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

UNITED STATES OF AMERICA	
v.	**CRIMINAL No. 15-398-3**
WAYDE McKELVY	

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

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

I. Introduction. In its Response to Doc. No. 261, McKelvy's Rule 33 Supplemental Memo ("Rule 33 Supp. Memo"), the government asserts that, "at trial, the whole case boil[ed] down to intent." Doc. No. 275 ("Rule 33 Response") at 5. McKelvy agrees that the primary issue at trial was whether McKelvy acted with the requisite criminal intent – whether he knowingly, intentionally, and willfully participated with co-defendants Troy Wragg and Amanda Knorr in a fraud against by making false statements and material omissions to the potential investors in Mantria. However, as set forth at length in McKelvy's Reply Memorandum in Support of his Motion for Judgment of Acquittal Pursuant to Fed.R.Crim.P. 29(c)("Rule 29 Reply"), a critical issue is whether the government proved beyond a reasonable doubt that McKelvy was involved in the offer or sale of a security. For the reasons set forth in his Rule 29 Reply, McKelvy argues that the guilty verdicts were contrary to the weight of the evidence and that there is a serious danger that an innocent person has been convicted, based on issues of criminal intent, the absence of persuasive evidence that the investments were "securities" and that McKelvy was, in effect, a "broker," as well as trial errors on "legal duty" to disclose commissions and the absence of evidence of a "unity of purpose."

McKelvy agrees that the verdict was emphatic, Rule 33 Response at 5, and extremely quick[1] - deliberations lasted approximately four hours on a Friday afternoon after 12 days of trial testimony.

II. The government failed to prove that McKelvy had the requisite criminal intent.

A. The government conceded that there was no direct evidence, from witnesses other than the defendant, of McKelvy's criminal intent. In its Rule 33 Response, the government argues that it presented direct and circumstantial evidence of McKelvy's intent. The government argues (correctly) that the "most direct evidence came from McKelvy's own sworn statements to the SEC [at two depositions[2] on October 22, 2009 and November 19, 2010]." Doc. No. 275 at 5.

McKelvy will analyze below the government's arguments as to the conflict between McKelvy's statements in the seminars, on the one hand, and his statements to the SEC attorneys, on the other hand. But first, McKelvy cannot help but observe that the bigger picture is that (a) the government argues that Troy Wragg, Amanda Knorr and McKelvy engaged in a multi-year conspiracy to commit wire fraud, securities fraud, and substantive counts of wire fraud and securities fraud, and (b) because the government did not call Wragg as a witness and because the government conceded that "Knorr's testimony did not prove McKelvy's intent," Rule 33 Response at 9, we are left with a topsy-turvy case, where the government's witnesses have not provided any relevant evidence of McKelvy's criminal intent. Instead, the government focuses almost exclusively on McKelvy's own, sometimes apparently contradictory, statements to prove criminal intent.

---

[1] Cf. United States v. Fattah, 914 F.3d 112, 144-45 (3d Cir. 2019) (Court quotes Bartle, J.: "There have been only approximately four hours of deliberation. There's no way in the world [a juror] could have reviewed and considered all of the evidence in the case and my instructions on the law.")

[2] While the technically correct reference is to McKelvy's "sworn statements" on those dates, he will use "depositions" instead.

B. The government conceded that Knorr's testimony did not suggest that McKelvy acted with criminal intent and, instead, gave strong evidence favorable to McKelvy. The defects in the government's case are more pronounced than the government conceded in its Rule 33 Response. Id. at 9. Actually, as set out in the Amended Supplemental Memorandum in Support of McKelvy's Rule 33 Motion, Doc. No. 261 (Supp. Rule 33 Memo) at 19-21, Knorr's testimony provided strong – we would argue almost irrefutable - support for McKelvy's position that he believed what Wragg told him about the Mantria properties (that they were selling like hotcakes); that he believed what Wragg and Knorr told him in the 2008 year-end report about the expected more than $14 million in land sales revenues; that the material about Mantria's success and prospects for McKelvy's seminars came from Wragg and Knorr; that he believed what Volpe and Seaner said in their reports, as forwarded to him by Wragg and/or Knorr, about the future of green energy; that he did not know Mantria's true financial condition; and that he did not knowingly, intentionally, and/or willfully participated in a wire and/or securities fraud scheme by making false statements and/or material omissions to the potential investors in Mantria.

In fact, the government acknowledges that

> **McKelvy points to the testimony of certain government witnesses who had little to no interaction with McKelvy and, thus, were not in a position to testify regarding McKelvy's intent.**

Doc. No. 275 at 9. None of the 20 witnesses the government called provided any direct evidence that McKelvy acted with criminal intent.

C. The government's contention that Knorr was "not in a position" to testify as to McKelvy's criminal intent is fallacious. In response to McKelvy's arguments in his Supp. Rule 33 Memo that none of its witnesses provided direct evidence about McKelvy's intent, Supp. Rule 33 Memo at 33, the government explained that those witnesses – including Knorr - "were not in a position to testify regarding McKelvy's intent." Rule 33

Response at 9. The government then attempts to explain why co-defendant Amanda Knorr provided little evidence of McKelvy's criminal intent because she was "not present for almost all of the conversations between Troy Wragg and McKelvy." Rule 33 Response at 9. This argument is both immaterial and specious. This explanation is immaterial because it does not matter why Knorr may not have had as much information as the government had hoped. And it is specious, because it was the government which decided to reward her, after taking her proffered statement,[3] with a 5K motion in exchange for her proffered testimony against McKelvy, the only known remaining target of the government's investigation. It was the government's decision to call Knorr and not to call Wragg as witnesses, in a case where from the very beginning, McKelvy has stated that there was no evidence of McKelvy's criminal intent presented to the grand jury.

The government's argument is also specious because it is based on a false premise – that the reason that Knorr did not provide any direct evidence of criminal intent is because, unlike Wragg, she was not in position to do so. The government amped up its argument a notch by claiming that Knorr, among others, "had "little to no interaction with McKelvy". Id. at 9. To the contrary, there are at least six reasons why the "not in a position" and "little or no interaction" claims are unfounded: (a) Knorr was in a position to know at least most of what Wragg knew about McKelvy - she testified that, as the Chief Operating Officer, she was Mantria's "number-two executive." Tr. 10/1/18 at 70. In addition, Knorr was not only a co-officer of Mantria, but she was dating him and was also living with him for an unspecified period. Tr. 10/1/18 at 126-28. (b) Knorr was copied on the majority of emails that Wragg sent to McKelvy with false information on Mantria, including the Year-End 2008 Report. See Supp. Rule 29 Memo at 37, 41-42; Supp. Rule 33 Memo at 19-21. (c) Knorr admitted that she had provided false information to McKelvy, knowing both that this information was false and that McKelvy would tell potential investors what Knorr and Wragg were telling him. See Supp. Rule 29 Memo at 42.

---

[3] Knorr gave statements to the FBI, which were noted as proffers, on November 17, 2014, December 10, 2014, and August 27, 2015.

In addition, (d) Knorr was in a position to have known whether McKelvy's conduct exhibited his criminal intent in that, as she stated, she attended and/or listened to presentations to potential investors by Wragg and McKelvy. See Supp. Rule 33 Memo at 17. Knorr testified that she heard McKelvy say things that she knew were not true, but admitted that she never told McKelvy that the statements he made in his presentations were not true. Tr. 10/2/18 at 35-36. It would seem apparent that she was in a position, at least as to the presentations she attended, to have told McKelvy that things he said were not true. (e) With the sole exception of the email to McKelvy, among others, in November 2007 about Mantria's 3.0 buyer incentive program, Knorr did not identify any emails where Wragg was a party to manipulation of Mantria's financial information, on which emails McKelvy was copied. To the contrary, Knorr – not McKelvy – was included in emails between Wragg and Gary Wragg that provided strong evidence of a conspiracy to falsely inflate the appraisals to $70,000 per home site. See Supp. Rule 29 Memo at 39. (f) Although Knorr could have been asked at trial to rebut what McKelvy said Wragg had told him, she did not so testify.

The government's argument that "the fact that Knorr's testimony did not prove McKelvy's intent is meaningless …," Rule 33 Response at 9, is a remarkable one. This assertion raises the question: How could the government argue that the fact that the star government witness did not provide any evidence on the key issue at trial – McKelvy's criminal intent – is "meaningless"? To the contrary, this admitted weakness goes directly to the heart of the government's case. McKelvy appreciates, of course, that the government argues that the apparent contradictions between what McKelvy told the potential investors and what he told the SEC attorneys on the two occasions where he testified under oath is the central focus of both of the government's Responses, but that does not mean that Knorr's failure to add any probative evidence on this point is "meaningless."

D. <u>The government's claim that Knorr's testimony favoring McKelvy was "meaningless" is without any foundation</u>. Moreover, the government's claim that McKelvy's argument that Knorr gave no relevant incriminating testimony against McKelvy, with the possible exception of her reference to the email which was sent

to McKelvy by Wragg concerning the 3.0 program, see McKelvy's Supp. Rule 33 Memo at 33, 16-17, is "meaningless" is totally without merit. To the contrary, Knorr's testimony that she and/or Wragg forwarded to McKelvy numerous emails and documents which falsely stated that Mantria's performance and prospects were excellent, is clearly exculpatory and should be taken into account in determining whether "there is a serious danger that a miscarriage of justice has occurred — that is, that an innocent person has been convicted." See United States v. Bado, 2017 WL 2362401, *2 (E.D.Pa. 2017).

The trial testimony and the documentary evidence presented at trial – including a large number of emails from Wragg and Knorr to McKelvy - showed that Wragg and Knorr provided a significant amount of misleadingly positive information to McKelvy about the financial condition of Mantria, land sales that generated revenues of tens of millions of dollars, and the status of green energy including revenue forecasts of hundreds of millions of dollars that turned out to be false. See Supp. Rule 33 Memo at 19-21; Supp. Rule 29 Memo at 37, 41-42. Knorr testified that McKelvy repeated that information in his presentations to the potential investors.

E. The government labels "irrelevant" the testimony of unimpeached witnesses Volpe and Seaner that they told McKelvy they believed in bright prospects for green technology. The government ignores the trial evidence that included extensive information provided by Knorr and Wragg (including information prepared, apparently in good faith, by Seaner and Volpe) that deluded McKelvy into accepting a fraudulently inflated view of Mantria's financial condition and of the status of the green energy technology.

The government responds to the significant amount of exculpatory evidence by arguing that "what McKelvy was *told* by others [including Wragg and Knorr] about Mantria's profitability is irrelevant in light of McKelvy's own sworn statements about what he actually *knew* – namely, that Mantria was not profitable." Rule 33 Response at 9 (emphasis in original). There is no conceivable basis in the record for the government's contention that what McKelvy was told by Wragg and Knorr is "irrelevant"

and that such information is pre-empted by what he (McKelvy) supposedly "knew" – based on what he said at the SEC depositions without even a hint of what McKelvy's supposed basis was for his new, presumably better informed knowledge.

Because there was no evidence, or even a suggestion, that McKelvy looked at Mantria's accounting records or at such indications of sales activity as letters of intent, there are only limited possibilities as to why his statements at the deposition on October 22, 2009 were so different from what he had said during the seminars on May 7 and May 21, 2009 – those possibilities include that he had drawn negative inferences: from what he had been told about Mantria's inaction (such as non-payment to "his" investors of scheduled distributions); from what he had been told by Mantria personnel about the lack of progress on the green energy front; from what he had been told by Wragg, Knorr, or someone else; or based on an independent change of outlook due to, for example, the SEC's reaching the stage of issuing a subpoena to Wragg, Knorr, and himself, between the date of the ribbon-cutting at Dunlap in early August, 2009,[4] and his SEC deposition on October 22, 2009. From this list of four possibilities, it is clear that the first three are based on what he may have been "told" – without more information, it is impossible for the government to conclude that what McKelvy said at the October 22, 2009 deposition was something he "knew," as contrasted with something he had been "told."

F. The government ignored, apparently considering it was also irrelevant, the favorable evidence about the Retirement TRACS formal investigation and about LLCs. In its Rule 33 Response, the government did not mention McKelvy's arguments that, despite the SEC's cautionary language in its "termination letter" (G-KG4), cf. McKelvy's Supp. Rule 33 Memo at 11, it remains the government's burden to have shown that McKelvy acted knowingly, intentionally, and willfully by not having registered as a broker. If the government did not, as McKelvy contends, meet

[4] McKelvy testified that after the Dunlop ribbon cutting ceremony, he and Donna were sitting in a rental car – they began crying and said "we finally did it, we pulled this together for not only us but the investors." Tr. 10/10/18 at 115-16.

this burden, then all of Gottschall's and Flannery's testimony about the duties of sellers of investments were not relevant evidence and cannot be considered by the Court in deciding whether or not to grant McKelvy's Rule 33 Motion.

Because the government has provided no basis for making its leap from contending that the emails demonstrated that McKelvy wanted to "avoid" SEC regulations for public offerings – which Flannery also wanted to avoid by drafting PPMs instead of doing more paperwork – the government is left without providing the necessary support for its argument that McKelvy acted with criminal intent by not registering as a broker.

Likewise, the government does not respond to McKelvy's well-founded arguments that he had a factual basis for not believing that he needed to register as a broker, based on his experience with the outcome of the formal investigation and the advice of his attorney in Boulder that, setting up the investments as LLCs, he was exempt from SEC regulation. See Doc. No. 261 at 10-12, 36-37. The government also ignores McKelvy's reliance on Gottschall's testimony that, if he and other SEC enforcement attorneys believed that McKelvy should have been registered in connection with Retirement TRACS, "we would make a recommendation to the SEC to bring an enforcement case against them." Id. at 37. Because the government did not respond to any of the assertions in Doc. No. 261 at 10-12, 36-37, McKelvy argues that these points were conceded.

G. The government's reliance on the "handcuffed" email for its contention that McKelvy wanted to "evade" regulation by the SEC is, at best, misleading. The primary basis asserted by the government for its claim that McKelvy's having acted as an (unlicensed) broker was the email he sent to Wragg on June 12, 2008, in which he said that he did not want to be "handcuffed" by SEC regulations, see, e.g., Doc. No. 275 at 11, was only evidence of an attempt to avoid such regulation, rather than evade it, in that it came in response to Wragg's email to him, earlier that day, in which Wragg spoke of his (Wragg's) plan to "take[] Mantria Place public." G-KG11. McKelvy submits that his avoidance of SEC supervision is no different from Flannery's, who chose PPMs over formal prospectuses for the same reason.

H. The government did not respond to McKelvy's assertions that Flannery had belatedly and reluctantly agreed that it was his responsibility to file the Form Ds with the SEC. McKelvy argued in his Doc. No. 261 at 38-41 that Flannery begrudgingly admitted that the SEC required that the officers and/or attorney (Flannery) for the issuer (Mantria) report any compensation (commissions and fees) paid for selling investments. McKelvy also argued that Flannery's admission that he had made "mistakes" by not filing the necessary Form Ds on approximately 11 occasions. McKelvy asserts that this non-response is effectively a concession that, as McKelvy argued, any of Flannery's adverse testimony should be considered with great care and caution, and should be accepted only if corroborated.

III. The flaws in the government's claim that McKelvy knew he had to tell investors that he was receiving 12.5% commissions.

A. The government's reliance on Flannery's testimony at the charge conference on the issue of "duty to disclose" was unfounded. As the government knows, it argued in the charging conference that the defendant "was under a legal duty to" disclose his commissions to the potential investors, Tr. 10/11/18 at 90-91, was based on Flannery's testimony:

> **[W]hat Mr. Flannery testified was that it doesn't matter if the person had a license to sell securities or not, when you are pitching securities investments, you have to follow the securities laws. You … can't make … materially false statements [or] … material omissions. I mean, you can't -- what -- I mean, what -- by taking that out, Judge, what you're saying is that somebody who doesn't have a license to sell securities and is in a different posture than someone who does have a license to sell securities, they both have an obligation to follow the law.**

Id. (emphasis added). The Court responded, "I didn't see it that way but what you're saying does make sense based upon the evidence." Id. at 92 (emphasis added). The Court added, "[W]hen the Schedule D is involved, based on the testimony I heard from Mr. Flannery, I think there is a legal duty." Tr. 10/11/18 at 92-93 (emphasis added).

McKelvy did not object to the wording of the "legal duty" instruction, but he did argue during the charge conference, and argues now, that there was no relevant evidence to support this "legal duty" instruction. Tr. 10/11/18 at 92. This is a variation of the disagreement between the parties as to whether our assertion that the government did not prove that McKelvy acted as a "broker" was a relevant one.

At the charge conference, the government characterized Flannery's testimony as having said that anyone who sells securities is prohibited from making material omissions in connection with such sales, regardless of whether licensed or unlicensed as a broker. Tr. 10/11/18 at 91.[5]

Flannery phrased it differently. First, he said that "any issuer of securities is required to follow the rules and regulations." Tr. 10/4/18 at 11. McKelvy agrees with this statement, which places the legal duty of following the pertinent rules and regulations on the "issuer," meaning Mantria and its officers (including Wragg and Knorr), as well as its attorney, Flannery. Neither Flannery, Gottschall, nor anyone else has asserted that McKelvy was bound by the legal duties of the issuer. Moreover, as Flannery also testified, it was the issuer's officers and Flannery who were responsible for submitting the Form Ds, showing the commissions and other compensation for sales of the investments. Id. at 115.

Second, Flannery testified that "[a]nyone who is … acting … in a securities business is actually violating the law if they are acting in … a securities business. There's a whole bunch of guidance from the SEC on who and who not is a broker." Tr. 10/4/18 at 11.[6] Although this aspect of Flannery's testimony is

---

[5] This Court's Instructions at 41 use almost identical language on material omissions in wire fraud cases.

[6] When read in context, Flannery was referring to SEC regulations which stated, generally, that "anybody [is] a broker who takes money for selling securities to somebody." Id. at 11. This is in a similar vein to what we noted in Doc. No. 261 at 30-31.

complicated,[7] it is crucial to an understanding of the government's case: Flannery said that anyone who the SEC would consider a "broker," because he or she was in the "business of selling securities," and implied that a broker is bound by the SEC's central provision barring material false statements and material omissions, Rule 10b-5, which was one of the provisions underlying the charges in Counts 9 and 10.

But Flannery's implicit testimony that a broker is accountable for material omissions is at odds with the government's claim, Doc. No. 274 at 12-13, that McKelvy's argument that the government failed to prove that he was acting as a broker "is irrelevant" because "he was not charged with selling securities without a license." Id. Likewise, despite the government's arguments to the contrary, the issue of whether McKelvy acted as a broker was vital to the government's case. See Tr. 9/27/18 at 173-76 (Gottschall); Tr. 10/4/18 at 9-13, 33-34, 45, 52, 63-67, 94 (Flannery). Accordingly, the government's effort to allege and prove that McKelvy's status as an (unlicensed) broker, which they claim is central to its proof of criminal intent but, at the same time is irrelevant, cannot be sustained.

Flannery's testimony on the duty to disclose commissions was at odds with the government's approach in two other ways. First, Flannery stated (again) that it was the issuer's duty to inform the investors of any commission payments in the PPM. Tr. 10/4/18 at 34. In response to the government's question as to whether the PPM must include information as to "someone [who] is getting paid commissions to sell securities for a company," Flannery gave the following example of why putting such payments in the PPM would be "extremely important to the investor," in other words, why such payments would be "material."

> If the investor says he's putting $10 into something and 20 percent of that money is going out for something else, that means he's only getting $8 worth of value and if that

[7] There is no known support, for example, for Flannery's statement that anyone acting as a broker who receives payment for selling securities "is actually violating the law."

> happens, you have to let the investors know where that other 20 percent is going.

Id. While we agree that this example might be pertinent in other situations, the government never offered any evidence that that would be the case here. To the contrary, to dispute McKelvy's testimony that Wragg told him that his commission payments would be taken from Mantria's profits, rather than from the investments, Tr. 10/9/18 at 37, the government would have had to call Knorr, Rink, Granoff, or some other informed witness, to dispute McKelvy's account that Wragg told him that Mantria was absorbing the cost of his commissions.

Although he agrees with the government that several of the investors testified that they, in effect, wished that they had been informed of the 12.5% commission going to McKelvy before they had made the decision to invest in Mantria, McKelvy contends that such evidence does not automatically mean that McKelvy's not having told them about such commissions was evidence of a material omission on his part. In an instruction which specifically applied to Counts 9 and 10, but also should be applied to Counts 1-8 as well, the Court stated:

> 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.

Instructions at 53. McKelvy contends that a "reasonable investor" would have known that information on commissions was the issuer's responsibility. Cf. SEC v. Zandford, 535 U.S. 813, 819 (2002).

B. The only possible ground for the government's argument that McKelvy owed a duty to disclose his 12.5% commission arises out of his "not a dime" remark. Because a reasonable investor would expect, as suggested by Flannery, that information as to the commissions be included in the PPMs, there is only one apparent reason why McKelvy might properly be seen as having to disclose his commissions – that he, for example, told the investors that

he was getting no commission or that he was getting a commission of less than 12.5%. In this context, the only evidence presented by the government which arguably supports a contention that there was a duty on McKelvy to disclose his true commission came not from Flannery, as stated by the government at the charge conference, but rather from the government's introduction of McKelvy's "not a dime" statement during the May 21, 2009 presentation while discussing the fees charged by financial planners and those who sell annuities and insurance products. G-JL2A at 15. McKelvy argues that such an obviously casual, if not flippant, remark cannot be the basis for such a duty.

IV. The government's argument on the defendant's alleged creation of a paper trail is devoid of any factual foundation.

The government did not respond to McKelvy's argument, Doc. No. 261 at 46, that the government's suggestion, during the closings, that McKelvy and Wragg created a protective "paper trail" in their emails was misleading. As such, McKelvy asserts that his point was unopposed and therefore conceded.

V. McKelvy's deposition testimony.

A. The government's use of McKelvy's depositions on October 22, 2009 and November 19, 2010 does not prove that he knowingly made false statements and material omissions about Mantria. The government uses McKelvy's statements in October 2009 and November 2010 as proof of what he believed from October 2007 until the spring of 2009. The government, however, misconstrues the context of these statements. As such, McKelvy's statements in October 2009 and November 2010 are not dispositive as to what McKelvy actually believed in 2008 and spring of 2009.

During October 2009, McKelvy had to have begun to realize that much of the information provided to him by Wragg and Knorr was not accurate.[8] This was highlighted by the repeated delays in producing biochar.

[8] At the appropriate time, McKelvy will testify that he made a disclosure to counsel on May 15, 2019 that cuts both ways on this point.

Without getting into a detailed examination of the record, McKelvy submits that it appears that, for the two years he was associated with Mantria, McKelvy was on an emotional roller coaster, which was exacerbated by his excessive drinking. In early 2009, Wragg and Knorr provided McKelvy with positive information about the many uses of the green energy technology, the large market for biochar, and sales forecasts with revenue projections into the hundreds of millions of dollars. The marketing report and sales forecasts were prepared by Volpe. Widener never told McKelvy about any of the issues at the Dunlap plant. Supp. Rule 29 Memo at 46.

McKelvy testified, without challenge, that when he and Donna (McKelvy) Jarock attended the Dunlap ribbon cutting ceremony, they were crying in a rental car because they both believed that the carbon diversion technology was going to start generating significant revenues. McKelvy later learned that Wragg had created a new company with Carey Widener and John Seaner. McKelvy testified that he believed that Wragg was planning to cut him out of revenues from Mantria Industries. McKelvy also was advised, via an email, that he and Donna would not share in any of the revenues from carbon diversion system sales for almost two years until 2011. See Tr. 10/10/18 at 102-03; D-267. McKelvy testified that sometime in September of 2009, he started to learn of delays in the technology; Wragg told McKelvy that he wanted the biochar to be perfect, so he was running more tests and conducting additional research. Tr. 10/10/18 at 117.

By the date of the first deposition on October 22, 2009, McKelvy had to have realized that Wragg had been lying to him about Mantria's financial condition and the status of the green energy technology. This realization had to have impacted McKelvy's answers during the October 2009 and November 2010 depositions. Wragg's lies about important information about Mantria's financial condition and the status of the green energy was repeated (presumably innocently) by a number of government witnesses, including Knorr, Tisa Dixson, Cary Widener, Dan Rink, and Robert Volpe.

The government identified testimony from McKelvy's October 22, 2009 deposition as "admissions demonstrating what he knew at that time." Rule 33 Response at 5-7. While the government cites the deposition transcript, it does not cite the transcripts of the May 2009 presentations where McKelvy purportedly made false statements that contracted his deposition testimony in October 2009 and November 2010.

1. "Mantria not making money and the only source of money was new investors." The government first argues that, in his October 2009 deposition, McKelvy admitted that he knew that Mantria was not making money and that the only source of money for Mantria was the new investors. Doc. No. 275 at 5-6. Specifically, the government refers to McKelvy's deposition testimony where he said, "The money had to come from somewhere, and I know this is the only place Troy gets money." Id. at 6, quoting G-KG32 at 6.

It is clear from the deposition transcript that McKelvy was first referring to the efforts to raise operating capital for Mantria based on the question from the SEC attorneys – "Why did you decide to raise more money into the SOW Hard Money 50 Economic Stimulus?" McKelvy said that he knew that the majority of funds raised through the PPMs came through Speed of Wealth.

As set out in the Supp. Rule 33 Memo, McKelvy testified that while he knew that Mantria was not generating revenue from the carbon diversion technology in May 2009, he believed, based on the 2008 year-end report, that Mantria earned revenues from the land sales including $14.3M for 2008. Also, based on the Marketing Report and sales forecasts prepared by Volpe (D-100 and 247), McKelvy believed that Mantria would be generating revenue from the carbon diversion technology once the Dunlap plant was operating. McKelvy's testimony was corroborated by Knorr, who testified that she believed these sales forecasts. 10/3/18 at 20. Volpe testified that he prepared the forecasts based on information provided by Wragg. Supp. Rule 33 Memo at 28. McKelvy also testified that Wragg told him that there were letters of intent for the purchase of systems, although he conceded that he wished he had insisted that Wragg had shown him these supposed letters. Tr. 10/10/18 at 105-06. This testimony

was corroborated by Volpe and Rink. Supp. Rule 33 Memo at 27, 29.

McKelvy's deposition testimony makes clear that on October 22, 2009, McKelvy knew that Mantria still had not sold any carbon diversion systems or biochar. However, there is no evidence that McKelvy told investors that Mantria was actually selling biochar or carbon diversion systems. During the May 2009 presentations, McKelvy did not tell the investors that Mantria had earned any revenues from the sales of biochar or carbon diversion systems. During the May 7, 2009 presentation, in response to a question from the audience, McKelvy said "they [Taylor Romero and Josh Juhacz] met their quota in three months, and it's all pre-sales, because we haven't produced any biochar yet." G-JL3 at 75.

2. "Secret" commissions of 12.5%. The government argues that McKelvy admitted that the amount of the commission from Mantria was not disclosed to the investors. The government cites to McKelvy's deposition testimony that he did not tell investors that Mantria was paying him a commission "because I figured it would be assumed." G-KG 32 at 14.

McKelvy provided very similar testimony under oath to the SEC attorneys in June 2007 during the SEC's investigation of Retirement TRACS and McKelvy. McKelvy testified at trial that 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." Tr. 10/9/18 at 71. The SEC never told McKelvy that he had to disclose to the investors in the investment clubs anything about his commissions. McKelvy further 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," including not disclosing the percentage of commission payments, because the SEC did not tell him that he had to change the way he was doing business." Id. at 72-73. Also, there was no evidence that McKelvy provided false information to investors about the percentage of the commission he received i.e., that he was receiving a commission of 5%.

Moreover, the investor witnesses stated that they understood or presumed that McKelvy was receiving a commission. See Supp. Memo. in Support of Rule 33 Motion at 2-3, 5-7 (Holl, Marvin, Wahl, Anderson, Kalish, and Madrid).[9] The investors also testified that there were opportunities to ask McKelvy questions at the end of webinars, seminars, or in his office, but none of them asked McKelvy any questions about any commission. Id.

3. "McKelvy admitted that he knew Dunlap plant was not yet up and running." The government argues that, contrary to his representations to the investors, "McKelvy admitted that he knew that the Dunlap plant was not yet up and running." The government points to McKelvy's deposition testimony on October 22, 2009, where he stated that he knew that the factory was still in the "test stages." G-KG32 at 10. The government argues that, contrary to his representations to the investors, McKelvy stated that he knew that Dunlap was not selling any biochar yet and stated that they were "holding off on orders until we go through our tests." G-KG32 at 27.

Contrary to the government's assertions, McKelvy did not tell the potential investors that Mantria was producing biochar at Dunlap. During the May 7, 2009 presentation, McKelvy said "we haven't produced any biochar yet." G-JL3 at 75. During the May 21, 2009 presentation, McKelvy said "[i]f you go to Hawaii to do your due diligence, there's a site already producing carbon biochar there." G-JL2A at 67.

4. "McKelvy stated that he knew the Dunlap plant was not selling any biochar." The government next argues that McKelvy admitted that he knew the factory was still in the "test stages" (G-KG32 at 10) and that he knew that the Dunlap plant was not selling any biochar yet and that he admitted that they were "holding off on orders until we go through our tests." G-KG32 at p. 27.

---

[9] Carty testified that he executed the Very Important Points to Keep in Mind (D-103), but he did not recall seeing the language that a commission would be paid. Tr. 9/28/18 at 165-66. Carty acknowledged that he could have asked McKelvy questions but did not ask any questions. Id. at 169.

As set out above, McKelvy did not tell investors that Dunlap was producing biochar. During the May 7, 2009 presentation McKelvy told the potential investors about pre-sales because he knew that Mantria Industries had not produced any biochar yet.

5. "Mantria worth $100 million or more." The government argues that, contrary to his representations to the investors, McKelvy stated that Mantria was worth $100 million and later admitted that his ownership interest in Mantria was worth "squat at this point" because their business had not come to "fruition." G-KG32 at 10. The government also argues that, when asked what his personal net worth was, which included his ownership in Mantria, McKelvy stated, "Real assets is in my opinion zero." Id. at 11. The government asserts that, accordingly, McKelvy knew that Mantria was worthless before Mantria was shut down by the SEC despite telling the victims that Mantria was worth more than $100 million. Rule 33 Response at 6. Other than McKelvy's testimony in October 2009, when the circumstances had changed dramatically since the spring of 2009, the government produced no evidence that McKelvy was aware that the appraisals were falsely inflated.

As set out above, circumstances had changed from the spring of 2009 to October 22, 2009. As stated in the Supp. Rule 33 Memo, McKelvy testified that he believed that the land owned by Mantria was worth over $100 million based on the appraisals that he had seen. Supp. Rule 33 Memo at 45-46.

Knorr testified that Wragg lied to her and McKelvy about the appraisals. Tr. 10/2/18 at 67-68. Knorr testified that she did not realize at the time that Wragg was lying about the appraisals. Id. Knorr testified that she did not think the appraisals were false; she believed they were legitimate. Id. at 82. Knorr testified that she did not think that the appraisal of Mantria Place (D-139) which valued the property at $172,240,000 was false. Knorr's testimony corroborates McKelvy's understanding - in the spring and summer of 2009 - that the

appraisals were valid and that Mantria owned land valued at over $100 million.[10]

6. "McKelvy lived lavishly." The government references McKelvy's deposition testimony about living lavishly - "I live good" and "Yes, I don't save money. My testimony is I do not save money. I spend every dime I make." G-KG32 at 44. McKelvy concedes that he spent the money he received from Mantria. As stated in the affidavits he submitted to the SEC, McKelvy was candid about how he spent the money he received from Mantria – primarily on alcohol, prostitutes, and partying. G-KG1 and KG2. However, McKelvy's excessive spending has no relevance to whether he knew Mantria's true financial condition or that he was knowingly making false statements or material omissions.

7. "Mantria land appraised at over $100 million." The government next points to McKelvy's testimony in the October 2009 deposition that, while the land had been appraised at $100 million, "until it sells, I think it is worth nothing." G-KG32 at 12. The government argues that this testimony is evidence that McKelvy knew the land was not worth $100 million. While McKelvy's deposition testimony may appear to be directly contradictory to his understanding of and reliance on the appraisals for the collateral for the investments, it is not impeaching when understood in the context of the emotional roller coaster set forth above. During the deposition, McKelvy appears to be testifying about his perspective of Wragg and Mantria as of October 22, 2009, which was becoming more pessimistic, as opposed to his view of the appraisals throughout 2008 and much of 2009. For the reasons set out above, McKelvy's deposition testimony from October 2009 does not prove that he did not believe in the spring of 2009 that the land was valued at $100 million.

8. Technology patented. The government then points to McKelvy's testimony about technology that was patented when he said "I knew it wasn't patented" and that "it was a blatant lie." G-KG32 at 37.

---

[10] Widener testified that he reviewed a Moody's report that valued Mantria at $100 million. Tr. 9/26/18 at 254.

The government misstated McKelvy's October 2009 deposition testimony and did not put it in the proper context. During the question and answer segment near the end of the May 21, 2009 presentation, someone asked McKelvy, "What's the competition and how is the technology protected?" McKelvy responded, "Well, it's patented." McKelvy testified during the October 2009 deposition as follows:

> **Q: What is the basis of your knowledge that patents are pending?**
> **A: I was told by Troy that patents were pending.**
> **Q: How do you know that patents were never applied for by CDI?**
> **A: Because that is what Troy told me. They never applied for patents.**
> **Q: When did you learn that?**
> **A: When did I learn that? Maybe a month ago.**
> **Q: You learned a month ago that patents had been applied for?**
> **A: Have not been applied for by the CDI, maybe six weeks ago, maybe two months ago.**

G-KG32 at 34-35.

It is clear that McKelvy testified that he had only learned, by late August or September 2009, that the carbon diversion technology was not patented. McKelvy's deposition testimony does not prove that he did not know that the technology was not patented or that a patent had been applied for in May 2009.

Knorr testified that she believed that CDI held a patent to the technology and that she told McKelvy that CDI held a patent to the technology. Tr. 10/3/18 at 48.

B. <u>McKelvy's deposition testimony on November 19, 2010.</u> The government identified additional admissions purportedly made by McKelvy in his November 19, 2010 sworn statement to the SEC set forth below:

1. "McKelvy made approximately $6.2 million from Mantria between 2007 and 2009." The government argues that McKelvy's testimony that he made approximately $6.2 million from Mantria between 2007 and 2009 was a significant admission. McKelvy's testimony about the money he received from Mantria does not prove that McKelvy knowingly and willfully made false statements and material omissions to the potential investors in Mantria.

Moreover, there was no evidence that McKelvy was trying to hide the commissions he earned from Mantria. McKelvy included $3.3 million of commission payments from Mantria as income on his 2008 tax return. See D-SG3.

2. "I knew they were not profitable." When asked about Mantria profits, McKelvy stated, "I knew they were not profitable," contrary to his statements to the victims to induce them to invest. G-KG30 at 6.

It is clear from the questions the SEC attorneys asked and McKelvy's answers that McKelvy was focusing on the carbon diversion technology. The key testimony is:

> Q: What, if any, information did you have regarding the profitability of – Mantria's operations?
>
> A: What he provided me.
>
> Q: Do you have any recollection of what he provided you?
>
> A: No. Just the pro formas.
>
> Q: Well, in you, did you think –
>
> A: I - knew they weren't profitable and the investors knew they weren't profitable at that time.
>
> Q: So you knew Mantria was not profitable?
>
> A: Right, and so did the investors. The investors were investing in a business, the carbon diversion business, with the outlook to come, just like Americans invested in the railroad before it was built and so on and so forth.

G-KG30 at 6.

As set out above, during the May 7, 2009 presentation, McKelvy told the potential investors about pre-sales because Mantria Industries had not produced any biochar yet.

3. "McKelvy admitted he knew that Mantria was using new investor funds to pay back old investors, but claimed that Mantria was not a Ponzi scheme." The government argued that McKelvy admitted that he knew that Mantria was using new investor funds to pay back old investors, but claimed that Mantria was not a Ponzi scheme. Reply Brief at 7-8.

McKelvy testified that he said that Mantria was not a Ponzi scheme during one of the May 2009 presentations because you "can't have a Ponzi scheme if you've got collateral." Tr. 10/10/18 at 147, 150. As set forth at length, supra, there was no evidence that McKelvy knew that the collateral was fraudulent. Moreover, McKelvy testified that he believed that Mantria had sufficient revenues, in the form of cash flow, to pay the investors. Id. at 258. McKelvy also testified that he believed that Mantria was a legitimate land developer with real land sales. McKelvy stated that he believed in Mantria's assets of land and the carbon diversion technology. Id. at 151-52. McKelvy also testified that he did not believe Mantria was a Ponzi scheme because of its many employees. Id. at 153.

In addition, as set out in the Supp. Rule 33 Memo, CPA/CFO Rink, CPA/Controller Granoff, General Counsel Flannery, and Mantria marketing VP Volpe, who knew more than McKelvy did about Mantria's inner workings, testified that they did not know that Mantria was being operated as a Ponzi scheme. Supp. Rule 33 Memo at 45.

VI. The court's good faith instruction was erroneous.

McKelvy agrees that this Court's good faith instruction was properly based on the Third Circuit Model Jury Instruction, No. 5.07. During the charge conference, counsel objected to the part of the instruction which stated:

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

Court's Instructions at 79. McKelvy objected to the part of the instruction emphasized above, based on the ground that it was not enough that the government show that the defendant knowingly made false statements. Tr. 10/11/18 at 127-30. Although counsel did not have authority then and does not have authority now for this proposition, he argues, as he did during the conference, that the Court's elements for criminal intent were broader than just acting "knowingly." As the Court knows, its Instructions provided that, depending on the counts at issue, the government would also have to prove that the defendant acted intentionally and willfully. As counsel (inarticulately) stated during the conference, "There might as well be no good faith instruction … if the defendant is not entitled to an instruction the if it's a belief honestly held." Id. at 128.

While the government is correct that the Third Circuit instruction was based on the Court's ruling in U.S. v. Quality Formulation Laboratories, Inc., 512 Fed.Appx. 237, 240-41 (3d Cir. 2013), McKelvy argues that omitting the words "intentionally" and "willfully" allowed the government a way around the instructions on those elements.

VII. The allegations and arguments in McKelvy's Supp. Rule 29 Memo and his Rule 29 Reply are adopted by reference.

VII. Conclusion. Accordingly, for the reasons set out here and in his other related filings, McKelvy requests that this Court, as a matter of weighing the evidence and considering whether the jury's verdict was contrary to the weight of evidence, the Court determines "that there is a serious danger that a miscarriage of justice has occurred — that is, that an innocent person has been convicted," and that the Court rule that "taken as a whole and viewed in the light of the evidence, [the challenged instruction does not] fairly and adequately submit[] the issues in the case to the jury [without confusing or misleading the jurors]," order a new trial on Counts 1-10.

Respectfully submitted,

/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
williamjmurrayjr.esq@gmail.com

***/s/* Walter S. Batty, Jr.**
Walter S. Batty, Jr., Esq.
101 Columbia Ave.
Swarthmore, PA 19081
(610) 544-6791
tbatty4@verizon.net

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 Defendant's Reply Memorandum in Support of his Rule 33 Motion for a New Trial, 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: May 22, 2019