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	:	

REPLY 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 Reply Memorandum in Support of Defendant's Motion for Judgment of Acquittal Pursuant to Fed.R.Crim.P. 29(c).

I. Legal standards. The government did not object to McKelvy's statement of the legal standards for a motion under Rule 29(c) in his Doc. No. 262. Likewise, McKelvy does not object to the government's standard of review section in its Response, Doc. No. 274, there is no dispute as to these standards.

II. The extended statute of limitations under 18 U.S.C. § 3293(2).

A. Relevant statutes. The parties agree on the relevant statutes.

B. Pre-trial rulings without prejudice. The Court's denial of McKelvy's pre-trial motion to dismiss, based on the statute of limitations, does not limit McKelvy from raising this issue now that the trial has been completed. The government never refuted McKelvy's argument, in his Amended Supplemental Rule 29 Memo ("Supp. Rule 29 Memo"), Doc. No. 262 at 4, that the Court specifically ruled that its pre-trial rulings were without prejudice. As McKelvy argued there, one of the reasons this Court denied McKelvy's pre-trial limitations motions and denied his motion for reconsideration of that denial, was that, as the Court noted in its Order denying reconsideration, the Court then

assess the sufficiency of the evidence. Doc. No. 153 at n. 1. Any suggestion by the government to the contrary, Doc. No. 274 at x, is incorrect.

C. The government's first rationale – burden of proof. The government cited United States v. Pelullo, 964 F.2d 193, 215-16 (3d Cir. 2012), Doc. No. 274 at 3, as had McKelvy, Doc. No. 262 at 7, for the rule that it is the government's burden to prove – beyond a reasonable doubt – that this case qualifies for the extended ten-year statute of limitations on Counts 1-8.

D. Because MFL was an entirely fraudulent operation, it cannot be considered a financial institution within the meaning of section 3293(2). Both McKelvy and the government discussed the impact of United States v. Serpico, 320 F.3d 691, 694 (7th Cir. 2003), on this case. In essence, McKelvy argued that Serpico was distinguishable in that it involved a federally insured full-service bank,[1] which "actively participates" in a "loans-for-deposits" scheme, rather than an entity similar to MFL, which we argued and the evidence shows was never operated as a legitimate institution. McKelvy agrees with the government that he did not cite a case which directly supported his position, but notes that, likewise, the government has cited no case to support its position – which is a crucial flaw, in light of Scott's testimony and of the government's burden of proof.

McKelvy argued in his Amended Supplemental Rule 29 Memo ("Supp. Rule 29 Memo"), Doc. No. 262 at 4, that the government offered no evidence that MFL was operated as a legitimate institution. The government's Response, Doc. No. 274 at 4, is remarkable. When the government asserted that the (so-called) "mortgages" were submitted to a legitimate title company, the government knows that use of a title company was included in the overt acts alleged in Count 1 as a part of the charged conspiracy.

The government contends that McKelvy's "argument that these mortgages were not profitable to Mantria is beside the point, as profitability is not a requirement under the statute." Doc. No. 274 at 4. But the government ignores the word "business" in 18

[1] McKelvy asks the Court to take judicial notice of this fact, as of the date of the Serpico opinion. According to Bloomberg.com, it was acquired in 2011 by Premier Bank.

U.S.C. § 20(10). Section 20(10) includes "a mortgage lending business" as constituting a "financial institution." Since the Supreme Court has used dictionary definitions in approximately 225 cases over a decade (as reported in the New York Times article quoted in McKelvy's Doc. No. 105, at 35-36), McKelvy's use of dictionary definitions for such words as "business" cannot be "beside the point."

The government's claim that MFL "in fact functioned as a mortgage lending business, issuing mortgages to buyers of the real estate in Tennessee," Doc. No. 274 at 4, is a flat-out misstatement. Just because MFL was using what they referred to as "mortgages" does not mean that they were, in fact, mortgages. To the contrary, these documents were just part of the orchestrated fraud to "gin up" the appraisals and purported sales prices of the real estate, cf. Amanda Knorr's testimony at Tr. 10/3/18 at 108, 126, so as to fool the investors (and McKelvy) into believing that the investments were valuable ones.

While we do not challenge the government's assertions that MFL held itself out as a mortgage company or that attorney Christopher Flannery created MFL "to function as a mortgage lending business," Doc. No. 274 at 4, that does not mean that MFL was operated as a legitimate institution for even one transaction. As noted in its Doc. No. 262 at 5, the testimony of both Dan Rink and Amanda Knorr was that Mantria lost money on each of the lot sales, when MFL wrote the mortgage with its "buyer incentives." With the testimony of Rink and Knorr that Mantria was losing money on each lot sale which was financed by MFL, with the testimony of forensic accountant Kyle Midkiff that MFL used unsubstantiated accounting entries to attempt to cover over MFL's losses of over $4 million at the end of 2008, and with Wragg's decision to shift from land sales to green energy, it was conclusively demonstrated that MFL did not, as the government argued, "function as a mortgage lending business."[2] Id. at 4.

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[2] The government's argument that "McKelvy himself admitted this, stating during his SEC deposition, 'Mantria 17 is a Tennessee financial institution, a commercial bank,'" Doc. 274 at 4-5 is unsupportable. Surely, the government knows that whatever McKelvy said at a deposition is not relevant on this point.

E. Carl Scott's testimony, MFL's fraudulent application to TDFI, and the reasonable doubt standard. The government argues that the testimony of Carl Scott, the Director of Licensing, for the Tennessee Department of Financial Institutions ("TDFI"), that MFL registered as a financial institution to issue mortgages under the laws of Tennessee, Tr. 9/27/18 at 9, was supported by the government's exhibits Doc. No. 274 at 4. In essence, the government argues that because MFL registered with TDFI, it was in fact a financial institution under the relevant federal statutes. While registration might, in the absence of contrary evidence, be significant, registration alone is not decisive here, in the face of Scott's testimony, as summarized here and below.

The starting point for this analysis is the government's burden on the statute of limitations issue for Counts 9 and 10, which is that the government must prove, beyond a reasonable doubt, that these crimes "occurred within six (6) years of the end of the commission of the offense." Instructions at 78.

As McKelvy argued in his Doc. No. 262 at 7-9, MFL cannot be considered to be a "financial institution" under Tennessee law because fraudulent information was supplied by Knorr in the applications. The government does not challenge the substance of the evidence that Knorr falsely claimed that she was the 51% owner of MFL; does not challenge the substance of Kyle Midkiff's testimony regarding the financial statements; and does not challenge McKelvy's proffer concerning Scott's testimony that "straw" purchasers would also be disqualifying.

The government makes two remarkable arguments to establish its position: first, it contends that "providing false information" to a regulator "does not mean that they are not financial institutions under the law." Doc. No. 274 at 6. McKelvy replies: it depends on the circumstances – he is not referring to just any "false information," he is referring to materially false information on the application to become a financial institution in Tennessee and on the renewal applications for the license.

The government overlooks Scott's testimony, as quoted by McKelvy, Doc. No. 262 at 6-7, where he (Scott) was asked whether it would impact the granting of a license if an "initial application or a renewal application [includes] false

information … about the ownership of the entity seeking licensing or registration …?" Scott replied, "We would deny it." Id. When asked what TDFI would do if it found out, after the fact, about such false information on the application, Scott replied that the agency would deny the application. Id.

Because Scott was called as a government witness and because his above-quoted testimony was not impeached by the government, the government is not only bound by his testimony, but is also required to prove beyond a reasonable doubt that Scott was incorrect, as a matter of law, for stating that MFL would have been disqualified, based on false material entries in the applications to TDFI. Accordingly, the government had to show beyond a reasonable doubt that TDFI could not have disqualified MFL ab initio under these circumstances. The government cited no case law or relevant statutes on this point.

The government argues alternatively, "even if the registration were found to be issued under false premises, the government is not required to show that Mantria Financial was registered or licensed under state law." Doc. No. 274 at 6. At best, this is a play on words. While it is possible – as represented by the government - that, in other states, there is no requirement that an applicant accurately list percentages of ownership in an application to become a financial institution,[3] such a hypothetical does not affect what happened here.

While McKelvy agrees that, if Wragg had decided to purchase land in another state, where there was no requirement that a financial institution be registered or licensed, then MFL theoretically would not have had to file an application and there would have been no application on which to have false representations, the statute of limitations issues would be very different. But here, MFL was located in Tennessee where there was a registration requirement and there were material misrepresentations on the application for status as a "financial institution." The Director of Licensing for TDFI testified that false information about percentages of ownership would be

[3] Although the government cites no authority for this assertion, it claims that, "[M]any states do not require companies like Mantria Financial to be registered or licensed." Id. at n.1.

disqualifying. In this situation, if TDFI had learned of this falsity after the fact, MFL would not have been registered and there would have been no arguable claim that it otherwise satisfied the statutory requirements. See also, Doc. No. 262 at 9-11.

F. The government did not respond to McKelvy's arguments about the contents of the first two MFL applications. McKelvy pointed to G-AK16 as containing false information about the ownership of MFL. Doc. No. 264 at 7. That application contained false information about the ownership interests which were above 5% - this exhibit contained the statement that these ownership interests were: "Amanda Knorr 51 percent, Troy Wragg 49 percent." Tr. 9/27/18 at 26. The government did not comment on the defendant's argument about the prior two applications, of which TDFI had no paper copy or digital image – that it was highly probable that the first two applications contained similar information.

McKelvy provided three different reasons in support of this assertion. First, Knorr testified that, as explained in more detail in Doc. No. 264 at 7, Wragg had "wanted [MFL] to be minority owned." Second, Scott testified that the ownership information "[s]hould have been on the original application," and that even though he did not have the original application to examine, the original application did have information "similar to this" ownership percentage question. Tr. 9/27/18 at 26, 27-28. Third, viewing MFL's original application in the context of a Mantria press release, G-AK14, which was dated March 27, 2008 and stated that, "Mantria Financial is a minority-owned business, with 51% controlled by [COO] Amanda Knorr …." The government never responded to McKelvy's argument that this evidence made it extremely unlikely that the first two applications would have contained accurate figures: that MFL was 100% owned by Mantria.

By not having contested McKelvy's assertions regarding Scott's testimony, this Court should view the government's non-response as tacit admissions.

The above-cited evidence also shows that Knorr's misrepresentations on the applications and on the supporting financial documents were not the product of mistakes, but rather

were intentional – witness Knorr's testimony that Wragg wanted appraisals to "gin up" land values and investment prices, and Knorr's testimony that Wragg had "wanted [MFL] to be minority owned."

Federal court cases on the applicability of the void ab initio standard to cases where an insurance company sought to disqualify a policy holder, who had submitted false information on an application, referred to state statutes which require showings by the insurance companies of the claimant's having acted with intent to deceive or deliberately, rather than mistakenly. In our case, that would mean that the government would have to maintain its burden of proving, beyond a reasonable doubt, that McKelvy could not satisfy the void ab initio doctrine did not apply – otherwise the fraudulent MFL application would be disqualifying. Based on the Tennessee statutes which had the closest applicability, the government would have to argue that McKelvy – in the role analogous to that of an insurance company – could not meet the burden set by the statute. Accordingly, it is the government's burden to come up with what it believes is an analogous state statute, but the government faults McKelvy for not citing any cases. Doc. No. 274 at 5.

At least in the context of a defense by an insurance company that a policy was void ab initio, the analogous cases frame the issue in terms of state statutory law. See, e.g., Penn Tank Lines, Inc. v. Liberty Surplus Ins. Corp, 2011 WL 2117949, *11 (E.D.Pa. 2011)(under Pennsylvania statutory law, an insurance company can successfully raise a void ab initio challenge to the enforceability of a liability insurance policy if the insurance company shows that false statements on the application were intentional and deliberate, rather than mistakes); see also National Grange Mut. Ins. Co. v. CRS Auto Parts, Inc., 312 Fed.Appx. 483, 484 (3d Cir. 2009)(Pennsylvania statutory law); Arch Specialty Insurance Company v. Cline, 2012 WL 12823706, *3 (W.D. Tenn. 2012)(an insurance company would have to show, under Tennessee statutory law, that a misrepresentation on an application for life insurance was "made with actual intent to deceive"); cf. Healthcare Mgmt. Res., LLC v. Carter, 2007 Tenn. App. LEXIS 35, *18-19 (Ct. App. 2007) (under Tennessee decisional law, fraud renders all contracts void ab initio, at

the option of the defrauded party, when diligently exercised and in the absence of intervening rights of innocent third parties).

At first glance, McKelvy's research shows that Section 45-13-405. "Violations - Cease and Desist Orders – Penalties," of the 2009 Tenn. SB 2279, effective June 23, 2009, provides that, for any violation of the applicable chapter, one of the possible penalties is "revo[cation of] any license issued under this chapter." Based on Carl Scott's testimony, quoted below, furnishing a fraudulent application to TDFI would have been disqualifying.

G. 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, if there is testimony later in this case that the buyers were effectively straw buyers used to inflate the price of the lots/land,[4] the mortgages issued would have been consistent with MFL's status as a mortgage lender? We also proffer that Scott answered, "No."

H. The government made no mention of Midkiff's testimony. Although the government's arguments on MFL's status as a financial institution focused on the testimony about the false representations about MFL's ownership, the arguments made above as to these misrepresentations fully apply to Midkiff's testimony about the falsity of MFL's net worth accounting in its financial statements submitted with its applications. Doc. No. 262 at 11-14. The government's non-response to Midkiff's testimony is a tacit recognition of its force.

I. The government did not prove, by a reasonable doubt, that MFL was adversely affected by the fraud. McKelvy argued in his Supp. Rule 29 Memo that the government had not offered a scintilla of evidence to support its contention that MFL was adversely affected by the fraud. Doc. No. 262 at 14. Specifically, the defendant argued, as he did in his Amended Limitations Memo,

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[4] In her interview by the FBI on January 25, 2018, Tisa Dixson's 302 stated that she "agreed the buyers were effectively straw buyers used to inflate the price of the lots/land." McKelvy expected to ask her this question, as reflected in co-counsel Batty's notes, which we have furnished to government counsel.

Doc. No. 105, that the government must show that the fraud directly caused actual loss and/or a substantial risk of loss. Doc. No. 262 at 14. Although the government focused in its Response on the ill effects experienced by MFL (and its parent company, Mantria) after the SEC had seized Mantria's assets starting in October 2009, the government never responded to the defendant's assertion, id. at 45-48, that Mantria and MFL (MFL was created on or about November 1, 2007) were already apparently insolvent as of the fall of 2007 – when they were seeking funding through McKelvy to pay off an outstanding construction loan in the amount of $3.2 million, and that the effect of the Ponzi scheme was to keep Mantria and MFL afloat for about two years, using fraudulently obtained investor funds. Doc. No. 262 at 14; cf. Doc. No. 105 at 46-49.

For the government to be able to overcome McKelvy's argument, beyond a reasonable doubt, the government would had to have shown that, unaided by the fraudulently-obtained investor money, Mantria (and MFL) would have staved off insolvency and looming bankruptcy, which was the financial status in the fall of 2007. The government never made even a passing attempt to show McKelvy's assessment was incorrect and, accordingly, has failed to carry its burden. Substituting such arguments as its claim that the defendant's position was "patently absurd," Doc. No. 274 at 6-7, without even being able to correctly describe his position, is unfortunate.

III. The government's "second rationale" under section 3293(2). In Doc. No. 262 at 14, McKelvy argued that, 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 or home equity loans to generate money to invest in Mantria and had lost money on those investments. McKelvy identified Dee Holl, Charles Carty, and Phil Wahl as the three witnesses who so testified.

As to Holl and as stated in Doc No. 262, McKelvy conceded that the jury could have reasonably concluded that the government proved that one of the reasons she defaulted on her $30,000 credit card debt was Mantria's failure to pay her the promised returns on her investments. Id. at 15-16. McKelvy made this concession based on Holl's having defaulted, even though he

recognized there may be a lack of definitiveness in her testimony on the "affected" issue. Id. But, either because McKelvy had argued that Holl did not identify any FDIC insured banks associated with her credit cards, id. at 14-15, or for a reason known only to itself, the government did not refer to Holl's testimony in its Response.

Contrastingly, McKelvy had conceded as to Wahl and Carty that their credit cards (Wahl) and home equity loans (Carty) were with federally insured banks. Doc. No. 262 at 16-17. But, as to these two investor witnesses, McKelvy argued that the government had not proved that the financial institutions from which they had obtained their credit cards or loans had been adversely "affected" because there was no evidence that the Ponzi scheme had directly caused an actual loss or a substantial new or increased risk of loss to the banks. Id. at 16. McKelvy cited several cases concerning the issue of the "directness" of the loss and contrasted the facts in their instances with Holl's testimony; Wahl stated that he has paid off some of the credit cards and is in the process of paying off the debt on others, id. at 16, and Carty said that he had made arrangements to pay off his home equity loans. Id. at 17.

McKelvy argued, in his Doc. No. 262 at 17, that neither Wahl nor Carty testified that he was at risk of defaulting on any of his loans from or credit cards with federally insured banks. McKelvy also argued 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 home equity loan and every credit card. Id. The government countered with a claim that such loans were ones that "they could not afford." Doc. No. 274 at 8. Put most discreetly, this claim is made of whole cloth – as noted above, Wahl and Carty each testified that he had made arrangements to pay off any outstanding loans.

IV. <u>The limitations statute as to the securities fraud counts, Counts 9 and 10</u>. As to Counts 9 and 10, McKelvy argued that the only overt acts which were timely for the six-year statute of limitations on those two securities fraud counts were overt act nos. 52, 53, 54, and 55 and that the government had not proved,

for different reasons, an essential element of each of these overt acts.

On reflection, McKelvy concedes that much of the government's analysis of the overt act issues, Doc. No. 274 at 9-10, is correct; we withdraw our arguments as to the overt acts component of Counts 9 and 10.

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, Wragg, and Knorr.[5] In his Supp. Rule 29 Memo, Doc. No. 262, McKelvy reviewed, at 18-20, the importance of the Third Circuit's decision in United States v. Dobson, 419 F.3d 231, 237 (3d Cir. 2005). Also in that memo, McKelvy set out, at 20-24, some of the Court's Instructions which were pertinent to his arguments later in the memo. The government had no comment on either of these sections of the defendant's memo.

A. The allegations and evidence regarding "securities" – Counts 9 and 10. In his Doc. No. 262, McKelvy asserted that, despite the numerous allegations in the indictment of the importance of "securities," the government had not proved the securities element of its case. The defendant first focused on the lack of such poof in Counts 9 and 10, id. at 24-25, and then on Counts 1-8. Id. at 25-26. McKelvy argued that, despite the numerous allegations in the indictment and despite the evidence at trial pertaining to "securities," the government had failed to prove that the Mantria investments were, in fact, "securities."

In its Response, Doc. No. 274, the government argued:

> At trial, the government presented plenty of evidence showing that the Mantria investments were securities as defined by law. The term "security" means any note, stock, treasury stock, security future, bond, debenture, certificate of interest or participation in any profit-sharing agreement. 15 U.S.C. § 78c(a)(10). In determining whether or not an instrument is a security, Courts frequently apply the Supreme Court's Howey "investment

[5] McKelvy inadvertently omitted reference to Wragg in the underlined summary of the argument in his Doc. No. 262 at 18.

> contract" analysis (from SEC v. W.J. Howey, 328 U.S. 293, 301 (1946)). There are three elements of the Howey test. First, there must be an investment of money. Steinhardt Group v. Citicorp, 126 F.3d 144, 151 (3d Cir. 1997). Second, the investment must be made into a common enterprise. This element requires a pooling of investors' contributions and distribution of profits and losses on a pro-rata basis among investors. Steinhardt, 126 F.3d at 151. Third, the profits from the investment must come solely from the efforts of others. Steinhardt, 126 F.3d at 153, quoting Lino v. City Investing, 487 F.2d 689, 692-93 (3d Cir. 1973).

Doc. No. 274 at 10-11.

The government and McKelvy have very different ideas as to what constitutes evidence, much less "plenty of evidence." As demonstrated by McKelvy, Doc. No. 262 at 24-25, 26-29, the government's evidence from experienced SEC attorney Gottschall as to the definition of "securities" was that the PPMs were the "securities." Id. at 26-28. Flannery stated that "almost anything can be a security… [including] orange trees …." Id. at 27 (quoting Tr. 10/4/18 at 5). As also demonstrated by the defense, the only mention by a government witness of any other definition of the "securities" in this case came in the half-sentence of Flannery's testimony, on questioning by the defense. Id. at 28. It is, of course, the government's burden in any case such as this one to prove that the investments were, in fact, securities.

The government's claim that "Gottschall … testified that the Mantria investments were securities" is accurate only in the context of his saying that the PPMs were the securities, as discussed in McKelvy's Doc. No. 262 at 27. When the government next asserts that, "For example, during his testimony, Gottschall clearly defined a security as 'an interest usually, a partial ownership interest in a company or … debt,'" Doc. No. 274 at 11 (citing Tr. 9/27/18 at 174), this argument is misleading. In the quoted passage, Gottschall was not talking about the Mantria investments, but was responding to the government's background question, "[W]hy does the SEC require people who sell securities to be licensed?," Tr. 9/27/18 at 173,

followed by the hypothetical question, "[W]hat's the difference then between buying a security and buying a car, for example?" Tr. 9/27/18 at 174. Contrary to the government's claim now, there was absolutely no reference in either of these questions or answers to Mantria's investments.

As also argued by McKelvy, Doc. No. 262 at 28, the government did not mention, at trial, Flannery's testimony on cross that the Mantria securities were "notes, [and] interests in future earnings." Tr. 10/4/18 at 154. Instead, the government went back to its theme with Gottschall in the following question to McKelvy on cross: "[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?," to which McKelvy answered, "No, that's not correct. At the time I didn't know what a PPM was…." Doc. No. 262 at 28 (citations omitted).

In its Response at 10-11, the government, for perhaps the first time in this case, mentioned the statutory definition of "security," which statute had been quoted more fully in McKelvy's Doc. No. 262 at 28, n. 16, which statute, as summarized by the government now: "note, stock, treasury stock, security future, bond, debenture, certificate of interest or participation in any profit-sharing agreement." Doc. No. 274 at 10-11 (citing 15 U.S.C. § 78c(a)(10)). Somehow, the government left out of the above-quoted definition of "securities" the term it then focused on, "investment contracts," which were part of the statutory definition quoted by McKelvy at Doc. No. 262, n.16.

The government states that, "In determining whether or not an instrument is a security, Courts frequently apply the Supreme Court's investment contract analysis, as set out in SEC v. W.J. Howey, 328 U.S. 293, 301 (1946)." Doc. No. 274 at 10-11 (emphasis added). By using this "frequently" phrasing, the government sidesteps McKelvy's argument that it (the government) did not make any allegations or ask any questions of its witnesses pertaining to the statutory definition of securities and instead focused only on the flatly incorrect approach that the Mantria PPMs were "securities." The government seems to imply that because, in other cases, "Courts frequently consider the issue of whether an investment is an 'investment contract,'"

this Court and/or the defense should have, sua sponte, raised the "investment contract" issue without any such allegation by the party with the burden of proof – in this case, the government.

The government's reference to "investment contracts," together with its recitation of the Howey analysis, come for the first time in this litigation in its Response.[6] If the government had believed, before or at the time of trial, that the Mantria investments were "investment contracts," then it was incumbent on government counsel to articulate that theory through Gottschall and Flannery. But, that did not happen.

In an attempt to buttress its position, the government accuses the defense of being both "myopic[]" and "disingenuous" regarding the testimony as to the issue of whether the Mantria investments were securities. Doc. No. 274 at 11-12. Instead, the government asserts that Gottschall made an "affirmative response to what was clearly a misspoken question by the government, mistakenly referring to the PPM as securities, rather than the investments summarized within those PPMs as securities." Id. But the government cites no evidence to support this revisionism. If, for example, the government had used elsewhere its newly-minted phrase – that the securities were "the investments summarized within those PPMs as securities," id. – then its position might be an arguable one.

But, the government apparently has forgotten that it represented just three weeks before the trial began that the PPMs were the securities. In a letter to the defense dated September 4, 2018, the government provided a summary of the testimony of three of its witnesses – Gottschall, Flannery, and Joseph Piccione – who would be testifying as "fact" witnesses and not under Fed.R.Evid. 702 as "expert opinion" witnesses. Exhibit "A," attached. The letter represented that Gottschall would testify that "the PPMs were in fact securities" and that Flannery would testify that "the PPMs he wrote were in fact securities." Id.

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[6] McKelvy had, in his Doc. No. 262, cited the Howey case as the one referred to by Flannery when he spoke of the Supreme Court case involving Orange trees. Id. at 27 n. 14.

While the purpose of this letter appears to have been to forestall any claim by the defense that the testimony of one or all of these witnesses should have been qualified as expert opinion evidence, pursuant to Rule 702, and while any attorney can wish that what he or she said during a trial had been better said, the theme that Gottschall and Flannery would say that the PPMs were the securities was not mis-articulated.

The defense took the government too literally, when it represented in its letter that Gottschall and Flannery were "fact witnesses." But, to paraphrase Shakespeare, this letter protested too much. If these two lawyers were truly "fact" witnesses, then it would have been arguable that they did not have the qualifications to deliver the reams of legal background and legal history they did. Not having objected at trial to the qualifications of these two witnesses to provide such testimony, McKelvy could do so now only by claiming that this was plain error, which he will not do.[7]

B. <u>The allegations and evidence as to whether McKelvy acted as a "broker</u>." As McKelvy argued in his Doc. No. 262, Count 1, ¶ 3 of the indictment alleged that McKelvy was not "licensed to sell securities." In its Response, the government again resorted to the claim that the defense has been "disingenuous."

> **In the same disingenuous vein, the defendant also makes a series of convoluted arguments that the government failed to prove that [1] McKelvy knew the Mantria investments were securities or [2] that McKelvy was a securities "broker."**

Doc. No. 274 at 12 (brackets added). The government has compressed two of McKelvy's arguments into one. We will first consider the argument we made first – that the government had not proved that he was a securities "broker." Id. at 12.

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[7] **While there are apparent advantages to describing a witness as a fact witness, such as not having to qualify the witness as an expert or to provide the defense with a summary of an expert's expected testimony, there are also disadvantages. One of the disadvantages is not being able to ask the witness to state his or her opinion on certain issues.**

The government first claims that McKelvy's argument that the government failed to prove that he was acting as a securities broker "is irrelevant" because "he was not charged with selling securities without a license." Doc. No. 274 at 12-13. Remarkably, this is almost, to a word, what McKelvy said in his Memorandum in Support of his Motion to Strike, Doc. No. 136: "In th[is] memorandum …, McKelvy argued that several passages in the indictment were irrelevant and prejudicial." Id. at 6-7. If the issue of McKelvy's alleged status as a broker is irrelevant, then the government's admission that it "present[ed] significant evidence showing that McKelvy did in fact act as a broker," id., is, paradoxically, an implicit concession – however unintended – that this evidence should be stricken and a new trial granted.[8] Doc. No. 274 at 12-13.

Specifically, McKelvy argued in his strike motion and memo that he objected to, among others, the passages in the indictment that "McKelvy has never been licensed to sell securities" and "Federal securities law also generally required those selling securities to the general public to be licensed." McKelvy quoted extensively from his strike motion and memo in his Doc. No. 261 at 41-45. The government responded that such allegations were not only relevant to their case, but also essential to be able to prove criminal intent. Again, McKelvy quoted the government's response extensively in his Doc. No. 261 at 41-45.

In denying McKelvy's motion strike, after considering the parties' memos, the Court ruled:

> **In the instant case, language [in the indictment] stating that Defendant was not licensed to sell securities, that he attempted to evade SEC regulations, and that federal securities laws generally require a license to sell**

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[8] **The government uses what might be called a "whiplash" technique by contradicting itself within the space of two sentences, saying at first, "Notwithstanding the ultimate irrelevance of McKelvy's alleged status as a broker" and, in the next sentence, that McKelvy's status as a broker "was relevant in that it showed McKelvy's criminal intent." Id. at 13. It goes without saying that the government must choose its position.**

> securities to the general public is relevant to proving the required intent for each charge in the Indictment. Defendant's lack of a license to sell securities, like loss, is relevant to proving his specific intent to defraud. [citation omitted]. Moreover, this language is relevant to proving that Defendant "intentionally chose not to register with the SEC or obtain the proper licenses because he was afraid that the SEC would learn of and crack down on his fraudulent conduct." (Doc. No. 137 at 7.) In this regard, the Government claims that Defendant intentionally sought to remain undetected by the SEC. The Government submits that it will use this evidence at trial to prove that Defendant knew his tactics were in violation of law and that his actions were not taken in good faith.

Doc. No. 151 at 8-9 (emphasis added). It is apparent that the challenged assertions and evidence cannot be both relevant and irrelevant.[9]

C. There is no evidence that McKelvy knew that Mantria investments were "securities." McKelvy made several arguments in this section of his Doc. No. 262 at 31-34, which arguments have largely been ignored by the government in its Response. Without listing each of the defendant's arguments which have not been challenged, we believe that they all have been implicitly conceded.

As the arguments which the government did make, it asserted that "there is no legal requirement that the defendant knew he was selling securities; rather, as set forth explicitly in the jury instructions, all the government had to prove was that McKelvy knowingly made false statements "in connection with the sale of securities." Doc. No. 274 at 12. There is, however, no comprehensible difference, between these two concepts, under the facts of this case. While the "in connection with" language would generally be considered as broader than the language

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[9] Moreover, the government made several assertions in the its Response as to the reasons for denying the strike motion – such as that McKelvy's not having sought [registration as a broker] to sell securities and was attempting "to evade SEC scrutiny" is probative of both his intent and lack of good faith – which are summarized in McKelvy's Doc. No. 261 at 43-44. The government's implicit concession is at odds with these allegations as well.

McKelvy used – that the government failed to prove that he knew he was selling "securities" - did not focus on the term "selling," but on the term "securities."

The government argues that, "He knew full well that the Mantria investments were securities; otherwise, there would be no reason for the SEC to be involved." Doc. No. 274 at 12. This is a glaring non sequitur – for example, just because he knew that the SEC was "involved" in the formal investigation of his association with TRACS Investment Club investments, does not mean that he knew that these investments were "securities."

There are two good reasons for McKelvy's argument that he did not know that the Mantria investments were "securities." First, as Gottschall explained, when discussing the SEC's formal investigation of McKelvy's investment clubs:

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

Tr. 9/28/18 at 103. McKelvy argues that this reasoning applies to securities as well – one cannot be a "securities broker" unless he or she is dealing in "securities." Accordingly, Gottschall provided compelling testimony that the SEC had not found in the formal investigation that McKelvy knew that those investments were securities.

There is a second good reason for McKelvy's believing that the SEC's rules and regulations did not govern this matter, as summarized in his Doc. No. 262 at 31-34: he thought, as demonstrated by his frequent use of LLCs, that the Mantria investments were similarly LLCs, just as were the TRACS Investment Club investments. Although the government did not mention the point, McKelvy argued in a footnote in his Doc. No. 262 at 34 n. 22, 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," citing a 2018 Kansas district court decision which ruled that, under some circumstances investments in LLCs will not be considered "securities." If a federal court takes 18 pages to discuss this and other issues,

McKelvy cannot be faulted for not apprehending that his lawyer's advice may have been incorrect.

In addition, as made clear by the Court's instructions, the issue was not whether McKelvy should have known that the Mantria investments were securities, but whether he "knew" that they were securities. In the same vein as we argued on the issue of the Dobson factors,

(1) McKelvy did not "know" that the Mantria investments were "securities" under the jurisdiction of the SEC, in the sense that he was "conscious and aware of" this. See Instructions at 36, 33.

(2) McKelvy did not act "intentionally" to market "securities," in the sense that he had a "conscious desire" or "purpose" to sell "securities." See Instructions at 36, 34.

(3) McKelvy did not act "willfully" to market "securities," in the sense that he "knew his conduct was unlawful and intended to do something the law forbids." See Instructions at 36, 35.

D. Under the "overarching scheme" and other Instructions, the government did not meet the no "rational trier of fact" standard. In response to the government's summary of the evidence supporting its position that there was ample evidence to satisfy the "overarching scheme" Instruction, Doc. No. 274 at 13-15, McKelvy adopts his analysis of the government's contentions in his Supp. Rule 33 memo. Suffice it to say for now that McKelvy is not familiar with a major federal fraud case where the government relied solely, as it does here, on the defendant's arguably conflicting statements. Especially in a case where the two lead defendants plead guilty, with cooperation agreements holding out the prospect of government recommendations to reduce their sentences pursuant to U.S.S.G. Sec. 5K1.1 and neither witness provided any evidence of McKelvy's criminal intent, McKelvy is not being unreasonable in challenging the remainder of the government's evidence.

E. In responding to the defendant's arguments that the multiple lies Wragg and Knorr told him demonstrated he had no criminal intent, the government resorts to the technique of just changing the subject.

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,

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Dated: May 22, 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:

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