses. Not only was the evidence offered by Knorr part of the government's misdirecting its substantial evidence against the "straw men" of those who were involved in the frauds, as noted above, but not charged as defendants. This followed the same pattern - calling a number of real estate witnesses (George Dixson, Tisa Dixson, and Kelly Dishman) who said they had not met, had not talked with, and did not know anything about McKelvy.

B. The Court's decision to grant the government's proposed amendment of the draft "good faith" Instruction was both in error and prejudicial.

1. Legal standard. When a district court considers a contention "that the Court committed several errors in instructing the jury which entitle him to a new trial," the court is to "consider the totality of the instructions and not a particular sentence or paragraph in isolation." United States v. Norris, 753 F.Supp.2d 492 (E.D.Pa. 2010), citing United States v. Khorozian, 333 F.3d 498, 508 (3d Cir.2003)(citation omitted).

The court in Norris continued:

> **"Moreover, in reviewing jury instructions, our task is also to view the charge itself as part of the whole trial" since "isolated statements … seemingly prejudicial on their face, are not so when considered in the context of the entire record of the trial." United States v. Park, 421 U.S. 658, 674–75 … (1975)(internal marks omitted) (quoting United States v. Birnbaum, 373 F.2d 250, 257 (2d Cir.1967)).**

Id. at 518.

If a defendant does object to an instruction, the district court (and any reviewing courts) will determine if the instruction were erroneous in light of the harmless error standard. Under that standard of review, a new trial is warranted unless "it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" Neder v. United States, 527 U.S. 1, 15 (1999), (quoting Chapman v. California, 386 U.S. 18, 24 (1967)).

When evaluating a particular instruction, the case law places heavy burdens on those, such as McKelvy, who seek a new trial on that ground. As the court said in United States v. Fumo, 2009 WL 1688482 (E.D. Pa. 2009), aff'd, 655 F.3d 288 (3d Cir. 2011):

> **"A defendant is not entitled to the jury instruction of his choosing or in his particular language." United States v. Carter, 966 F.Supp. 336, 349 (E.D.Pa.1997). Ultimately, the trial court's jury instruction will not comprise reversible error if, "taken as a whole and viewed in the light of the evidence, [the instruction] fairly and adequately submits the issues in the case to the jury [without confusing or**

> misleading the jurors]." [United States. v. Simon, 995 F.2d 1236, 1243 n. 11 (3d Cir.1993)(quotations omitted).]

Id. at *45.

2. The Court's addition of the emphasized language to the following Instruction was erroneous.

> A defendant does not act in good faith if, even though he or she had an honestly held belief or opinion, he or she knowingly made false statements, representations, or promises to others.

Id. at 79 (emphasis added). As McKelvy stated in his objection, the additional language moots the good faith defense and confuses what might have been an appropriate instruction – that the good faith defense would not be available to a defendant who lied about the particular matter which was the subject of the defense.

VI. As noted above, McKelvy adopts by reference all of the arguments made in his Supplemental Rule 29 Memo, placed in the context of the legal standards for a Rule 33 Motion.

VII. Conclusion. Accordingly, McKelvy requests that this Court, as a matter of weighing the evidence and considering whether, "taken as a whole and viewed in the light of the evidence, [the challenged instruction does not] fairly and adequately submit[] the issues in the case to the jury [without confusing or misleading the jurors]," order a new trial on Counts 1-10.

Respectfully submitted,

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Dated: April 2, 2019

CERTIFICATE OF SERVICE

I hereby certify that I have served by electronic mail a true and correct copy of the foregoing Defendant's Supplemental Memorandum in Support of his Rule 33 Motion for a New Trial, upon Assistant U.S. Attorneys Robert J. Livermore and Sarah Wolfe:

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