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	:	

AMENDED SUPPLEMENTAL MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL PURSUANT TO FED.R.CRIM.P. 29(c)

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	:	

AMENDED SUPPLEMENTAL MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL PURSUANT TO FED.R.CRIM.P. 29(c)

Defendant Wayde McKelvy, by his attorneys, Walter S. Batty, Jr. and William J. Murray, Jr., submits this Memorandum in Support of Defendant's Motion for Judgment of Acquittal Pursuant to Fed.R.Crim.P. 29(c).[1]

I. Legal standards. The legal standards for a motion under Rule 29(c) ("After Jury Verdict"), are set out in United States v. Glenn, 2018 WL 4091788 (E.D.Pa. 2018)(Slomsky, J):

> Under Rule 29 …, a defendant may file a motion for judgment of acquittal based on insufficient evidence presented at trial …. When considering a Rule 29 motion, a court must view the evidence and the reasonable inferences drawn in the light most favorable to the Government to determine whether any rational trier of fact could have found proof of guilt beyond a reasonable doubt based on the evidence presented. In doing so, a court must make all reasonable references in favor of the jury's verdict. Furthermore, a court may conclude that there was sufficient evidence to sustain a conviction, even if based on circumstantial evidence.
>
> Therefore, it follows that a finding of insufficient evidence should only be made in situations where the

[1] In his Supplemental Memorandum Supporting his Motion for a New Trial ("Supp. Rule 33 Memo"), McKelvy will adopt all the arguments made in this Memo.

> Government clearly failed to prove its case beyond a reasonable doubt. Courts must take caution to avoid "usurp[ing] the role of the jury by weighing credibility and assigning weight to the evidence, or by substituting its judgment for that of the jury." United States v. Brodie, 403 F.3d 123, 133 (3d Cir. 2005) (citing United States v. Jannotti, 673 F.2d 578, 581 (3d Cir. 1982)).

Id. at *7 (other citations omitted). See also, United Sates. v. Caraballo-Rodriguez, 726 F.3d 418, (3d Cir. 2013) (en banc).

It is well-established that, in ruling on a Rule 29 motion made after all the evidence, as was the case here, the Court is to consider only relevant evidence, American Tobacco Co. v. United States, 328 U.S. 781, 787 n.4 (1946), and to "consider[] all of the evidence in its totality." United States v. Miller, 527 F.3d 54, 69 (3d Cir. 2008)(citing two prior Third Circuit cases). In a case such as this one, where the defendant has testified, the government may utilize the defendant's testimony in its argument as to why the defendant's Rule 29 motion should be denied. United States v. King, 2010 WL 1539886 (E.D.Pa. 2010).

II. The extended statute of limitations under section 3293(2).

A. Relevant statutes. Our position that section 3293(2) is inapplicable has been strengthened by the evidence at trial.

McKelvy argues that the traditional five-year statute of limitations is applicable in this case and that, accordingly, acquittals should be granted on Counts 1-8. The government's position, throughout this litigation, has been that the applicable statute of limitations is 18 U.S.C. § 3293(2).

Section 3293(2) provides a ten-year statute of limitations for the crimes charged in Count 1, the wire fraud conspiracy count, and Counts 2-8, the wire fraud substantive counts, "if [each] offense affects a financial institution." Cf. United States v. Anthony Allen, 160 F.Supp.3d 698, 705 (S.D.N.Y. 2016).

As used in section 3293(2), the term "financial institution" is defined in 18 U.S.C. § 20(1) or 20(10) as follows:

> As used in this title, the term "financial institution" means --

> **(1) an insured depository institution (as defined in section 3(c)(2) of the Federal Deposit Insurance Act);**
>
> **… or (10) a mortgage lending business (as defined in section 27 of this title) ….**

As stated in United States v. Cardillo, 2015 WL 3409324 (D.N.J. 2015), "In 2009, Congress amended the definition of 'financial institution,'" as set out above in section 20(10), to include "a mortgage lending business (as defined in section 27)." Section 27, in turn, states, "In this title, the term 'mortgage lending business' means an organization which finances or refinances any debt secured by an interest in real estate, including private mortgage companies …, and whose activities affect interstate or foreign commerce."

The government offered a first and second rationale as to why section 3293(2) is applicable here.

B. The government's first rationale – factual analysis. The first rationale is that Mantria Financial ("MFL"), which was initially set up to issue mortgages on land sold by Mantria in Tennessee, see Count 1, ¶ 5, later went bankrupt as a result of the fraud scheme. Doc. No. 113 at 9. The indictment alleges that "Mantria Financial was a financial institution and mortgage lending business which engaged in interstate commerce." Id. McKelvy responds that the government has not established, beyond a reasonable doubt, see United States v. Pelullo, 964 F.2d 193, 215-16 (3d Cir. 2012), and that MFL qualified as such.

It cannot be over-emphasized that, as to any arguments by McKelvy challenging the applicability of the extended statute, it is the government's burden – beyond a reasonable doubt – to refute the defense arguments, rather than the defendant's burden to establish anything. McKelvy argues that the government's failures on this requirement are multiple ones.

C. Because the evidence showed that MFL was an entirely fraudulent operation, it cannot be considered a financial institution within the meaning of section 3293(2). This Court ruled, in denying McKelvy's pre-trial motion to dismiss based on several arguments, including one that MFL could not be considered to be a "financial institution" because it must be a

"legitimate one" to be protected by the extended statute against loss from a fraudulent scheme. Doc. No. 105 at 42. This Court stated that the case is governed by the principle articulated in United States v. Serpico, 320 F.3d 691, 694 (7th Cir. 2003), "A financial institution used for fraudulent purposes, however, is still a financial institution under § 27," which is applicable to the ten-year extended statute. Doc. No. 138 at 8.

One of the reasons that this Court denied McKelvy's motion to dismiss for a violation of the statute of limitations, and denied his motion for reconsideration of that denial, was that, as the Court noted in its Order denying reconsideration,

> Only where the Government 'has made what can fairly be described as a full proffer of the evidence it intends to present at trial' can the Court address 'the sufficiency of the evidence... on a pretrial motion to dismiss an indictment.'" (Doc. No. 138 at 7).

Doc. No. 153 at n. 1, at p. 2 (citations omitted). The absence of a "full proffer" by the government of its evidence, accordingly, was one of the grounds for denying McKelvy's dismissal motion.

Now, however, that the trial is complete, it is readily apparent that the government did not offer any evidence that MFL was operated as a legitimate institution. Rather, the testimony was from both Dan Rink and Amanda Knorr that Mantria lost money on each of the lot sales, where MFL wrote the mortgage with its "buyer incentives." Also, there was no evidence that MFL wrote any mortgages on any land other than that purchased from Mantria. Accordingly, the evidence was clear that MFL's so-called "mortgages" could not be considered as such, under the standard definition cited by McKelvy: "a conveyance of an interest in property as security for the repayment of money borrowed." Dictionary.com, definition no. 1.

Rather, the evidence showed that Wragg and Knorr did not intend that the "purchasers" – with their "buyer incentives" - repay the money "borrowed," or that the property acted as "security." Tisa Dixson testified that the prices for which the lots were sold were "outrageous" and that Ray Bryant's appraisals were "inflated." Tr. 9/27/18 at 20-22, 61.

McKelvy argues that Serpico and the case citing it for the proposition that a financial institution which "actively participates" in a fraud is readily distinguishable from this case, where MFL was an entirely fraudulent operation.

D. Carl Scott's testimony – TDFI's procedures. The only evidence which the government submitted in support of the allegation in the indictment that MFL was a "financial institution" was the testimony of Carl Scott, the Director of Licensing for the Tennessee Department of Financial Institutions ("TDFI"). Tr. 9/27/18 at 4-5.

Scott stated that, according to a "screenshot" of prior transactions,[2] G-CS2, 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. Tr. 9/27/18 at 8, 11. Scott stated that this license expired on June 30, 2008 and that the initial license was renewed, for the period July 1, 2008 through June 30, 2009. Id. at 8. The agency's practice was that it would grant applications for a one-year period sometime before June 30 of a particular year. Id. at 10.

Scott mentioned, on direct, that there were four requirements for receiving a license such as the one applied for by MFL - submitting an application, pay an application fee of $325, pay certain taxes, and a bond of $200,000. Tr. 9/27/18 at 5-6. When answering the government's questions about the information on the screenshot, Scott mentioned few details as to the contents of MFL's three applications.[3]

Scott also testified about what appears to have been the third application[4] - for which there was a digital copy, G-AK16, which

---

[2] Scott said that the paper records of two of the applications by MFL had been destroyed in accordance with the agency's document management policies. Id. at 7.

[3] McKelvy has received a partial transcript of Scott's testimony, which was incomplete due to an ESR malfunction.

[4] This third application, submitted on May 19, 2009, is sometimes referred to on cross as the second application.

was notarized on May 19, 2009, which form included images of signatures. Tr. 9/27/18 at 14-15.

On cross, Scott stated that there was a fifth requirement for obtaining a license: submitting "[f]inancial statements showing a net worth of $25,000." Tr. 9/27/18 at 20. Scott identified G-SG9 as a copy of the financial statement for the period ending December 31, 2007, which was submitted with MFL's first application, on November 13, 2007. Id. at 22-23. This financial statement shows that MFL had a net worth of $25,000. Id. at 23.

When Scott examined G-AK16, he said that that was MFL's (third) application, dated May 19, 2009. Tr. 9/27/18 at 24-25. This application showed that MFL represented that Knorr owned 51% and Wragg owned 49% of the company. Id. at 26.

McKelvy argues that the two financial statements (the balance sheet and the statement of income and shareholder equity) attached to G-AK16, even though they were attached to the third application, are relevant as well to the second application, which governs the period July 1, 2008 through June 30, 2009. This is because the balance sheet reflected adjusting entries made during the second half of 2008 which are directly relevant to TDFI's $25,000 minimum net worth requirement for the time period covered by the second application, July 1, 2008, through June 30, 2009. That is also true for a MFL balance sheet for the period ending December 31, 2008.

With reference to the G-AK16, MFL's third application, Scott stated, in response to defense counsel's questions on cross:

> Q Okay. If on an application, initial application or a renewal application false information is provided about the ownership of the entity seeking licensing or registration, would that impact the -- granting the license?
>
> A Yes, sir.
>
> Q And in what respect?
>
> A We would deny it.
>
> Q And <u>if you learned after the fact that false information had been submitted in an application, you would deny that</u>.

A Yes, sir.

Tr. 9/27/18 at 27 (emphasis added).

Although these answers by Scott dealt with "the ownership of the entity seeking licensing" – an issue discussed below - there is a clear inference that MFL's false information about its net worth, as also demonstrated below in the section on Kyle Midkiff's testimony, is equally material and equally disqualifying, because it deals with the TDFI's minimum requirement for the financial stability of the firm. Once again, it is the government's burden, beyond a reasonable doubt, to disprove the testimony of Scott.

E. Knorr's false assertion of a 51% interest in Mantria Financial is disqualifying. On the third application - for which there was a digital copy, G-AK16 - Scott said that there is a line on this form which directs the applicant to "identify all parties owning over 5 percent interest in the application." He further testified that that space shows (in hand-printing), "Amanda Knorr 51 percent, Troy Wragg 49 percent." Tr. 9/27/18 at 26. See Scott's testimony quoted above, in response to the line of questions beginning, "If on an application …?" Id. at 27.

During her testimony, Knorr initially maintained on cross that she believed that she owned - as represented on the G-AK16 - 51% of MFL, because Wragg had "wanted it to be minority owned." She later corrected her testimony when she was shown D-254, a K1 tax return dated November 30, 2007, which she had signed, showing that MFL was 100% owned by Mantria Corp.; Knorr ultimately acknowledged that she was not the 51% owner of MFL. Tr. 10/2/18 at 142-44, 147.

McKelvy submits that the evidence is clear that MFL was 100% owned by Mantria Corp and that the entry on G-AK16 concerning the 51%/49% ownership split between Knorr and Wragg was entirely false and that, following Scott's testimony, had TDFI known the truth, MFL's applications would have been denied.

As to the question of whether the ownership-percentage figures on G-AK16 were also in effect at time of MFL's first two applications, submitted in November 2007, and in or about June

2008, respectively, the following exchange took place between defense counsel and Scott:

> Q The ownership interest in entities that are being licensed and certified, is that the type of information that would be recorded anywhere else in your agency's records?
>
> A Should have been on the original application, sir, but since I don't have that.
>
> Q The original application, does the original application request information similar to this --
>
> A Yes, sir….
>
> Q That, in your view, your agency's view, the ownership interest is important material information.
>
> A Yes, sir.
>
> Q You want to know who you're doing business with --
>
> A Right.

Tr. 9/27/18 at 26, 27-28.

Accordingly, from Scott's testimony, it is apparent that MFL would have been disqualified as a mortgage lender if the TDFI had known the truth at the time the G-AK16 application was filed. It is also apparent that the initial application, submitted on November 13, 2007, and the second application submitted in about June 2008, contained ownership information.

The only remaining issue as to the first two applications is whether the government has proved, beyond a reasonable doubt, that the representations made on these applications provided truthful information – that Mantria Corp. was the 100% owner of MFL. McKelvy argues that the only logical conclusion, when the first two MFL applications to TDFI are viewed in the context of the claims in the MFL press release, G-AK14DX, is that the initial applications would have claimed (falsely)that Knorr was the 51% owner of that company. This exhibit includes a press release from Mantria Corp., dated March 27, 2008, claiming that "Mantria Financial is a minority-owned business, with 51%

controlled by [COO] Amanda Knorr ….” McKelvy contends that, in light of this online press release having been issued less than two months after MFL's being approved by TDFI - it is extremely unlikely that the first two applications would have contained accurate figures: that MFL was 100% owned by Mantria Corp.

Neither Knorr, Scott, nor any other government witness said that the initial form contained accurate information on the ownership issue. Instead, Knorr, on cross, suggested that she thought she was the 51% owner of MFL. Tr. 10/2/18 at 141.

F. Carl Scott's testimony – question and answer omitted due to ESR malfunction. According to notes kept by counsel, we proffer that Scott was asked, at the end of cross (when the ESR was not functioning), whether mortgages have been consistent with its status as a mortgage lender, and that Scott answered, "No."

G. The government's attempt to sidestep the defense arguments on the first rationale are unavailing. At trial, when confronted with McKelvy's evidence and arguments on the first rationale, as summarized above, the government advanced an approach which was belied by the allegations in the indictment, the allegations in the government's central pre-trial memo on the limitations issue, and by the language of the applicable statutes: that McKelvy's contentions were unfounded because having a state license was not an element of the statutory definition of a financial institution under section 3293(2).

The only financial institution named in the indictment was MFL and its status as a financial institution is tied there to the license to finance real estate mortgages in Tennessee:

> **Mantria Financial was a financial institution and mortgage lending business which engaged in interstate commerce. Mantria Financial was licensed in Tennessee to finance real estate mortgages.**

Id. at ¶ 5. Moreover, in its Response, Doc. No. 113, to McKelvy's Amended Limitations Motion, the government used language which echoed the allegations in the indictment: "Wragg created [MFL], which was a bank [sic] financial institution licensed to lend money under Tennessee law." Id. at 8.

Likewise, while the applicable statutes do not require a "mortgage lending business" to be licensed under state law, they do require that such a "business" "finances or refinances any debt secured by an interest in real estate, including private mortgage companies" – in other words, the statutes require that a "mortgage lending business" issues mortgages. After numerous repetitions of the statutory requirements in McKelvy's memos, the government somehow forgets that it has to show beyond a reasonable doubt, on the first rationale, that MFL issued actual "mortgages."

It was Wragg and Flannery who decided that MFL should be created in Tennessee, to serve buyers of Mantria's properties there. As Scott testified, to issue mortgages in the state of Tennessee, a business must apply to the TDFI, meeting the requirements discussed above. Once an applicant has met the requirements set by TDFI, "they can make mortgage loans in the State of Tennessee." Tr. 9/27/18 at 16.

Scott testified:

> **In 1951, the legislators enacted the Industrial Loan and Thrift Act to allow the citizens of the State of Tennessee to access loans, the rates may be just a little bit higher, but … [t]he legislators wanted it to be regulated….**

Tr. 9/27/18 at 5. Scott stated that the statute permitted the creation of companies which could make "mortgage loans" to "citizens of … Tennessee." Id. at 5, 8. Applicants which obtained "registrations" would be found to be qualified. Id. at 6. When MFL's application was approved, it became "a financial institution under the laws of Tennessee." Id. at 9. MFL maintained this status until January 14, 2010. Id. at 10.

It is irrelevant whether MFL could have been created in another state where there were no licensing requirements; the facts remain that MFL decided to locate in Tennessee and issued its purported mortgages there. As such, it is now known that the "mortgages" issued by MFL were fraudulently obtained and, by necessity, invalid. In effect, the government now argues that invalid mortgages were still "mortgages," for purposes of the statutes mentioned above. According to Scott's testimony, such an argument is not a defensible one.

As such, the government has failed to carry its burden of showing that, had the TDFI known the true facts, it still would have issued the license to MFL as a mortgage lender.

H. MFL's failure to satisfy the $25,000 net worth requirement is disqualifying. McKelvy argues that Midkiff's testimony, as set out below, meant that MFL was out of compliance with the net worth requirement at least for part of the second certification – from August 31, 2008 until June 30, 2009, and for all of the third certification period, from July 1, 2009 until June 30, 2010 and, accordingly, that MFL was not a "financial institution," within the meaning of Tennessee law. Accordingly, for this reason, as well as for the others set out above, MFL was not entitled to the protection of the extended statute of limitations, section 3293(2).

At trial, Marcum forensic accountant Midkiff testified as a defense witness. Midkiff stated that she is both a certified public accountant and a certified fraud examiner. Tr. 10/11/12 at 54-55. She has testified on numerous occasions as an expert in forensic accounting. Id. at 56.

Midkiff stated that the TDFI had a minimum net worth requirement for mortgage lending companies, such as MFL, of $25,000. Tr. 10/11/12 at 60. Midkiff stated that, according to the Notes to its Financial Statement dated December 31, 2007, MFL was formed on October 31, 2007. Id. at 59.

Midkiff stated that it was her opinion, based on Marcum's examination of relevant documents, including emails, that MFL "did not meet the ongoing net worth requirements that were required by the State of Tennessee." Tr. 10/11/12 at 57. She stated that by using the word "ongoing," she meant, "at all times." Id. at 60-61. She stated that, "to calculate net worth, you take the total assets and subtract the liabilities and what you're left with is the equity." Id. at 61.

Midkiff stated that her examination of MFL's balance sheet, for the year ending December 31, 2007, G-SG9, showed that MFL had met the $25,000 net worth requirement for those three months. Tr. 10/11/12 at 62. From this balance sheet, which showed that MFL had over $211,000 in liabilities, it appeared that the

company was in "a development stage," because it was "thinly capitalized." Id.

Midkiff stated that MFL had obtained a license from TDFI in February 2008. Tr. 10/11/12 at 62. The income statement, G-SG10, for MFL for the eight months ending August 31, 2008, had been prepared by Steven Granoff. Id. at 62-63. She stated that this income statement reflects a loss on operations of $1,861,016. Id. at 63. That income statement showed "a capital contribution to beef up equity of [$1,860,000] … almost the same amount as the actual loss." Id. at 63-64.

When asked if she had tried to determine the source of this "capital contribution," Midkiff stated, "I didn't see any documentation or information about it." Tr. 10/11/12 at 64.

Midkiff identified D-SG1 as the MFL financial statements for December 31, 2008, which had been attached to MFL's third application to TDFI, dated May 19, 2009. Tr. 10/11/12 at 64-65. This income statement showed a net loss of almost $4.2 million. Id. at 66. This income statement also showed a "capital contribution … of [$]4.5 million," leaving a positive net worth "on paper" of $330,411. Id. at 66.

Midkiff explained that the manner in which the net worth on D-SG1 was "beefed up" was by means of a "subscription agreement," which was a "subscription receivable" from Mantria Corp., an affiliated company. Tr. 10/11/12 at 66-67. She observed that this renewal application was written in (May) 2009. Id. at 67. Without this "subscription agreement," MFL would have had a negative net loss of about $4.2 million, instead of the requisite net worth of $25,000. Id.

Midkiff found there was no documentary support for the supposed capital contribution of about $4.5 million. Tr. 10/11/12 at 67. Accounting practice permits such a capital contribution to be listed as a current asset, as it was here, only if "it's going to be collected in the very near term." Id. at 68.

Midkiff said that the absence of any supporting documentation calls into question whether this was a "real" subscription receivable. Tr. 10/11/12 at 69. According to generally accepted

accounting principles, any such receivable should have been listed as what is called a "contra-equity" – a deduction to net worth. Id. at 70. But there was no such receivable on the books and no such entry in the accounts receivable. Id. at 70.

Midkiff referred to D-SG2, a group of emails which included one from Rink to Wragg, dated May 18, 2009 – one day before G-AK16 (the third application) was submitted, with a proposed adjusting entry on the December 31, 2008 income statement. This email said that this would be a way to resolve the approximately $4 million negative net worth issue. Tr. 10/11/12 at 71-72.

This May 18, 2009 e-mail, D-SG2, from Rink to Wragg which forwarded financial statements prepared by Granoff, states:

> [Attached] is a draft of the MF financials for 2008. In order to have an ending equity in excess of $25,000, we have added a Subscriptions Receivable account for $4.5M. This yields about $300K in equity. Please consider this carefully as we need to do something like this. Without this equity deficit would be something like $4M ….

McKelvy argues that the apparent way to read this email is that Rink is advancing this financial statement, with the adjusting entry of about $4.5 million as a subscription receivable, was a ploy to provide the necessary documentation to the TDFI.

Midkiff then referred to D-264, D-265, and D-266 as charts which would help the jury understand the subscription receivable issue. Tr. 10/11/12 at 72-75. She stated that, based on her experience, the subscription receivable entry was just a "plug." Id. at 75-76. The government did not ask Midkiff any questions.

McKelvy argues that the government has not made any attempt to overcome, beyond a reasonable doubt, the defense testimony about the financial statements submitted to TDFI, to make up for MFL's substantial deficits, were unsubstantiated.

McKelvy argues that, as a result of the trumped-up accounting, MFL did not comply with the net worth requirement for the period August 31, 2008 through the end of that certification period, June 30, 2009, and, accordingly, that MFL was not a "financial

institution," within the meaning of Tennessee law. Accordingly, for that time period as well as for the period after the third application was submitted, the government was not entitled to rely on the extended statute of limitations, section 3293(2).

I. MFL were not adversely affected by the fraud. McKelvy also argues that, while there were numerous assertions by the government regarding the issue of whether or not MFL had been adversely "affected" by the fraud, there was not a scintilla of evidence to support the government's position that MFL was adversely affected. Knorr (and Rink) testified numerous times that Mantria was on the verge of bankruptcy before McKelvy started raising funds for them, Tr. 10/2/18 at 69; Tr. 10/3/18 at 10-11; that Mantria lost money on each sale of a lot in Tennessee Tr. 9/28/18 at 227-28 (Rink); Tr. 10/3/08 at 9 (Knorr); and that, except for less than $300,000 in lot sales, Mantria's only source for paying, among other things, the out-sized payroll, was investor funds, does not take from McKelvy's argument that these facts, alone, show that Mantria – and by necessity MFL - was not adversely affected by the fraud. To the contrary, the only thing that kept Mantria alive was the fraud scheme.

III. The government's "second rationale" under section 3293(2).

As to the government's second rationale for invoking section 3293(2), there were three witnesses who said at trial that they had used credit cards to generate money to invest in Mantria and had lost money on those investments - Dee Holl, Charles Carty, and Phil Wahl. There are two issues as to these three investors: first, did the government prove that their credit card(s) had been issued by a federally-insured institution; and second, did the government prove that such institutions had been adversely "affected" because it had suffered an actual loss or a substantial new or increased risk of loss.

Holl. Holl said she invested her life savings into Mantria and that she calculated her losses at about $170,000. Tr. 9/25/18 at 142. She said that 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. Id. at 74. As to Faine's involvement, Holl said:

> **Faine was going to open up credit cards in my name and the goal was 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. Holl did not explain the process, but Faine apparently did what she was told he could do – open credit cards in her name.[5]

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.

As to the first issue, proof that the fraud had affected a federally insured entity under subsection (1) of 18 U.S.C. § 20, the government must prove, as with any other criminal statute where federally-insured status is an element of the offense, that that element must be proved beyond a reasonable doubt, by means of either testimony from a representative of that institution or by means of a stipulation to the authenticity of a certificate of federal insurance.[6] See United States v. Bortnick, 2005 WL 1693924, *5 (E.D.Pa. 2005)("proof of FDIC insurance is the basis for federal jurisdiction in bank fraud cases," citing United States v. Schultz, 17 F.3d 723, 725 (5th Cir. 1994).) Accordingly, Holl's testimony cannot, as a matter of law, satisfy the federally insured element of proof under section 3293(2).

---

[5] 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.

[6] The absence of evidence that credit card(s) were issued by a federally insured lender is puzzling. Even if Holl had not kept any records concerning the institutions which allegedly issued any credit card(s) to her, the government presumably could have called Brooke Faine, who was originally on their witness list, to supply the missing information.

As to the second issue, as set out in our Amended Limitations Memo, Doc. No. 105, under section 3293(2), the government must show the "affected" element of section 3293(2) was not too remote from the fraud. See Pelullo, supra, 964 F.2d at 215-16. In addition, the government must produce, under section 3293(2), sufficiently detailed evidence which withstand the statute of limitations defense. See United States v. Carollo ("Carollo II"), 2011 WL 5023241, *3 (S.D.N.Y. Oct. 20, 2011). Section 3293(2) requires that the effect of the fraud be "sufficiently direct," see United States v. Heinz, 790 F.3d 365, 367 (2d Cir. 2015), cert. denied, 136 S.Ct. 801 (2016) (citing United States v. Bouyea, 152 F.3d 192, 195 (2d Cir. 1998) (per curiam) (internal quotation marks omitted); cf. United States v. Bogucki,316 F.Supp.3d 1177, 1189 (N.D.CA. 2018)(scholarly opinion noting that, as to the "directness of harm" issue, the court in United States v. Ohle, 678 F.Supp.2d 215, 228–29 (S.D.N.Y. 2010), ruled that the losses considered in that case were "a direct and foreseeable result of the [defendant's] conspiracy.").

Holl testified that the reasons for the default were that she had lost her job for two years, lost the life savings she had put into Mantria, and was not able to keep up with the payments on the credit cards. Tr. 9/25/18 at 86. As to Holl, even though there may be a lack of definitiveness on the issue of whether an entity experienced an actual loss or a substantial risk of loss which was a direct result of the fraud, McKelvy concedes that the jury could have reasonably concluded that the government proved that one of the reasons Holl defaulted on her $30,000 credit card debt was Mantria's failure to pay her the promised returns on her investments.

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,[7] but

[7] The names of these banks were: Comerica Bank, Chase, CitiBank, and Barclays Bank.

did not state or imply that he had defaulted or was close to defaulting on any of these cards. Id. at 167-70.

Carty. 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. To fund the $40,000 investment, he also took advances from a Minnequin credit card. Id. After his Mantria investments failed, Carty paid back $500 a month on the HELOC; refinanced his house; and rolled the HELOC into the refinancing. Id. at 162. Carty said that he paid off the HELOC. Id.

Because McKelvy concedes that the banks at which Wahl and Carty had their credit cards were federally-insured during 2007-09, there is no issue as to them concerning the federally-insured element, as there is for Holl, as we argue above.

But, as to Wahl and Carty, the government has not attempted to assert that there was an actual loss, in that neither witness defaulted on his credit card debt payments. Likewise, McKelvy maintains that the government has not proved, beyond a reasonable doubt, that the risk of loss was "new or increased" or that it was "substantial." Court's Instructions at 75; see Serpico, supra, 320 F.3d at 694-95; United States v. Ghavami, 2012 WL 2878126, *5 (S.D.N.Y. 2012), citing United States v. Mullins, 613 F.3d 1273, 1278 (10th Cir. 2010); United States v. Rubin/Chambers, Dunhill Ins. Services (CDR), 831 F.Supp.2d 779, 783-84 (S.D.N.Y. 2011). Neither Carty nor Wahl testified that he was at risk of defaulting on any of his loans from or credit cards with federally-insured banks.

It follows that there could not have been, as a matter of law, any risk of loss to a federally insured bank, other than the same risk which is a part of every issuance of every HELOC and every credit card. Up to now, the government's apparent position has been that, anytime any investor used funds from a federally-insured bank to invest in Mantria, there was automatically a substantial new or increased risk of loss to that bank. Any such construction of section 3293(2) would, in effect, mean that the "affected" requirement of the statute was meaningless.

Moreover, the government made no attempt to show that any risk of loss was a substantial, as opposed to a de minimis, risk of

loss, because the government made no effort whatsoever to explain Carty's or Wahl's circumstances concerning any such risk. Cf. Doc. No. 105 at 52-55, Doc. No. 121 at 38-41.

Accordingly, the government's second rationale for invoking section 3293(2) is likewise without substance.

IV. The limitations statute as to the securities fraud counts, Counts 9 and 10. On Counts 9 and 10, the statute of limitations is six years. 18 U.S.C. § 3301; Court's Instructions, at 78.

As will be demonstrated in McKelvy's Supp. Rule 33 Memo, at 34-41, any suggestion that McKelvy owed a duty of disclosure to the investors of the fact and percentage of his commissions was not supported or supportable by the evidence. As such, the allegations in the indictment's overt acts, including overt acts nos. 52, 53, and 54, the three overt acts concerning McKelvy's receipt of wire transfers of "undisclosed fees" – which would have had to have occurred within the six-year period before the date of the indictment (September 2, 2015) – were not a part of a securities fraud scheme because, contrary to Flannery's testimony, McKelvy did not have a duty to disclose such commissions to the investors.

Other than these three overt acts, the only other overt act charged which comes fewer than six years before the indictment date of September 2, 2015, is overt act no. 55, the form sent to investors by Wragg and/or Knorr on or about November 20, 2009; there simply was no evidence, however, of any involvement by McKelvy in the creation or distribution of this form.

V. The government has offered no evidence from which the jury could infer that there was an "overall" conspiracy, wire fraud scheme, and/or securities fraud scheme involving McKelvy and Knorr. As McKelvy argued in his Motion to Dismiss for Failure to State an Offense, and supporting Memo, Doc. No. 111, where there are demonstrably "two layers" of the fraud, the government has to allege and prove an "overall" conspiracy or an "overall" fraud scheme. United States v. Dobson, 419 F.3d 231, 237 (3d Cir. 2005). This Court properly instructed the jury, on the Dobson "overall" fraud scheme issue, as a part of three instructions – page 41, 53, and 67.

McKelvy argues that the absence of evidence of the overall scheme as described in paragraphs 10 and 11 requires that the remedy be an acquittal on Counts 1-9 and consideration of the related issue as to whether Count 10 should also be vacated, because, other than the alleged fraud, McKelvy is not charged in Count 10 with having made any material misrepresentations or omissions within the six-year limitations period.

At trial, there was substantial documentary evidence, in the form of scores of emails and other supporting documents, that Wragg repeatedly lied to McKelvy and others about the business successes of Mantria. Wragg told McKelvy of the multiple sales of Mantria's homesites in Tennessee, of the supposedly independent appraisals showing that the land was worth millions of dollars, and of Mantria's repeated successes in obtaining letters of intent, worth millions of dollars, for green energy products. The documentary evidence is clear - Wragg was defrauding McKelvy, just as Wragg was defrauding the investors.

The government, however, has offered not a shred of evidence that McKelvy was involved in an "overall" conspiracy or "overall" fraud scheme as those terms are used in Dobson.

As discussed in McKelvy's supplemental Rule 33 memo, the government's claim in its closings that Wragg and McKelvy jointly created the numerous emails, daily sales reports, and appraisals – all providing fraudulent information to McKelvy about Mantria's supposed business successes – as a means of concocting a "paper trail" for "plausible deniability," was mere rhetoric, lacking a factual foundation.

A. Dobson standard. McKelvy argues that, taking the evidence in the light most favorable to the government, there was no evidence (1) of criminal intent, under the Instructions issued by the Court, or of (2) the overarching scheme necessary under the Court's Instructions pursuant to United States v. Dobson, 419 F.3d 231, 237 (3d Cir. 2005).

While the Court issued specific Instructions for the two conspiracy counts (Counts 1 and 9) and while the substance of the underlying offense in Counts 1-8, wire fraud, was different from the underlying offenses in Counts 9 and 10, securities fraud, there were two common threads: first, Counts 1-9 and part

of Count 10 charged fraud schemes; second, the Court's Dobson (overarching scheme) instruction applied to all ten counts.

McKelvy will focus on the Court's fraud scheme, Dobson, conspiracy, and (substantive) securities fraud Instructions

B. Instructions relevant to Dobson and other issues.

1. Counts 1-10: "Nature of the Indictment" - Instructions at 36.[8]

> [T]he Defendant, Wayde McKelvy, is charged in the indictment with violating federal law, specifically, conspiracy to commit wire fraud, wire fraud, conspiracy to commit securities fraud, and securities fraud. I will explain to you generally what the defendant is charged with in each count of the indictment, and then I will give you more specific instructions on the elements of each offense.
>
> Count One charges Defendant with conspiring to knowingly and intentionally devise a scheme to defraud or obtain money or property by means of materially false or fraudulent pretenses, representations or promises through the use of a wire in interstate commerce.
>
> Counts Two to Eight charge Defendant with knowingly and intentionally devising a scheme to defraud or to obtain money or property by means of materially false or fraudulent pretenses, representations or promises through the use of a wire in interstate commerce.
>
> Count Nine charges Defendant with knowingly and intentionally conspiring to make materially false representations or omissions in the connection with the purchase or sale of Mantria securities with the intent to defraud investors and in doing so used or caused to be used any means or instruments of transportation or communication in interstate commerce or the use of the mails in furtherance of the fraudulent conduct.
>
> Count Ten charges Defendant with knowingly and intentionally making materially false representations or omissions in connection with the purchase or sale of Mantria securities with the intent to defraud investors and in doing so used or caused to be used any means or

[8] McKelvy will refer to the page numbers of each group of Instructions in the written Instructions, instead of to the transcript of the oral charge.

> **instruments of transportation or communication in interstate commerce or the use of the mails in furtherance of the fraudulent conduct.**

Id. at 36 (emphasis added).

2. Counts 1-10: Dobson charge – Instructions at 31.

> **Before you reach the question of whether any of Wayde McKelvy's statements were materially false or fraudulent pretenses, representations or promises, you must first unanimously find that he willfully and knowingly participated in one or both of the overall schemes to defraud.**
>
> **Count One, at paragraphs Ten and Eleven, charges two parts of the overall objective of the wire fraud conspiracy, which is incorporated into the wire fraud charges. In paragraph Ten, the indictment charges, in essence, that in order to induce prospective investors to invest in Mantria, defendant Wayde McKelvy, together with co-defendants Troy Wragg ("Wragg") and Amanda Knorr, made materially false statements and omitted material facts to mislead investors as to the true financial status of Mantria, including grossly overstating the financial success of Mantria and promoting excessive returns.**
>
> **In paragraph Eleven, the indictment charges, in essence, that while defendant Wayde McKelvy, together with co-defendants Troy Wragg and Amanda Knorr, claimed that Mantria made millions of dollars selling real estate and green energy products, they knew that Mantria had virtually no earnings, no profits, and was merely using new investor money to repay earlier investors.**

Id. at 31 (emphasis added).

3. "Knowingly," "intentionally," "willfully" – Instructions at 33, 34, 35.

> **[As to any count where the government was required to show that the defendant acted "knowingly,"] the Government must prove beyond a reasonable doubt that the Defendant was conscious and aware of the nature of his actions and of the surrounding facts and circumstances, as specified in the definition of the offense charged.**

> [The term "intentionally"] means that the Government must prove beyond a reasonable doubt either that (1) it was the Defendant's conscious desire or purpose to act in a certain way or to cause a certain result, or that (2) the Defendant knew that he was acting in that way or would be practically certain to cause that result, and that he acted deliberately and not because of ignorance, mistake, or accident.
>
> [As to any count where the government was required to show that the defendant acted "willfully,"] in the sense that "McKelvy knew his conduct was unlawful and intended to do something the law forbids."

Id. at 33, 34, 35 (emphasis added).

4. Counts 1-8: "Wire Fraud – "duty to disclose" - Instructions at 41.

> The failure to disclose information may constitute a fraudulent misrepresentation if the defendant was under a legal duty to make such a disclosure, the defendant actually knew such disclosure ought to be made, and the defendant failed to make such a disclosure.

Id. at 41 (emphasis added).

5. Count 10: "Securities Fraud – Fraudulent Act," material facts, useless facts - Instruction at 53:

> [I]n connection with the purchase or sale of Mantria securities[9] the defendant did any one or more of the following:]
>
> If you find that the government has established beyond a reasonable doubt that a statement was false or omitted, you must next determine whether the fact misstated was material under the circumstances. A material fact is one that would have been significant to a reasonable investor's investment decision. An omitted fact is material if a reasonable investor would view it to have significantly altered the total mix of information made available.
>
> The materiality requirement filters out useless information that a reasonable investor would not consider significant, even as a part of a larger mix of factors to consider in

[9] The word "securities" is not defined in the Instructions.

> making an investment decision. Immaterial statements include vague, soft, puffing statements or obvious exaggerations upon which a reasonable investor would not rely.

Id. at 53, 56 (emphasis added).

6. Count 10: Securities Fraud – Knowledge, Intent and Willfulness – Instructions at 56.

> The second element that the government must establish beyond a reasonable doubt is that the defendant participated in the scheme to defraud knowingly, willfully, and with the intent to defraud.
>
> To act "knowingly" means to act voluntarily and deliberately, rather than mistakenly or inadvertently.
>
> To act "willfully" means to act knowingly and purposely, with an intent to do something the law forbids, that is to say, with a purpose to disobey or disregard the law.
>
> "Intent to defraud" in the context of the securities laws means to act knowingly and with the intent to deceive.

Id. at 56 (emphasis added).

7. Counts 1 and 9: Conspiracy to Commit an Offense Against the United States – Basic Elements Instructions at 63.

> In order for you to find Wayde McKelvy guilty of conspiracy to commit an offense against the United States, as separately charged in Counts One and Nine, you must find that the government proved beyond a reasonable doubt each of the following four elements:
>
> First: That two or more persons knowingly and willingly agreed to commit an offense against the United States, as charged in the indictment. I have already explained to you the elements of the offenses of wire fraud and securities fraud;
>
> Second: That Wayde McKelvy was a party to or member of that agreement;
>
> Third: That Wayde McKelvy joined the agreement or conspiracy knowing of its objective to commit an offense against the United States and intending to join together

> with at least one other alleged conspirator to achieve that objective; that is, that Wayde McKelvy and at least one other alleged conspirator shared a unity of purpose and the intent to achieve a common goal or objective, to commit an offense against the United States ….

C. The allegations in the indictment regarding "securities" – Counts 9 and 10. Counts 9 and 10 are securities fraud counts[10] and "securities" are an element of the offense in each of those two counts. See Instructions at 52. The government did not request a specific instruction defining "securities." Moreover, as demonstrated below, the government's closing took this element for granted. Finally, due to a remarkable presentation by the government's two securities authorities, the conflict between them as to the identity of the "securities" left the jury with insufficient evidence, as a matter of law. As in any other securities case, the government is required to have proved, beyond a reasonable doubt, that the Mantria investments which were the subject of Counts 9 and 10 – and, as explained below, a significant part of Counts 1-8 - were, in fact, "securities." Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, 552 U.S. 148, 162 (2008)(the third element of a violation of Rule 10b-5 is "a connection between the misrepresentation or omission and the purchase or sale of a security").

As stated above, the Instructions for Count Ten charges McKelvy with "knowingly and intentionally making materially false representations or omissions in connection with the purchase or sale of Mantria securities with the intent to defraud investors." Id. at 36 (emphasis added). As further defined, to act "knowingly" means that the defendant was "conscious and aware of the nature of his actions and of the surrounding facts and circumstances." Moreover, to act "intentionally" means to act with a "conscious desire or purpose to act in a certain way or to cause a certain result, or that (2) the Defendant knew that he was acting in that way or would be practically certain to cause that result." Id. at 33, 34 (emphasis added).

McKelvy argues that for the jury to have returned a verdict of guilty, it would have to find, beyond a reasonable doubt, that

---

[10] Here, as in most securities fraud cases, the central violation alleged in the indictment is of 17 CFR § 240.10b-5, often referred to as Rule 10b-5.

he acted "knowingly," in that he was "conscious and aware of the … of the surrounding facts and circumstances," which would include his marketing "securities," as defined by SEC statutes. As demonstrated below, there are multiple reasons why the government has failed to prove, beyond a reasonable doubt, that Mantria's investments were "securities" and that McKelvy "knowingly" and "intentionally" sold securities, as defined in the SEC statutes.

D. The allegations in the indictment regarding "securities" – Counts 1-8. Counts 1-8 are wire fraud counts (Count 1, conspiracy to commit wire fraud; Counts 2-8, substantive wire fraud). Although these wire fraud violations involved sales of investments, the general principles of fraud prosecutions are no different for sales of any other objects such as real estate or automobiles. Specifically, fraud charges concerning investments do not necessarily have to involve "securities;" here, the government chose to make "securities" a significant part (rather than an element) of those eight counts.[11]

The core allegations concerning "securities" in those eight counts[12] are:

-- "Speed of Wealth, LLC, and Retirement TRACS LLC, were Colorado limited liability companies operated by defendant Wayde McKelvy which pooled investor funds for joint investments." Count 1, ¶ 2 ("Background").

-- "Securities investments in Mantria and its related entities mainly were performed through Private Placement Memorandums ("PPMs") …." Count 1, ¶ 3 ("Background").

-- "Defendant Wayde McKelvy advised and assisted investors to pool investment funds in an attempt to evade SEC regulations." Count 1, ¶ 3 ("Background").

---

[11] As is explained in his Rule 33 Memo, the reason that the government included "securities" as a significant part of Counts 1-8 was to be able to argue that McKelvy's status as an "unlicensed" seller of "unregistered" investments was evidence of his intent.

[12] Many of the allegations concerning "securities" in Count 1 are incorporated into Counts 2-8.

-- "During the duration of the conspiracy, Mantria raised approximately $54.5 million in new investor funds in their unregistered securities offerings." Count 1, ¶ 4 ("Background").

-- "Defendants Troy Wragg, Amanda Knorr, or Wayde McKelvy sold unregistered securities in Mantria or its subsidiaries." Count 1, ¶ 4 ("Background").

-- "Mantria Financial issued unregistered securities which defendants Wragg, Knorr, and McKelvy sold to investors in Colorado and elsewhere." Count 1, ¶ 5 ("Background").

-- "The [SEC] was … charged by law with protecting investors by regulating and monitoring, among other things, the purchase and sale of securities, including securities sold through PPMs. None of the securities sold by Mantria were registered with the SEC. … Federal securities law also generally required those selling securities to the general public to be licensed." Count 1, ¶ 7 ("Background").

-- Defendants Wragg, Knorr, and McKelvy "raised approximately $54 million from more than 300 investors nationwide in twelve fraudulent and unregistered securities offerings for Mantria and its related entities." Count 1, ¶ 9 ("Manner and Means").

-- Defendants Wragg, Knorr, and McKelvy "made the following materially false statements to prospective investors:"

> **g. That Mantria was "not a Ponzi scheme," although they knew that Mantria was just such a scheme paying investors' "earnings" with money raised from misled new investors.**

Count 1, ¶ 13 ("Manner and Means").

E. <u>The evidence regarding "securities" is insufficient, as a matter of law – Gottschall, Flannery, orange trees</u>. McKelvy asserts that the government did not prove that the Mantria investments were "securities," as alleged in the indictment, for several reasons. First, the two lawyers (SEC attorney Kurt Gottschall and Mantria securities attorney Christopher Flannery), whom the government called as their authorities on securities matters, (a) gave flatly contradictory testimony on the nature of "securities" in this case and (b) could not agree with each other as to what the "securities" were involved here.

McKelvy will briefly summarize the testimony of the government's two authorities on "securities." Gottschall has worked for the

SEC for 19 years and is the associate regional director for enforcement in the SEC's Denver regional office. See Tr. 9/27/18 at 168. McKelvy will also summarize the testimony of attorney Flannery, who said that he has been a securities lawyer for about 30 years. See Tr. 10/5/18 at 77.

Gottschall provided one definition of what, if any, the securities were in this case. The government asked Gottschall this leading question:

> [B]ased upon your investigation were the PPMs … being produced by Mantria … in fact, securities?

Tr. 9/27/18 at 193. To which he answered, succinctly, "Yes," meaning that Gottschall was testifying that the PPMs (10 of which he had identified in his declaration at D-24 at ¶¶ 3A-J)[13] were, in fact, "securities." Cf. Stafford Investments, LLC v. Vito, 375 Fed.Appx. 221, 222 (3d Cir. 2010) (unpub.) (PPM "used to solicit investors").

The second definition of securities was from Flannery. When asked, "[W]hat is a security?," Flannery responded broadly and at some length, stating that "almost anything can be a security" and making an analogy to a Supreme Court case on orange trees:

> [A]lmost anything can be a security…. [T]here was a case that held that orange trees could be a security. A guy was selling individual orange trees, but he was taking care of the orange tree himself, he was picking the oranges and selling the oranges. And the SEC … took the position … [in the Supreme Court] that that was a security because someone was giving their money to a third party with the expectation that they would make a return on that money.

Tr. 10/4/18 at 5.[14] On cross, Flannery flatly contradicted Gottschall's testimony[15] regarding the PPMs, by stating that the

---

[13] The parties stipulated that the PPMs D1-11 were the offering documents that were produced by Mantria in response to the SEC subpoena and were identified in D-24 at ¶¶ 3A-J. Id. at 118.

[14] The Supreme Court case to which Flannery referred was a civil case. S.E.C. v. W.J. Howey Co., 328 U.S. 293 (1946).

[15] See United States v. Cruz, 265 Fed.Appx. 481, 483 (9th Cir. 2008) (agent's testimony "flatly contradicted," conviction reversed).

PPMs were not "securities," but rather were "disclosure documents." Id. at 154-55.

When asked on cross to identify the "securities" in this case, Flannery said, in a half-sentence, that there were two types of securities, notes and "interests in future earnings." Tr. 10/4/18 at 154. The government, however, never sought to support this testimony – by way of explaining how either instrument met the complex statutory definition of "securities"[16] or by pointing to documents which would support such a contention.

Despite Flannery's flat-out contradiction of Gottschall's testimony, the government persisted with its (unfounded) position that the PPMs were securities. During cross of McKelvy, the government's attorney asked, in a leading question,

> [T]here's no question in your mind that the PPMs, the investments that Mantria were selling, those were, in fact, securities; isn't that correct?

Tr. 10/10/18 at 245. McKelvy replied, id.,

> No, that's not correct. At the time I didn't know what a PPM was. In my mind, … their PPMs was telling the investors what they're promising, we were making loans before it turned to equity, we were making loans and then we were collateralizing the land.

As stated in the Instructions, a question by a lawyer is not evidence, but McKelvy contends that a leading question such as this one can be the functional equivalent of an argument, where a party stakes out a position. Gottschall's testimony that the PPMs were "securities" was incorrect, as a matter of law. A PPM is no more a "security," than would be a prospectus.

In its closings, the government similarly paid no attention to the flat-out contradiction by Flannery of Gottschall's testimony that the PPMs were "securities." In this manner, the government

---

[16] An abridged definition of "security," under 15 U.S.C. § 78c(a)(10) is "any note, stock, treasury stock, security future, security-based swap, bond, debenture, certificate of interest … in any profit-sharing agreement …, any collateral-trust certificate, … transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, any put, call, straddle, option, or privilege on any security, certificate of deposit, …."

took the "securities" issue for granted, rather than prove its case. Likewise, the government made no mention of Flannery's contention that notes or "interests in future earnings" should be considered as "securities." As such, the government made no attempt to fill the obvious gaps in its evidence.

F. There were no allegations in the indictment, nor any proof at trial, that McKelvy acted as a "broker." Count 1, ¶ 3 alleged that McKelvy was not "licensed to sell securities." The government made no effort to have any witness explain why, under the applicable statutes, McKelvy would have had to become such a "registered" representative.

Moreover, the government made no allegation in the indictment or offered any evidence at trial, to show that McKelvy was acting as a "broker." This was a crucial omission in the government's case, which omission contrasts with the allegation in the SEC's Motion for Summary Judgment ("SEC Motion") that McKelvy was acting as a "broker/dealer." See SEC Motion at 15-16.[17]

Not only were there no references to "broker" or "broker/dealer" in the indictment, there was no evidence that the defendant fit the statutory requirements for a broker under 15 U.S.C. § 78c(a)(4),[18] including the requirement that he "engaged in the business of effecting transactions in securities for the account of others." This statutory definition includes these technical terms, which must be satisfied in any case where a defendant allegedly acted as a "broker." As stated in S.E.C. v. Kramer, 778 F.Supp.2d 1320 (M.D.FL. 2011), pursuant to this statute, which "defines neither 'effecting transactions' nor 'engag[ing] in the business,' [the cases use] an array of factors determines whether a person qualifies as a broker under Section 15(a)." Id.

---

[17] See SEC v. Mantria Corp.("Mantria"), No. 09-cv-02676 (D. Colo.)(filed February 25, 2011)(SEC asserted that McKelvy and other defendants "are liable for acting as unregistered broker dealers"), at 15-16. Because, without getting into detail, there is no arguable support for any claim that McKelvy acted as a "dealer," we will instead use the term "broker."

[18] Perhaps pursuing the goal of not wanting to take the jury "into the weeds" of securities law, the government has failed to prove its underlying allegations on this point.

at 1334 (citations omitted).[19] No analysis under such cases as Kramer was even attempted here.

Although Gottschall testified as to the SEC's concern, in its formal investigation of McKelvy's four investment club LLCs, that when someone sells "securities," the SEC typically requires that the salesperson either be registered as a broker or be affiliated with a registered broker, see Tr. 9/27/18 at 173, that comment about what is "typically" done, is not a substitute for testimony that, based on an analysis of the requirements of 78c(a)(4), which were never articulated at trial.[20]

Likewise, Flannery did not testify that McKelvy was required to register as a "broker." Instead, he commented, generally, that "broker/dealers" are the people on TV doing ads for TD Ameritrade. Tr. 10/4/18 at 9-10. In response to the government's question, "[W]hy was it important for you to know whether anybody was getting paid [to sell Mantria investments]?," Flannery said, again speaking generally, "[T]here's a law against somebody getting paid that's not a broker-dealer except under very limited circumstances." Id. at 33.

But none of this general commentary related to any obligation on McKelvy's part to register as a "broker." The closest he came was his observation that, "[P]eople who are in the business of

---

[19] The six factors listed by the court are whether a person "(1) works as an employee of the issuer, (2) receives a commission rather than a salary, (3) sells or earlier sold the securities of another issuer, (4) participates in negotiations between the issuer and an investor, (5) provides either advice or a valuation as to the merit of an investment, and (6) actively (rather than passively) finds investors." (citations omitted).

[20] On cross, Gottschall agreed that McKelvy had testified, during an SEC deposition in its investigation of McKelvy's investment clubs, that he was not registered as a broker and was not affiliated with a registered broker. Tr. 9/28/18 at 5-6, D-23. He also stated, on re-direct, that, referring to G-KG11, that Wragg had encouraged McKelvy in emails to get the necessary training to become registered as a broker because "we are planning on taking Mantria Place public." Id. at 51-52. In neither of these instances was Gottschall referring to any requirement that McKelvy become a broker to continue doing what he had been doing by marketing Mantria investments.

getting paid [by commission] to sell securities should be licensed as a securities broker." Tr. 10/4/18 at 65. Because this statement is a generalized one which did not make any reference to the facts concerning McKelvy; because this testimony was couched in terms of what he (Flannery) believed salespersons "should" do, which is only a philosophical comment and not a legal one; and because it does not quote or make reference to the pertinent statute(s), this one line cannot suffice to prove that McKelvy was required to register to become a "broker."

G. There is no evidence that McKelvy knew that Mantria investments were "securities." The government has made no attempt to show that McKelvy knew that, contrary to the advice of his attorney in Boulder that LLCs to make loans, secured by land, were not "securities" (see below) and contrary to his belief that he had been "cleared" by the Retirement TRACS investigation, he can be held to have "known" that he was marketing "securities" regulated by the SEC. See discussion above, at 24-31, of applicable Instructions regarding the requirements that the evidence show, beyond a reasonable doubt, that the defendant acted "knowingly" and "intentionally" regarding his involvement with selling "securities."

McKelvy submits that the government's failure of proof is not only apparent from the testimony cited above, but is also highlighted by the government's non-response to two aspects of McKelvy's testimony, both at his SEC depositions and at trial, as to his state of mind regarding his use of LLCs and his awareness that the SEC's formal investigation had not led to any enforcement actions or even prophylactic instructions, as discussed below.

-- LLCs. McKelvy testified at trial that, when he was dealing with the four investment clubs, he did research on LLCs. Tr. 10/9/18 at 52. McKelvy stated that he set up LLCs to invest in the Mantria offerings like he did with the Retirement TRACS investment clubs. Id. at 49. Specifically, McKelvy created LLCs for the different Mantria offerings; his plan was for investors to act as members of the LLC and the LLC would invest as an entity; the deeds of trust were held by the LLCs; the members of an LLC had a certain percentage of ownership based on the amount of money they invested into the LLC. Id.

McKelvy stated that, after the SEC investigation of Retirement TRACS, he used the LLCs because he believed this procedure was proper. Tr. 10/10/18 at 49. His manner of proceeding with the Mantria investments was similar to the way he operated the investment clubs. Id. at 50. He said that he told the SEC attorneys, during his sworn testimony, that he believed that utilizing LLCs was a proper practice.[21] Id. at 50-51.

In that SEC statement under oath, when McKelvy was asked about the chronology of his dealings with the potential investors in Mantria, he mentioned that, at the end of his seminars, he would tell the audience that, "If you guys are interested, talk to Donna [McKelvy]. She can get you out a package." SEC Tr. 10/22/09 at 50. When asked (by attorney Gottschall), what was in the "packages," McKelvy said, the "LLC documents, the PPM documents, [and] our addendum package." In his off-hand manner, the defendant stated – referring to whether the exhibits "everyone in the courtroom" had seen during the trial – "there was LLCs everywhere." Tr. 10/10/18 at 25-26. There can be no doubt that McKelvy considered an LLC to be a part of the Mantria investments with which he was involved.

As McKelvy explained in his testimony on direct, he deliberately followed his prior practice of utilizing LLCs as his investment vehicle. Tr. 10/9/18 at 51-52. As McKelvy stated, when he initially set up his investment clubs, he consulted with an attorney in Boulder who told him "how to … create LLCs." Id. This attorney also said that, because the clubs were investing in real estate through the LLCs, the investments were "not securities." Id. McKelvy said that he "did some research about LLCs" to satisfy himself that, by choosing this approach, the clubs could function lawfully.[22] Id.

---

[21] It should be noted that, during the SEC statement under oath on October 22, 2009, six different LLCs were referred to by the SEC attorneys (one of whom was Gottschall) in their exhibits: Ex. 9, SOW Mantria 25 Percent LLC; Ex. 10, SOW LLC; Ex. 14, SOW Hard Money Loans Investment Club, LLC; Ex. 17, SOW Hard Money Loans Two, LLC; Ex. 19, SOW Mantria Income, LLC; Ex. 20, SOW Mantria Diversification, LLC. SEC Tr. 10/22/09 at 3-4.

[22] McKelvy argues that his reliance on his attorney's advice that the combination of LLCs and deeds of trust meant that his investments were not bound by SEC procedures may, under some circumstances have been correct. Cf. Foxfield Villa Associates,

McKelvy argues that because the two testifying attorneys not only disagreed as to how to define a "security," but also did not correctly identify the securities involved in this case, they cannot be cited as refuting McKelvy's position that he should not have been held to have acted "knowingly" (defined as being "conscious and aware of the nature of his actions"), "intentionally" (defined as reflecting a "conscious desire or purpose"), and/or "willfully" (defined as "[knowing] that his conduct was unlawful")[23] as to whether he should have been held to the SEC's requirements for a broker.

Even if McKelvy was wrong as a matter of civil SEC statutes and regulations, the government made no showing, as a matter of criminal law, that he knew he was acting as a broker regulated by the SEC.

-- Formal investigation. McKelvy testified at trial about the SEC's formal investigation of Retirement TRACS in 2007. Tr. 10/9/18 at 57ff. He stated that he believed that, if he was doing something wrong, "the SEC would've shut me down quickly" and that the SEC "didn't ask me to change a darn thing." Id. at 59-60. McKelvy stated that, after he testified in this matter, he continued operating Retirement TRACs the way he had been operating it. Id. at 60.

McKelvy testified about the testimony under oath he provided to the SEC on June 7, 2007, in connection with the investigation of Retirement TRACS. Id. at 61. As McKelvy testified at trial, he had told the SEC attorneys,[24] including Gottschall, that:

-- He was not licensed to sell securities. Id. at 63.

LLC v. Robben, 309 F.Supp.3d 959 (D. Kan. 2018) (under some circumstances investments in LLCs will not be considered "securities"), appeal filed (10th Cir. March 23, 2018).

[23] See definitions in Instructions at pages 33, 34, and 35.

[24] As directed by the Court, counsel was permitted to ask McKelvy questions about what he remembered telling the SEC attorneys in his 2007 statement under oath in the Retirement TRACS matter and was permitted to read to himself passages from the transcript of this statement, but the defense was not permitted to introduce the transcript itself. Tr. 10/9/18 at 62ff.

-- He did not believe he needed to be a licensed broker because he "was not selling securities" and that he did not want to be underneath the scrutiny of the SEC. Id. at 64.

-- His attorney formed the LLCs for the investment clubs. Id. at 68.

-- He never disclosed the percentage of commission payments he received to the members of the investment clubs because they knew "I don't work for free." Id. at 71.

-- He believed that collateral and appraisals were important. Id. at 71.

-- He did not want to fall under the umbrella of the SEC because he did not want to deal with the additional regulations and expenses. Id. at 71-72.

McKelvy testified that after he received the letter from the SEC terminating its investigation of him and Retirement TRACS, he believed that he was doing "nothing wrong," that he did not need to become a registered broker and that he could "keep doing business as I was doing it because I wasn't told that I had to change the way I was doing business." Id. at 72-73. McKelvy further testified that when he began working with Mantria, "it was almost exactly the same thing I was doing with the investment clubs." Id. at 73.

H. Analyzing the "overarching scheme" Instructions. McKelvy argues, following the "Before you reach the question …" language in the Instructions at page 31, that as to Counts 1-10, there is no relevant evidence, when considered in a proper context,[25] that "he willfully and knowingly participated" in an overarching scheme with Wragg and/or Knorr, as alleged in paragraph 10 and/or paragraph 11 of Count 1. As stated in the Court's Instructions at 36, concerning the overall scheme requirement:

> **[Paragraph 10 alleged that McKelvy] made materially false statements and omitted material facts to mislead investors as to the true financial status of Mantria, including**

---

[25] **Because McKelvy expects the government to argue that there are two instances where he made admissions which could support the government's argument, those two instances - McKelvy's knowledge of the "buyer incentive" programs and McKelvy's testimony about his awareness of Mantria's financial condition - are examined below at 43-46.**

> **grossly overstating the financial success of Mantria and promoting excessive returns.**
>
> **[Paragraph 11 alleged that McKelvy] knew that Mantria had virtually no earnings, no profits, and was merely using new investor money to repay earlier investors.**

In sum, there is no relevant evidence, taken in context, that McKelvy knew the "true financial status of Mantria" or "knew that Mantria had virtually no earnings [etc.]." The standards of proof in the above-quoted Instructions are exacting ones:

(1) That McKelvy "knew" Mantria's "true financial status" in the sense that he was "conscious and aware of" this condition. See Count 1, paragraph 10 ("paragraph 10"), Instructions at 35.

(2) That McKelvy acted "intentionally," by allegedly making material misrepresentations and omissions in that he had a "conscious desire" or "purpose" to secure investments, despite his "knowing" about the company's true financial condition. See paragraph 10, Instructions at 34.

(3) That McKelvy "knew" that Mantria "had virtually no earnings, no profits, and was merely using new investor money to repay earlier investors," in the sense that he was "conscious and aware of" these financial difficulties. See paragraph 11, Instructions at 35.

(4) That McKelvy acted "intentionally," by allegedly making material misrepresentations and omissions, in that he had a "conscious desire" or "purpose" to secure investments, despite his allegedly "knowing" about the company's financial difficulties. See paragraph 11, Instructions at 34.

(5) That McKelvy acted "willfully" by allegedly making material misrepresentations and omissions in that, due to his alleged awareness of Mantria's "true financial condition," "McKelvy knew his conduct was unlawful and intended to do something the law forbids." See paragraph 10, Instructions at 35.

(6) That McKelvy acted "willfully" by allegedly making material misrepresentations and omissions in the sense that, due to his alleged awareness of Mantria's financial difficulties, "McKelvy knew his conduct was unlawful and intended to do something the law forbids." See paragraph 11, Instructions at 35.

I. Applying the "overarching scheme" Instructions to the evidence. The government did not show by a preponderance of the relevant evidence, much less beyond a reasonable doubt, that it met the "overarching scheme" test, as set out in paragraphs 10 and/or 11 of Count 1. This is because the only government witness who provided any relevant evidence concerning McKelvy's allegedly having had the requisite mental state as to Mantria's financial condition and/or financial difficulties was Knorr, who provided two past references – both taken out of context by the government – in flawed attempts to bolster the government's position, as discussed below at 43-46. Instead, almost all of Knorr's testimony, as highlighted here, supported McKelvy's position:

(1) Mantria sent Daily Sales Reports ("DSR") to McKelvy. From 2007 to 2008, the DSRs sent to McKelvy showed the (claimed) activity on the sales of homesites in Tennessee. Knorr said that D-256, an email with a subject line of "Mantria Daily Sales Report," was dated October 19, 2007 and was sent by Stephana Gay to Wragg, Knorr, McKelvy, and Rink, as well as to Ian Juett, McKelvy's partner at the time and Mantria employees John Higgins, Michael Glenn, Ian Juett, Gary Wragg, and Tisa Dixson. Tr. 10/3/18 at 7-11.

Knorr said that D-168, one of the DSRs, listed 93 lots sold in the period covered, for a total amount of over $8 million. Knorr said that DSRs were sent to McKelvy "many times." Knorr admitted that the information on D-168 was false. Email D-167 sent (an apparently separate) DSR in August 2008 to five other Mantria employees. Tr. 10/2/18 at 84-94.

(2) Knorr did not tell McKelvy that Mantria was "on the verge of bankruptcy." Asked whether she told McKelvy that "Mantria was on the ver[ge] of bankruptcy," she said, "I did not, no." Tr. 10/3/18 at 11.

(3) Wragg's message to McKelvy: "everything was good at Mantria." Wragg's "focus was always … to keep Wayde McKelvy happy." Tr. 10/2/18 at 67. "Wragg wanted to make sure Wayde McKelvy believed everything was good at Mantria." Id. Moreover, Wragg wanted to "make sure the [commission] payments [to McKelvy] were made in a timely fashion." Id.

Knorr agreed that, at the same time in the second half of 2007 that Mantria was on the verge of bankruptcy, Wragg was trying to "make it appear that Mantria was a company that had strong financial revenues." Tr. 10/3/18 at 11.

Knorr stated that Mantria had an (unnecessarily) large number of employees; that it had moved into larger offices in Bala Cynwyd; and that there were at least four members of the Mantria sales team at the real estate office in Tennessee. Tr. 10/2/18 at 85.

(4) Wragg and Knorr lied to McKelvy about $14.3 million in land sale revenues in Mantria's year-end 2008 report. Knorr reviewed an email, D-90, from Wragg to McKelvy and Donna McKelvy, with a copy to herself, dated December 19, 2008, to which Mantria's 2008 year-end report, D-101, was attached. Tr. 10/2/18 at 95-97. When she initially reviewed this report, she thought that Mantria was a "fantastic" company. Tr. 10/3/18 at 12.

Knorr said that email, D-90, gave their explanation for creating the attached year-end 2008 report, D-101: "[W]e wanted to ensure you [McKelvy and Donna] have the skinny on everything occurring" and that "you know where everything is." Tr. 10/2/18 at 96, 99.

As to the report, D-101 - which was sent out less than two weeks before the end of 2008 - it said that, for Mantria Communities, "[I]n December, we will be closing on approximately 28 lots." Tr. 10/2/18 at 98-100. Knorr confirmed that she and Wragg "are stating this as facts that had taken place." Id. These sales, when added to the sales earlier that year, meant that there would be "revenues in 2008 of $14.3 million." Id. at 101. Knorr admitted that these representations were "not true." Id.

Other representations to McKelvy and Donna McKelvy: "All road paving will be finalized before year-end," admittedly false. Tr. 10/2/18 at 102. "ITE II. All electric and fiber-optics will be installed before year-end," admittedly not true. Id. Mantria paid about $12 million to the McClelland Foundation for what became Mantria Place, true (as verified by Rink). Id. at 105.

(5) Knorr's reaction to the 2008 year-end report. When Knorr first saw this report, her reaction – that Mantria was a "fantastic" company – demonstrates that there would not have

been any reason for McKelvy to have any concern that the 3.0 program might have continued to be a losing one.

(6) The 2008 year-end report represented that Mantria invested about $12 million to the McClelland Foundation for over 5,000 acres what was named Mantria Place (a representation which was later verified by Rink). Tr. 10/2/18 at 105.

(7) Knorr admitted three times that McKelvy's "knowledge about Mantria came from Wragg and [herself]." Tr. 10/3/18 at 16. Knorr admitted that "what [McKelvy] said to the investors" did not come from conversation with Rink or Granoff at "the water fountain." Id. Knorr agreed that what McKelvy was telling investors came from what she and Wragg had told him and that "anything that he knew about Mantria … came from you two." Id. at 17.

(8) McKelvy's testimony was undisputed that he saw the (inflated) appraisals when he received the two PPMs, D-4 and D-5, which were made available to him in 2007 and 2008; there was no reason for him not to rely on these appraisals. McKelvy was not rebutted when he stated that he saw and relied on Bryant's appraisals when he initially met with Wragg in September or October 2007, in the two PPMs, D-4 and D-5, and when Wragg traveled to Colorado in June or July 2008 to discuss Mantria Place with McKelvy. Tr. 10/10/18 at 7-9, 11-12, 35-37.

Knorr stated that Wragg had told her that "the land was worth millions of dollars," Tr. 10/2/18 at 72, and conceded that Wragg lied to her about the appraisals which, at some point, she realized were inflated. Id. at 67-68.

Knorr admitted that the appraisals were important to the investors because Wragg said that the investments were secured by the land. Tr. 10/2/18 at 121-22.

-- Eight summary appraisals in a PPM totaled $39 million. When asked whether appraisals had been included in the PPMs, Knorr first testified that she did not believe that they were. Tr. 10/2/18 at 74-75. After she was shown D-4, the first PPM for MFL, dated November 1, 2007, which contained Bryant's summary sheet appraisals for eight Mantria subdivisions as of October 7, 2007, she admitted that she had been mistaken on this point. Id. at 75-78. She acknowledged that this PPM, at pages 76-84,

included the summary sheets for eight appraisals, with a total valuation of approximately $39 million. Tr. 10/2/18 at 76-78.

Knorr said that she was not sure whether Wragg had shown appraisals to McKelvy at their first meeting, but that McKelvy could have seen the appraisals for himself on the Mantria website, Mantriacentral.com. Tr. 10/2/18 at 68.

-- Gary Wragg "needs" inflated appraisal, apparently for Mantria Place. Knorr reviewed D-95, an email dated July 13, 2009, from Gary Wragg (Troy's brother) to Wragg and herself,[26] stating, "Here is … what we will need to make it through project S[27] in terms of collateral." Tr. 10/2/18 at 123-24. In this email, Gary Wragg explained that "we need the appraisals to come in at $70,000 per home site" to "cover the $15 million we are short in collateral." Id. at 124. Knorr agreed with counsel that the email meant that "investments … had already been pledged and Mantria [had told] the investors we have sufficient collateral." Id. at 125. There was no evidence that McKelvy received this email or was aware that the appraisal figures had been manipulated.

Knorr agreed that, in an email dated August 17, 2009, D-97, Gary Wragg advised "everyone" - including Wragg and Knorr - that Mantria has available assets in the land in Tennessee to collateralize over $90 million in investments. She also agreed that others at Mantria would be aware of Gary Wragg's figures.

-- Appraisals looked "professional" and "legitimate." When Knorr first saw Bryant's appraisals, they looked "professional" and seemed "legitimate." Tr. 10/2/18 at 82. She said that Bryant's credentials and experience, as set out in one of his appraisals, showed him to be an experienced appraiser, with 31 years' experience as a supervisor, instructor, etc. Id. at 82-83. She

---

[26] The email chain does not show any notation that it was sent to McKelvy; rather, this is evidence of the fraudulent efforts of the Wragg brothers to "gin up," by themselves, the appraisal figures.

[27] Knorr stated that she was not sure which offering "Project S" referred to. Tr. 10/2/18 at 124. The only land then under development was Mantria Place.

agreed that Bryant appeared to be qualified to do his appraisal work and that she had no reason to believe his appraisal was not accurate. Id. at 83, 132.

Knorr reviewed D-97, an email dated August 17, 2009 from Gary Wragg to Wragg, Jada Hill (Mantria investor relations), and herself, which discussed Bryant's revised appraisal of Mantria Place, D-139 (attached), setting its (much increased) value at $173,945,000.[28] Tr. 10/2/18 at 128-31. Knorr agreed that, by sending this appraisal to Hill – who was "the point person between Mantria and the investors" - Gary Wragg was telling Mantria's "point person" that this "appraisal is over 172 million." Id. at 133. Knorr conceded that, based on this email, "Hill would understand that there is over $90 million in collateral available to secure the investments." Id. at 134.

When Knorr was asked whether, when she saw this appraisal, "[D]id you think it was false and fraudulent?," she replied, "No." Id. at 132. Although she conceded that she "really didn't know how appraisals [work]," it was her opinion, as of the time she saw it on or after August 17, 2009, that it was "legitimate, valid." Id. at 132.

Knorr discussed D-99, an email dated November 13, 2009, from Mantria's "underwriter" Stanco to Wragg, Gary Wragg, Hill, and herself, which referenced an attached spreadsheet, D-98, in connection with an upcoming meeting. Tr. 10/2/18 at 134-36.

Knorr identified D-98 as the spreadsheet, dated September 17, 2009, which was attached to D-99. Spreadsheet D-98 shows a breakdown providing valuations of the land in the various Mantria developments, totaling a net of approximately $15 million,[29] which could be used to collateralize the investments in Mantria. Tr. 10/2/18 at 136-37. This spreadsheet was not shown as being circulated to McKelvy.

---

[28] The revised appraisal was $92,669,250 more than Bryant's previous Mantria Place appraisal. Tr. 10/2/18 at 130.

[29] While spreadsheet D-98 initially used the figure of $32 million as available for collateral, that figure was adjusted downward in that document to $15 million. Id. at 139.

(9) Knorr admitted (a) three times that McKelvy's "knowledge about Mantria came from Wragg and [herself]." Tr. 10/3/18 at 16. Knorr admitted (b) that "what [McKelvy] said to the investors" did not come from conversation with Rink or Granoff at "the water fountain." Id. And, Knorr admitted that what McKelvy was telling investors came from what she and Wragg had told him. Id. at 17.

(10) Shift to green energy: Volpe's forecasts, Wragg's forecasts. Knorr said that D-242 was an email, dated March 28, 2009, from Wragg to McKelvy and Knorr; Wragg attached Volpe's (enthusiastic) sales and revenue forecasts for Biochar. Tr. 10/2/18 at 162-65. Here, Volpe provided forecasts, with dramatic annual increases. Id. at 165-67. These forecasts projected revenue of between $14.2M for 2009 and $267.1M for 2013. Id. at 167, Tr. 10/3/18 at 20 (figures rounded). Knorr understood that the information which she and Wragg had forwarded to McKelvy would be presented to investors. Tr. 10/3/18 at 34-36.

Knorr stated that D-244 was an email, dated April 3, 2009, identified by the court reporter as being from Wragg to McKelvy and Donna McKelvy, cc to Knorr re "April 7th PowerPoint Presentation," a reference to the upcoming SOW seminar. Tr. 10/3/18 at 24. She also identified D-248 as the PowerPoint which appeared to have been generated by Wragg or from someone else at Mantria. Id. at 25. Knorr read a statement from the PowerPoint which said, "Worldwide Demand for Biochar Estimated at 100,000,000 tons. Demand is highest ever given global renewable energy focus." Id. at 26. Annual revenues from Biochar sales were estimated at $5.7 million. Id. at 30.

(11) Visit to Hawaii; "Billion Dollar Contract" with CDI. Knorr said she and Wragg visited CDI's site in Hawaii where they were told that CDI was doing testing and producing Biochar; in December 2008, she told McKelvy about what she had seen and heard there. Tr. 10/2/18 at 117-18. Wragg cited an expert in Biochar and told McKelvy about his (the expert's) enthusiastic commentary. Id. at 119.

Knorr stated that Wragg sent an email, D-241, on March 22, 2009, to McKelvy and Donna McKelvy, which provided a copy of the "Master Agreement" with CDI. D-249. Tr. 10/2/18 at 154-57. In the email, Wragg said he and Knorr wanted to make sure that the McKelvys knew about what "Amanda and I call this our Billion Dollar Contract" with CDI. Id. at 157-58.

(12) 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." Knorr acknowledged that Wragg had sent an email, dated March 30, 2009 (D-243), to McKelvy and herself, forwarding an article from CNN.com about Biochar. In the email, Wragg said, "Biochar is no[w] hitting the front page of CNN …. We were ahead of the curve!" Tr. 10/3/18 at 21-23.

Knorr stated that D-248, an attachment to an email dated April 7, 2009, D-244, from Wragg to McKelvy, copy to her, was created by Wragg - MI "BioChar Receivables Factoring Program." Knorr also identified page 8 of that attachment, a spreadsheet, which showed that Mantria's "Biochar receivables program" had annual expected returns on investment of, for example, 428% and 471%. Tr. 10/3/18 at 28-29.

Knorr said that D-252 was an email, dated May 14, 2009, which she sent to McKelvy, attaching a PowerPoint document, D-102, that explained the carbon diversion process. Tr. 10/3/18 at 37-39. Knorr stated that this document, which McKelvy would be able to utilize at the upcoming SOW meeting (on May 21, 2009), explained how the landfill waste could be converted to Biochar, which could be used as fertilizer drawing out toxins from the soil and to produce electricity. Id. Knorr said she forwarded the "process" information to McKelvy, in response to the information she had received from CDI, which describes a process to convert trash into green energy - "trash to cash." Id. at 40. When she forwarded this information to McKelvy, Knorr believed it to be true. Id. at 42-45.

Knorr identified D-92, an email dated May 14, 2009 (the same date as email D-102, above) she had sent to McKelvy at Wragg's request. Tr. 10/3/18 at 55-56. Attached to this email was D-100, a MI marketing plan for green energy, dated April 15, 2009, prepared by Volpe. The plan mentioned that Volpe expected Mantria to "open the first CDI bio-refineries in the continental [U.S.] in Dunlap" starting in May 2009, but she stated that this forecast did not come true. Id. at 56-59.

Knorr told McKelvy that Mantria and CDI would clean up the landfills. Tr. 10/3/18 at 44-47. She stated that the PowerPoint, D-102, referred to the CDI carbonization process as "patent pending technology." Id. at 49. As of May 2009, her understanding of this technology was that it was a "game-changer" and it had the potential to be a monumental

development. Id. at 50. Knorr understood that the promise of this technology was green electricity; she told McKelvy about this potential. Id. at 50-51. Al Gore made a favorable reference to this technology in one of his books. Id. at 53-54. Knorr told McKelvy about these developments so that he would alert the investors. Id. at 54.

J. When understood in context, there is no support for the government's position on the Dobson requirements. Considering the evidence in the light most favorable to the government, McKelvy could not have been properly found to have acted knowingly (that is, "conscious and aware of the nature of his actions"), intentionally (that is, with "a conscious desire or purpose"), and/or willfully (that is, "with a purpose to disobey or disregard the law").

There are only two aspects of the evidence of which McKelvy is aware which arguably supports the government's position that McKelvy had any awareness of Mantria's "true financial status" (paragraph 10) or of Mantria's financial problems (paragraph 11), which will be considered in turn: (a) an email (G-AK6), dated November 6, 2007, from Wragg to McKelvy about the 3.0 program; and (b) McKelvy's testimony about his awareness of Mantria's financial condition.

(a) McKelvy's knowledge of the "buyer incentive" programs. When McKelvy testified on cross that, although he did not specifically remember receiving the email from Knorr in November 2007, G-AK6, Tr. 10/10/18 at 153-54, once he became aware of the discounts and other incentives in the 3.0 program and realized that there were no down payments required and deferred mortgage payments were permitted, he "called [Wragg] out on the carpet …" and said, "laughing," "[W]hat are you doing?" Id. He told Wragg that he could have a program with no down payment or a program with deferred mortgage payments, but not both. Id. Wragg's response was that

> [H]e quickly back pedaled, like he's really good at doing, and [said] oh, no, that's for Indian Trials only, and that's only for VIP customers like investors.

Id.

McKelvy said that he "believe[d] he [Wragg] was at least getting down payments, which would've been substantially enough to cover the debt load." Tr. 10/10/18 at 154. McKelvy said that he had

heard Flannery being asked by the government about the same email, but that Flannery, unlike McKelvy, had not "called [Wragg] out on the carpet on this."[30] Id. at 155.

Because Wragg did not testify and because the government never called Knorr to rebut, if she could, McKelvy's testimony on this point, what the defendant said should be taken as uncontradicted.

(b) McKelvy's testimony about his awareness of Mantria's financial condition. During cross-examination by the government's attorney, McKelvy was asked, "[D]uring May of 2009 you knew that Mantria was not profitable; isn't that correct?" Tr. 10/10/18 at 257. McKelvy replied,

> No, that's not correct. I knew that revenue was slowing up dramatically. I got reports from Dan Rink, I got e-mails from Troy. When I see the word revenue, that tells me cash flow. That's not investor money coming in, that's revenue.

Id. When asked again, "So you knew Mantria was not profitable?," he replied, "I didn't say that." Id. He further testified,

> [T]hey were pulling in revenue. At this point all I cared about is enough revenue to make the monthly payments, because now we're into the start-up stage of a company, of carbon diversion. As long as they're making enough revenue to make those payments on those 17 percent interest or whatever they were, that worked.

Id. at 257-58.

When asked if he understood the difference between revenue and profits, McKelvy stated that he did understand the difference and commented that

> [M]any … start-up companies [which] are in the red, where do you think they get their money to get out of the red, they borrow the money.

---

[30] Flannery said that he could not recall seeing the email which was sent to himself and to McKelvy, about the 3.0 program. Tr. 10/4/18 at 129-30. A comparison of McKelvy's testimony with Flannery's shows that McKelvy was more attentive to this issue, and/or more candid, than Mantria's securities attorney.

Tr. 10/10/18 at 258. When McKelvy was asked again if he "knew that Mantria was not a [profitable company]," [31] he answered, "No, I did not know that." Id.

The government attempted to impeach McKelvy by quoting an exchange in the SEC deposition on November 19, 2010. The government quoted a question and answer in that deposition, and asked if McKelvy remembered that exchange:

> "Q In your -- did you think --
>
> "A I knew they weren't profitable and the investors knew they weren't profitable at that time."

Tr. 10/10/18 at 258. At this point, McKelvy agreed that his testimony in 2010 had been accurate, explaining that he knew as of 2010 that Mantria was not receiving revenue – as he had testified moments earlier at the trial – from the "carbon diversion" aspect of their business. Id. at 258-59.

McKelvy was asked, if he had understood (in May 2009) that "they had no contracts to sell any systems." Tr. 10/10/18 at 259. He said that he was not sure of what he knew in May 2009 on this point, but added, apparently referring to the exhibits displayed during the trial, that

> Everyone's seen what I've seen, there is an intent, negotiations of contracts, based on what you just showed on there, people didn't want to go into a contract until they actually saw the site and saw the feed stock.

Id.

McKelvy was again asked about prior testimony at an SEC deposition, this time the one on October 22, 2009. He was asked whether he recalled the following questions and answers:

> "Q Has Mantria, any Mantria entity sold a system to anybody?
>
> "A No.

[31] From the earlier questioning, McKelvy was apparently re-asked the question as articulated in the bracketed words.

> "Q Have they contracted to have any system built?
>
> "A No."

Tr. 10/10/18 at 259. McKelvy responded,

> That's what I just said. I just said there was no revenue coming in from the CDI side. And that all those negotiations were contingent on something.

Id.

McKelvy agreed that, in terms of its potential value to investors, he did not "care about" biochar production, but did "care about" the system sales and the production of electricity. Tr. 10/10/18 at 260. As he had "witnessed" in Hawaii, the systems worked, in the sense that they "still incinerated … plant stock." Id.

McKelvy agreed that he had learned from Wragg and Knorr that there had been construction delays at Dunlap, which he said was not an unusual event, but said that he had not heard about any "problems" at Dunlap, from Cary Widener or anyone else.[32] Tr. 10/10/18 at 260. He agreed that, as of May 2009, that construction at the Dunlap plant had not been finalized. Id.

Accordingly, while McKelvy conceded that, during May of 2009 – which was after he had been told by Wragg and Knorr that Mantria was pivoting to green energy because the real estate market was faltering - he "knew that revenue was slowing up dramatically," Tr. 10/10/18 at 257, he explained that, based on what he had been told, he believed that Mantria was "pulling in … enough revenue[33] to make the monthly payments" on the interest owed to the investors. He considered Mantria, after its switch to emphasizing green energy, to have been a "start-up."

K. McKelvy requests the Court to enter judgements of acquittal on Counts 1 and 9, the conspiracy counts, because of Wragg's and Knorr's consistent pattern of lying to him (McKelvy) –

---

[32] When Widener testified, he said that he did not have any detailed discussions with McKelvy. Tr. 9/26/18 at 259.

[33] As he had explained, by which he stated that he meant "cash flow." Id. at 257.

prejudicial "spillover." In its Instructions on the two conspiracy counts, the Court told the jury that, to convict, they had to find beyond a reasonable doubt that McKelvy (1) that "two or more persons knowingly and willingly agreed to commit [the] offense against the United States … charged in the indictment;" (2) that "McKelvy was a party to or member of that agreement;" and (3) that "McKelvy joined the agreement or conspiracy knowing of its objective to commit an offense against the United States and intending to join together with at least one other alleged conspirator to achieve that objective; that is, that … McKelvy and at least one other alleged conspirator shared a unity of purpose and the intent to achieve a common goal or objective …." Instructions at 63.

McKelvy argues that the evidence is uncontestable that Wragg and Knorr constantly and repeatedly lied to him about the nature of Mantria's financial status and about the prospects of Mantria's business. As a result, McKelvy argues that, as a matter of law, there was no evidence of a "unity of purpose" or of an "intent to achieve a common goal or objective." Moreover, McKelvy argues that, as set out in the Rule 33 Memo, that prejudicial "spillover" infected the trial.

McKelvy's argument is governed by the rationale of United States v. Camiel, 689 F.2d 31 (3d Cir. 1982) (Aldisert, J.), aff'g, 519 F.Supp. 1238 (1981)(Green, J.), where the Third Circuit affirmed the district court's entry of a verdict of acquittal, following a jury verdict of guilty. The Court of Appeals ruled, as summarized by the publisher's synopsis, that

> (1) in view of several factors militating against finding common scheme, jury could infer existence of either two or perhaps even four distinct schemes to defraud, and evidence was insufficient, as matter of law, to support inference of single, unitary scheme involving all alleged co-schemers as found by jury and as charged in indictment; (2) trial judge did not err in determining that there was "spillover of evidence" from one scheme to another, nor did trial judge err in determining that substantial rights of defendants were prejudiced thereby; and (3) defect in indictment, that Government could not try case bottomed on multiple schemes on basis of single scheme indictment, could not be cured by

> **severance and separate trials, but, rather, it was indictment itself which was root cause of prejudicial variance and would allow for and encourage full range of evidence offered at trial below, resulting in "spillover" and "guilty by association" effects, and thus proper remedy was not retrial but acquittal, as directed by the district judge.**

689 F.2d at 31.

Among the "factors militate against finding a common scheme in this case," 689 F.2d at 36, were that it is incontestable that Wragg was the one who founded and controlled Mantria; that Wragg and Knorr repeatedly – if not incessantly – lied to McKelvy about what Mantria had done and what it was forecast to do in the future; and that McKelvy had no contact with the key players in the real estate side of the business, including George Dixson, Dishman, Tisa Dixson, Gary Wragg, and Bryant. It is difficult to imagine any case where one co-defendant lied more to another – the essence of an "antagonistic relationship" – than Wragg lied to McKelvy. Id. Accordingly, this Court should find that the government has not proved a common scheme, just as in Camiel.

VI. Conclusion. Accordingly, McKelvy argues that, as a matter of law, judgements of acquittal should be granted on Counts 1-8 for violations of the statute of limitations. In addition, McKelvy argues that judgements of acquittal should be granted on Counts 1-9 and on the fraud allegations in Count 10, for a total lack of evidence of McKelvy's participation in an "overall" scheme.

Respectfully submitted,

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

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

Dated: April 4, 2019

CERTIFICATE OF SERVICE

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

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

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

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

Dated: April 4, 2019