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'S OBJECTIONS TO
REVISED PRESENTENCE INVESTIGATION REPORT

Defendant Wayde McKelvy (McKelvy), by and through his attorney, William J. Murray, Jr., hereby submits his objections to the Revised Presentence Investigation Report (PSR) pursuant to Rule 32(f) of the Federal Rules of Criminal Procedure.

Introduction

The Offense Conduct section of the PSR appears to have been drafted for the sentencing hearings of Troy Wragg (Wragg), Amanda Knorr (Knorr), and McKelvy. That section contains certain information that is more pertinent and relevant to Wragg and Knorr's conduct. In addition, that section contains some factual assertions that are not supported by and in some instances contradicted by the trial evidence. McKelvy relies upon and incorporates his objections to the PSR set forth in his sentencing memorandum at 6-18. McKelvy also relies upon the Defendant's Version of the Offense, which is attached hereto as Exhibit A.

Objections to PSR

Page 1 – McKelvy objects to the maximum penalty for Counts 2 through 8. Defendants' scheme did not affect a financial institution, so the maximum penalty is not more than 20 years of imprisonment and a fine of $250,000 per count.

Para 9, first sentence – "Troy Wragg, Amanda Knorr, and Wayde McKelvy ran an elaborate Ponzi scheme, collectively known as Mantria Corporation (hereinafter - Mantria) which received more than $54 million in fraudulently obtained new investor funds." **Objection.** McKelvy objects to the central point of this sentence that McKelvy "ran" a Ponzi scheme known as Mantria. McKelvy acknowledges that he is culpable for his actions in connection with the Mantria Ponzi scheme, but the evidence shows that Wragg "ran" the Ponzi scheme. As set forth at length in the Memorandum of Law in Support of his Motion for Downward Departure Pursuant to U.S.S.G. § 3B1.2 for Mitigating Role in the Offense, McKelvy played a minimal role in the offense in comparison with Wragg and Knorr. As stated in paragraph 10, "Wragg was the leader of Mantria. Wragg exercised complete control over all aspects of Mantria and all decisions were made by him. Wragg micro-managed even the most mundane Mantria related matters."

Para 9, fourth sentence – "To induce investors to invest money in their businesses, Wragg, Knorr, and McKelvy repeatedly made fraudulent representations and material omissions about the economic state of their businesses." **Objection.** McKelvy objects that he knew that these representation and omissions were fraudulent at the time he made them. As set forth in detail in his Sentencing Memorandum and the Memorandum of Law in Support of his Motion for a Downward Departure pursuant to § 3B1.2, Knorr testified that she and Wragg provided false information to McKelvy about Mantria, its land sales, including the 2008 Year End report, which stated that Mantria Communities would earn $14.3 M in revenues for 2008, and about the status of the green energy technology. Tr. 10/2/18 at 101-02, 162. During the seminars, McKelvy repeated what he had been told by Wragg and Knorr about Mantria. Knorr testified that she heard McKelvy say things to potential investors that she knew was not true, but that she did not

tell McKelvy that what he was saying to the potential investors was not true. McKelvy acknowledges that he learned in the fall of 2009 that Wragg had been lying to him about the financial condition of Mantria and the status of its green energy technology. McKelvy acknowledges that he made material omissions to investors and omitted material information after he learned about the true financial condition of Mantria, the status of its green energy technology and that the SEC was investigating Mantria.

Para 11, first sentence – Objection. McKelvy objects that he was an "unlicensed securities salesman." In connection with promoting Mantria, McKelvy did not believe that he needed to obtain a license to sell securities. In June 2007, McKelvy provided testimony to the SEC pursuant to a subpoena and a formal order of investigation of his company, Retirement TRACS and himself. During that deposition, McKelvy told the SEC attorneys that he did not have a securities license (Tr. 10/9/18 at 63) and that he did not think he was dealing with securities. Tr. 10/9/18 at 63, 68. The SEC terminated the investigation without taking any enforcement action against McKelvy or Retirement TRACS. In addition, the SEC did not advise McKelvy that he needed to obtain a securities license.

Para 11, fourth sentence – Objection. McKelvy objects to the claim that he "lied to prospective investors about the financial state of Mantria and omitted material facts in order to dupe them into investing." While McKelvy admits that he made statements to the investors which were, in fact, false, he did not realize those statements were false until October of 2009. Knorr testified that she and Wragg provided false information to McKelvy about Mantria, its land sales, including the 2008 Year End report and about the status of the green energy technology. Tr. 10/2/18 at 101-02, 162. During the seminars, McKelvy repeated what he had been told by Wragg and Knorr about Mantria. Knorr testified that she heard McKelvy say things

to potential investors that she knew was not true, but that she did not tell McKelvy that what he was saying to the potential investors was not true.

Para 31, fourth sentence – "Wragg and McKelvy claimed that in 2008, Mantria had $11 million in revenue from the land sales and $2 to $3 million in profit." **Objection/Clarification.** Wragg and Knorr emailed a copy of the 2008 Year End Report to McKelvy, which provided that Mantria Communities earned revenues of $14.3 million from land sales for 2008. D-101. The Government did not present any evidence that Knorr or Wragg told McKelvy that the information in the Year End Report was not true. Accordingly, McKelvy's statements about revenue from land sales were based on this information provided to him by Wragg and Knorr.

Para 31, sixth sentences – "Wragg and McKelvy also did not account for the massive cash loss Mantria took on each real estate transaction, and the fact that the real estate "buyers" could walk away in two years without paying any money." **Objection/Clarification.** Other than the November 6, 2007 email to McKelvy about the Mantria 3.0 program, which included various buyers' bonuses, the Government did not produce evidence that McKelvy knew that Mantria was losing money on the lot sales. No witness contradicted McKelvy's testimony that Wragg told him that the Mantria 3.0 program was only used for the Indian Trails development and VIP customers like investors. In addition, Rink testified that he did not tell McKelvy that Mantria was losing money on every lot sale. Tr. 10/1/18 at 66.

Para 32, second and third sentences – "According to SEC regulations, all of the Mantria investors were required to be 'accredited investors," meaning that they had sufficient income, net worth, and investing experience to understand that an investment in Mantria was extremely risky and that they could afford to lose their entire investment. Unfortunately, McKelvy and Wragg ignored the SEC regulations and very few of the Mantria investors were in fact accredited."

Objection. Mantria relied upon an exemption under SEC Regulation D, which permitted it to sell its investments to up to 35 non-accredited investors per offering. Mantria was required to file a Form D with the SEC for every offering it made pursuant to Regulation D. Mantria failed to file the requisite Form Ds.

In addition, Wragg and Knorr, as the owners and senior officers of Mantria, the issuer, were responsible to determine whether the investors were accredited. Tr. 10/4/18 at 261. Mantria engaged Chris Flannery, a securities attorney, to, *inter alia*, draft the PPMs and review documents provided by potential investors (the confidential purchaser questionnaire) to determine if the potential investor was an "accredited investor". Flannery reviewed the completed CPQs (Tr. 10/4/18 at 269); he acknowledged that it was his duty to review the CPQs to make sure that each investor was qualified to invest in Mantria. Id. at 275. Flannery "flagged" some of the CPQs and questioned Wragg and Knorr about whether the investment in Mantria was appropriate for those individuals. See Exs. D-33, D-50. Emails introduced during trial showed that Flannery, Wragg and Knorr communicated about accredited/non-accredited investors and whether the investment in Mantria was appropriate for the individual. Tr. 10/4/18 at 270; Exs. D-33, D-50; see also, Memorandum of Law in Support of Defendant's Motion for a Downward Departure Pursuant to U.S.S.G. § 3B1.2 for Mitigating Role in the Offense at 22-24. The Government did not present any evidence that Flannery provided copies of the CPQs with McKelvy or shared his concerns about non-accredited investors with McKelvy.

Para 35, last sentence – "Wragg, Knorr, and McKelvy began soliciting investments in these 'green energy' projects by making false representations to potential investors, omitting material facts, and wildly exaggerating the extent of their operations." **Objection.** McKelvy did not know that the representations he was making to potential investors about the green energy

technology was false at that time. The information McKelvy provided to potential investors on the green energy projects was based on information provided to him by Wragg and Knorr. Knorr testified that she knew that McKelvy was repeating what she and Wragg told McKelvy about Mantria to the potential investors. Tr. 10/3/18 at 17, 37. McKelvy had great faith in the green energy technology and believed, up until the "tipping point" in October or November 2009, when he learned that Wragg had been lying to him about the failures of Mantria's development of the green energy technology. McKelvy's excitement in the green energy technology was based on, *inter alia*, what he observed in Hawaii, Volpe's Sales and Marketing Plan (Ex. D-100), and Volpe's Biochar sales and revenue forecasts of $14.2 million for 2009 to $267.1 million for 2013 (D-247). The Government did not introduce any evidence that at the time McKelvy told the investors about the green energy technology that he knew what he was saying was not true.

Para 37 – "In pitching Mantria to prospective investors, Wragg, Knorr, and McKelvy stated that Mantria was making huge profits in green energy sales, as high as 484% return on investments."

Objection. McKelvy did not tell potential investors that Mantria "was making" huge profits in green energy sales. During presentations to potential investors, McKelvy spoke about revenue projections based on forecasts prepared by Robert Volpe that Wragg and Knorr provided him. The Government did not produce any evidence at trial that at the time he made those projections, he knew that they were not accurate. In addition, during the May 7, 2009, presentation, McKelvy said "we haven't produced any biochar yet." G-JL3 at 75. McKelvy also said "it's all pre-sales because we haven't produced any biochar yet." G-JL3 at 75.

Para 38 – "Wragg and McKelvy told investors in May 2009 that Dunlap plant was up and running". **Objection.** McKelvy did not tell investors in May 2009 that the Dunlap plant was up and running. During the May 7, 2009, presentation, McKelvy said "we haven't produced any

biochar yet." G-JL3 at 75. McKelvy also said "it's all pre-sales because 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.

Para 39 – Objection. McKelvy did not tell investors in May 2009 that the Dunlap plant was "a fully functioning facility generating tons of Biochar per day." During the May 7, 2009, presentation, McKelvy said "we haven't produced any biochar yet." G-JL3 at 75. McKelvy also said "it's all pre-sales because 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.

Para 51, fifth sentence – "McKelvy did not have a license to sell securities and openly flaunted SEC rules." **Objection.** The Government did not prove that McKelvy knew that he needed a license to sell securities or that he knew that he was selling securities in connection with Mantria. In 2007, the SEC conducted an investigation of McKelvy and Retirement TRACS. In connection with that investigation, McKelvy was deposed by the SEC; he testified that he was not a licensed investment adviser and he was not affiliated with an investment adviser or broker dealer and that he did not believe that he was selling securities. The SEC terminated its investigation without taking any adverse action against McKelvy or Retirement TRACs. The SEC provided a letter to McKelvy that it was terminating the investigation of Retirement TRACs and him. The SEC did advise McKelvy that he needed to become a licensed broker.

Para 59, fifth sentence – "The land in Tennessee was, and always had been, essentially worthless." **Objection**. McKelvy objects that the land in Tennessee was worthless. JP Anderson, the receiver, engaged an appraiser to appraise some of the land being developed by

Mantria. Ex. D-17. That appraisal valued the land in Indian Trails Phase I and II and Ironbridge at $22,000 per lot for a total value of $3,080,000. Another development was appraised at $15,000 per lot for a value of $360,000. In addition, the land that Mantria was developing as Mantria Place had significant value, Mantria entered into an agreement to purchase the land (5,500 acres and 2,153 lots) for $12 million from the Maclellan Foundation. After Mantria was shut down by the SEC, the Maclellan Foundation foreclosed on the 5,500 acres of land because Mantria was not able to pay the $12 million purchase price for the land. The Government did not present any evidence that the land known as Mantria Place was not worth the $12 million Mantria agreed to pay for it or that the Maclellan Foundation engaged in a fraudulent sale of the land to Mantria.

Para 65 – Objection. McKelvy objects that that the Mantria business records show that he was "well aware of Mantria's financial problems and the fact that their businesses were never profitable." First, the Government did not present any evidence that Mantria's business records (federal tax returns) were shown to or provided to McKelvy. Second, McKelvy was not aware of Mantria's financial problems until October or November of 2009, when he reached the "tipping point" and learned that Wragg had been lying to him about Mantria. The trial evidence showed that Wragg and Knorr provided McKelvy with false information about Mantria's financial condition and the capabilities and status of the carbon diversion/green energy technology. See, e.g., D-90, D-101. In addition, McKelvy testified that he did not review the Mantria tax returns. Tr. 10/10/18 at 157. Moreover, the Government did not present evidence that McKelvy had access to Mantria's internal accounting records or budget reports that reflected that Mantria expected to lose over $1 million in the first half of 2009 or that Mantria was losing money faster than expected.

Para 74 – Objection. The restitution should be reduced by the approximately $17 million in interest payments to investors in Mantria.

Para 75 – Objection. McKelvy understands that there were approximately 300 investors in Mantria.

Para 76 – Objection. McKelvy did not commit perjury when he testified at trial. As set forth in detail in the Sentencing Memorandum, McKelvy did not lie under oath when he testified during trial. The jury's guilty verdict does not prove that McKelvy lied under oath.

McKelvy did not commit perjury when he testified "I'm not a financial advisor. I never put myself out to be a financial advisor." In connection with his role in promoting Mantria, McKelvy did not view himself nor hold himself out as a financial adviser. That testimony is consistent with his testimony in the 2007 SEC deposition and his 2009 SEC deposition in which he testified that he was not a licensed investment adviser and he was not affiliated with an investment adviser. The SEC did not advise McKelvy that he was acting as an investment adviser. McKelvy did not serve as a financial advisor to any of the investors in Mantria even though Dee Holl testified that she believed that McKelvy was her financial advisor.

When McKelvy testified during the SEC deposition (where he was not represented by counsel) that "until it sells, I think it is worth nothing" and that the value of the real estate "in my opinion, zero" despite the appraisals that valued the land at over $100 million was based on McKelvy's frustration with Wragg and Mantria after he had reached his tipping point in October or November 2009. McKelvy did not have counsel representing him to clarify what he meant when he made those statements. Moreover, the Government did not produce any evidence that McKelvy knew that the appraisals had been inflated or that the land could not "make good collateral" to secure the investments. See Memorandum of Law in Support of McKelvy's

Motion for Downward Departure Pursuant to § 3B1.2 at 6-7. To the contrary, the only documentary evidence introduced at trial concerning manipulation of appraisals was D-95, an email dated July 13, 2009, between Gary Wragg, Troy Wragg and Knorr that they needed appraisals which were inflated to $70,000 per lot to cover shortfall in collateral. McKelvy was not listed as a recipient of the email and there was no evidence that McKelvy received a copy of the email or that he was aware of its contents.

McKelvy's testimony that he believed in the green energy technology was not a lie, it was his belief at the time. McKelvy was testifying that he believed in the technology despite the delays in producing the biochar. Government witnesses, including Cary Widener, an engineer who had much more experience with green energy technology, Volpe, and Knorr testified that they also believed in the technology. See Tr. 9/26/18 at 262-63 (Widener); Tr. 10/3/18 at 143, 147 (Volpe); Tr. 10/2/18 at 114-15 (Knorr); and Tr. 10/3/18 at 50-51 (Knorr). McKelvy testified that, like Widener, he was more excited by the use of the technology to burn/eliminate trash/debris and generate electricity.

Accordingly, McKelvy did not lie under oath when he testified during trial. The jury's guilty verdict does not prove that McKelvy lied under oath. Therefore, the two-point enhancement pursuant to § 3C1.1.

Para 81 – Objection. McKelvy submits that the applicable loss is not $54,531,488.57. As set forth in detail in the Sentencing Memorandum, the loss attributable to McKelvy is $6 million. First, the loss of $54 million was not reasonably foreseeable to McKelvy because (1) he was not aware of Mantria's true financial condition until October of 2009 and (2) he did not know that the appraisals were inflated and that the value of the land was not sufficient to serve as collateral to secure the investments in Mantria. Second, the loss should be reduced by the $17.5 million in

interest payments Mantria made to the investors. Finally, the loss that was reasonably foreseeable to McKelvy were the approximate $6 million in commission payments he received from Mantria. McKelvy acknowledges that he did not inform the potential investors that he was receiving a commission payment of 12.5% of the investments in Mantria.

Para 83 – Objection. McKelvy objects to the two-point enhancement for use of sophisticated means pursuant to § 2B1.1(b)(10)(C). As set forth in detail in the Sentencing Memorandum, McKelvy did not "intentionally engage in or cause the conduct constituting sophisticated means." A sophisticated means is defined as "especially complex or especially intricated offense conduct pertaining to the execution or concealment of an offense." cmt. n. 9(B). McKelvy's role in the fraud scheme was promoter of Mantria. During presentations to and webinars with investor, McKelvy repeated the information that Wragg and Knorr provided to him about Mantria. Knorr testified that she and Wragg provided false information to McKelvy, including information about Mantria's real estate sales, that he then repeated to potential investors. It was undisputed that Wragg and Knorr provided McKelvy with the 2008 Year End Report that provided that Mantria earned $14.3 million in land sales revenues in 2008. See D-90, D-101. In addition, Wragg and Knorr provided McKelvy with Wragg and Knorr provided McKelvy with a vast amount of positive information and news about the green energy technology, including a marketing analysis with revenue projections prepared by Volpe in May 2009.

In its sentencing Memorandum, the Government provides examples of the "complexity of the fraud scheme". See Govt. Sent. Memo. at 24-25. However, the examples of the purported "sophisticated means" were created, controlled, and utilized by Wragg and in some instances Knorr, not McKelvy. McKelvy responded to the examples cited by the Government in detail in

his sentencing memorandum. See Sentencing Memorandum at 7-11. Therefore, the two-point enhancement for use of sophisticated means pursuant to § 2B1.1(b)(10)(C) is not applicable.

Para 84 – Objection. McKelvy objects to the two-point enhancement pursuant to U.S.S.G. § 2B1.1(b)(17)(B)(ii). As set forth in the Sentencing Memorandum, the enhancement pursuant to § 2B1.1(b)(17)(B)(ii) is not applicable because (1) Mantria Financial was not a legitimate financial institution since it was not a mortgage lender as that is defined under the Sentencing Guidelines; (2) Knorr and Rink testified that Mantria Financial lost money on every lot sale because of the "buyer incentives" with each mortgage; (3) as set forth in paragraph 83 of the PSR, the land "sales were only illusionary"; (4) Mantria Financial used unsubstantiated accounting entries (a $4 million subscription receivable) to attempt to cover over Mantria Financial's losses of over $4 million at the end of 2008; and (5) even assuming that Mantria Financial was a financial institution, the Defendant's conduct did not endanger the solvency of Mantria Financial.

In addition, Flannery's testimony shows that Mantria Financial was not a financial institution. Flannery testified that "in Tennessee there was a type of license you could get for a **company that was going to make loans upon sufficient collateral**, . . . **their only business was making the loan and then getting paid on the mortgage.** (Doc. No. 248 at 25-26). It's clear that Wragg was using inflated appraisals. Therefore, Mantria Financial was making loans without sufficient collateral as required for the Tennessee license. Second, Mantria Financial was not "getting paid on the mortgage". Mantria Financial never received payment on the mortgages. Therefore, Mantria Financial was not a mortgage lender or a Financial Institution. Moreover, it's clear that because of the buyers' bonuses that led to Mantria losing money on every sale that Mantria Financial was not affected by the fraud scheme. Emails between Wragg,

Knorr, Rink and Granoff show that Mantria Financial was essentially insolvent as early as September 2008, not because of the fraud scheme, but because of the Mantria business model that included the buyers' bonuses. See Ex. D-206. Therefore, the two-point enhancement pursuant to § 2B1.1(b)(17)(B)(ii) is not applicable

Para 85 – Objection. McKelvy objects to the four-point enhancement pursuant to § 2B 1.1(b)(20)(A)(iii). As set forth in detail in the Sentencing Memorandum, the offense was not a violation of the securities laws and McKelvy was not an "investment adviser". McKelvy does not meet the definition of an "investment adviser" for three reasons: (1) he was not "in the business" of providing securities advice; (2) he did not provide securities advice "for compensation" and (3) he was not a registered investment adviser. McKelvy promoted Mantria; he received a commission from Mantria. McKelvy was not providing advice to individuals on investments and he was not charging a management fee for providing advice as an investment adviser routinely does. McKelvy was not "in the business" of providing securities advice.

In addition, in June 2007, when McKelvy was deposed by the SEC, he testified that he was not a licensed investment adviser and he was not affiliated with an investment adviser or broker dealer. The SEC terminated that investigation of McKelvy and Retirement TRACs without taking any adverse action. In addition, the SEC did not advise McKelvy that he was acting as an investment adviser or that he should become affiliated with an investment adviser. Moreover, McKelvy did not hold himself out as an "investment adviser" the testimony of a single witness (Dee Holl) that she believed that McKelvy was her financial adviser is not dispositive on this issue. Therefore, the four-point enhancement pursuant to § 2B 1.1(b)(20)(A)(iii) is not applicable.

Para 86 – Victim Related Adjustment: Objection. McKelvy objects to the two-point enhancement pursuant to U.S.S.G. § 3A1.1(b)(1). As set forth in detail in the Sentencing Memorandum, the Government did not prove that McKelvy "specifically and intentionally targeted the elderly and unsophisticated investors." The investor witnesses who testified during the trial included educated professionals including John Marvin, who sold his business for approximately $800,000; Bruce Kalish, a retired Air Force Lt. Colonel, who worked as a comptroller in the Air Force, and performed financial management work for the Department of Defense and NASA; George "Jeff" Anderson worked in the computer technology industry; and Carla Madrid, who had over 20 years-experience in accounting and worked as an accounting manager for an aerospace company.

McKelvy's experience was selling life insurance. Life insurance policies are not typically marketed to elderly people because given the age of the person, the cost of the insurance policy would prohibitive. It's clear McKelvy's focus was more on middle aged people who would want/need life insurance.

In addition, the investor witnesses who testified at trial were not "elderly" when the invested in Mantria. The investors who testified at trial were the following ages when they first invested in Mantria: Holl 59 years old; Marvin 64 years old; Wahl 44 years old; Carty 51 years old; Anderson 62 years old; Kalish 51 years old; and Madrid 42 years old. Therefore, the two-point enhancement pursuant to § 3A1.1(b)(1) is not applicable.

Para 87 – Adjustment for Role in the Offense: Objection. McKelvy objects to the two-point enhancement pursuant to U.S.S.G. § 3B 1.1(c). As set forth in detail in the Defendant's Version of the Offense and Sentencing Memorandum, McKelvy did not realize that Wragg had lied to him about Mantria until October or November 2009. In addition, the Government alleges that

McKelvy supervised Donna Jarock, his ex-wife who was an employee of Speed of Wealth. However, Ms. Jarock was not a participant because she was not criminally responsible for the commission of the offense. The Government did not charge Jarock in this matter. Therefore, the two-point enhancement pursuant to § 3B 1.1(c) is not applicable.

Para 88 – Adjustment for Obstruction of Justice: Objection. McKelvy objects to the two-point enhancement pursuant to U.S.S.G. § 3Cl.1. As set forth in detail in the Sentencing Memorandum, McKelvy did not lie under oath when he testified during trial. The jury's guilty verdict does not prove that McKelvy lied under oath. McKelvy hereby relies upon and incorporates section II.A.3.g. of his Sentencing Memorandum where he addressed the arguments raised in the PSR and the Government's Sentencing Memorandum about the two-point enhancement pursuant to § 3Cl.1.

Para 89 – Objection. The Adjusted Offense Level (Subtotal) is 31, not 49.

Para 92 – Objection. The Total Offense Level is 31, not 49.

Para 107 – Updated information. McKelvy's father passed away on April 14, 2021.

Para 119 – Objection. Dr. Catherine Barber conducted a psychological evaluation of McKelvy and prepared a report of her evaluation and findings. See May 25, 2021 Report of Dr. Catherine M. Barber attached to the Memorandum of Law in Support of McKelvy's Motion for Downward Departure Pursuant to § 5K2.13 as Exhibit "B". Dr. Barber concluded that McKelvy suffers from a disorder that contributed to the commission of the offense. McKelvy's condition should be considered a mitigating factor.

Para 139 – Objection. The total offense level is 31, not 49, so the guideline imprisonment range is 135 to168, not life.

Para 146 – Objection. For counts 2 through 8, the maximum fine is $250,000 per count not $1,000,000 per count because a financial institution was not affected by the scheme.

Para 148 – Objection. The fine range for this offense is $30,000 to $7,250,000 not $12,000,000, since the offense level is 31 not 49.

Para 151 – Objection. The restitution should be reduced by the approximately $17 million in interest payments to investors in Mantria.

Para 158 – Objection. The Government has not established that there were 500 investors in Mantria.

Dated: June 24, 2021

Respectfully submitted,

/s/ wjm 409

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on June 24, 2021, a true and correct copy of Defendant's Objections to Revised Presentence Investigation Report was served via email and/or the Electronic Case Filing ("ECF") system upon the following:

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/s/ wjm 409
William J. Murray, Jr., Esquire

DEFENDANT'S VERSION OF THE OFFENSE

I. TIMELINE: THE "RISE" IN McKELVY'S MINDSET OF MANTRIA INVESTMENTS.

Overview - McKelvy concedes that he became aware of Wragg's lies during the last two months of the scheme, October/November 2009. But, McKelvy denies that he was aware that Wragg was lying from August 2007 until September 2009. McKelvy recognizes that the Court expects any defendant, who comes before the Court for sentencing, to acknowledge all misdeeds at issue. Consistent with that duty, McKelvy acknowledges that there was a sequence of events which led to a "tipping point" in his understanding of Wragg's true intentions. In this document, McKelvy will deny some of the allegations which the Court has accepted as true, for purposes of ruling on the post-trial motions; McKelvy is not disputing those findings at this stage, but rather is addressing only sentencing-related issues.

A. Real estate phase – Background.

1. Mayor Dishman's testimony shows that Wragg had a separate fraud scheme – against homesite purchasers – as of late 2006. Kelly Dishman met Wragg in late 2006, when Wragg said he hoped to develop land in Van Buren County. Dishman told Wragg that there was an insufficient public supply of potable water in the county to support any significant new developments. Tr. 9/26/18 at 125-30, 134-38. Dishman told Wragg that it would cost about $35 million to improve the water supply to support a new development. Id. at 129. To Dishman's knowledge, Wragg made no improvements to the water supply system for Mantria. Id. Dishman later heard from the recorder of deeds that Mantria had sold some properties for $100,000/lot. Id. at 142-43. Based on this and on what Dishman said about the absence of water supply to this area, Wragg was defrauding homesite purchasers as early as late 2006. This scheme was separate from Wragg's later scheme, starting in August 2007, to defraud investors in Mantria. Neither Dishman (nor any other witness) told McKelvy about any issues with Mantria's land. Id. at 144. It is apparent that McKelvy was not involved in Wragg's initial purchaser-fraud scheme.

2. McKelvy always wanted sufficient collateral to cover the principal put in by the investors. McKelvy adopts his testimony from the 10/22/09 SEC deposition, in which he said that when he had the Retirement TRACS investment club, he arranged for appraisals of the land used as collateral for the loans/investments. Tr. 10/9/18 at 51, 54-56 (McKelvy's testimony read into the trial record by the government). McKelvy recognizes that appraisals were subjective – three appraisers "will go in there and have three different opinions, but they're typically all close to the same." Id. at 55. He also confirms his prior testimony that the TRACS investors received "deeds of trust" or "mortgages," which provided that if a borrower (usually a developer) of funds from the investment club did not pay back the loan as agreed to, then the club members (the lenders) would have the right to seize specified land, as set out in the mortgage. Id. at 55-56.

3. Rink confirms he knew that Mantria was losing money on each homesite sale, but he never said this to McKelvy. When asked whether "Mantria was losing cash on every single sale" in which Mantria Financial ("MFL") was involved, Mantria's CFO Dan Rink answered, "Yeah. That's correct." Tr. 9/28/18 at 227. When asked if he had informed McKelvy "about Mantria losing money on every [homesite sale]," Rink said, "I never did." Tr. 10/1/18 at 66.

Rink's testimony is consistent with that of McKelvy, that he did not know that the homesite sales were losing money.

4. Just as Wragg and Rink withheld financial information from Flannery, they also held secret from McKelvy the inflation of the appraisals. From Rink's statement that, based on Wragg's directions, he did not inform attorney Christopher Flannery about the commissions going to McKelvy, Tr. 9/28/18 at 244-45, it is apparent that Wragg and Rink were insiders and that Wragg was very protective about information he wanted to keep hidden. It is obvious to McKelvy that one of the types of information Wragg deliberately kept from him was the truth about the appraisals – that they were inflated. In McKelvy's view, this was because Wragg needed McKelvy's help raising funds for Mantria and Wragg knew that collateral securing the investments was important to McKelvy.

5. Wragg's insistence on maintaining privacy of certain financial information was deep-seated. Wragg limited distribution of Mantria's financial information to those within what was described as an inner circle – sometimes including Rink and Amanda Knorr, and sometimes including Flannery as well – but McKelvy was not part of the inner circle. For example, Rink discussed D-211, which was an email he sent to Wragg and Knorr, concerning MFL equity and eligibility to become a financial institution under Tennessee law. Tr. 10/1/18 at 30. No copy of this email was sent to McKelvy, id., presumably because it was a topic which Wragg considers to be sensitive. Wragg was "very controlling," in an effort to keep information about Mantria's finances within his "inner circle," to the exclusion of McKelvy, among others. Id. It's clear to McKelvy that Wragg thought it was in his best interest to not inform McKelvy that they had been inflated, thereby victimizing McKelvy, as well as the investors, about the significance of Ray Bryant's appraisals.

6. Based on Rink's superior knowledge about Mantria's homesite "sales" and the value of the land, McKelvy cannot be held to have known more than Rink knew. In D-201, an email Rink sent on 9/12/08 to Mantria controller Steve Granoff, Wragg, and Knorr, he (Rink) asserted that "the value of the land [w]as sufficient … to collateralize" Mantria's investments. Tr. 10/1/18 at 7-10. There can be no doubt that Rink, as Mantria's CFO, had vastly superior knowledge about Mantria's financial affairs than did McKelvy. But, although Rink had been told by the government that he was not a subject of its investigation, GJ Tr. 8/19/15 at 2-3, he never retracted his statement in D-201 about the sufficiency of the collateralization. In McKelvy's view, this can only mean that Rink was confirming the accuracy of his statement in email D-201 that he believed that the land was sufficient to collateralize the investments.

7. McKelvy denies the claim that he knew that the land was "worthless" as collateral; Wragg obtained inflated appraisals before he met McKelvy. Cf. Tr. 10/12/18 at 23 (closing). McKelvy had never met Wragg before their initial meeting in Bala Cynwyd, PA, in August or September 2007. It is incontestable that Wragg must have started his fraud of inflating the appraisals well before this meeting, to give the appraiser time to prepare the complicated appraisal. As Knorr testified, Tr. 10/1/18 at 160-61, at a time when Mantria was facing bankruptcy, Wragg sought out McKelvy because he was not able to get financing anywhere else. McKelvy recalls that one of the several appraisals he saw during the meeting with Wragg was for Legacy Ridge. Tr. 10/10/18 at 8-9; D-137. That appraisal – and seven other appraisals of Mantria developments – was dated 8/7/07. Moreover, the defects in the appraisals noted by Tisa

Dixson – that (a) the properties used as comparable, such as Hawk's Bluff (two miles from Legacy Ridge), were not really comparable, and (b) Bryant would set his appraisal figures at anything the customer wanted – could not possibly have been known by McKelvy. Accordingly, there is no evidence that McKelvy knew that the appraisals were inflated.

B. Real estate phase – McKelvy's rising expectations - 2007-09.

8. The eight appraisals dated 8/7/07 were for a total value of over $39 million; "hotcakes;" McKelvy's site visit. Although McKelvy remembered the appraisals were "over $30 million," Tr. 10/10/18 at 12, Bryant's appraisals valued the land at over $39 million. See D4 at 79-86. During their initial meeting, Wragg told McKelvy that the land was "selling like hotcakes." Tr. 10/10/18 at 14. Shortly after their meeting, McKelvy went to Tennessee for a "due diligence" trip to see the land being developed. Wragg showed him around the sales office, which was in a trailer in a strip mall. McKelvy said that he met Wragg's sister, Tisa Dixson, and Margaret (Hurley), who was Wragg's mother. McKelvy said that Wragg told him that he (Wragg) had purchased the land for $2,000 to $4,000 per lot and the lots sold for between $65,000 to $120,000. Id. at 16.

9. There are at least 19 reasons why McKelvy's denial that he knew that the appraisals were "bogus on their face" was truthful. Cf. Tr. 10/12/18 at 23 (closing). Without the appraisals Wragg showed him during their first meeting, McKelvy never would have gotten involved with Mantria. As he said at trial, "If [Wragg] didn't have those appraisals during that first meeting I would've walked away" from doing business with Wragg. Tr. 10/10/18 at 40. There are several ways in which McKelvy's view – that the appraisals were persuasive – was corroborated, as set out below. First, McKelvy maintains, as he testified, that Wragg showed him appraisals which were done by Bryant, described as a licensed appraiser who had worked as an appraiser for the state of Tennessee for 30 years. McKelvy testified that he was he "was very impressed" by Bryant's qualifications, which included having supervised 15 other appraisers in 11 counties. See Tr. 10/10/18 at 8-9.

10. Second – McKelvy did not notice anything unusual about the format of full appraisals. At his quick glance at the full appraisals Wragg showed him, McKelvy (with his experience of reviewing appraisals at TRACS) was satisfied with the appraisals, which looked professional. See, e.g., D-136 20-pages, Indian Trail Estates Phase III (8/7/07); D-137 21-pages, Legacy Ridge (8/7/07). Cf. ¶ 2.

11. Third – What McKelvy saw during his "due diligence" trip to Tennessee. When he visited the developments, McKelvy was impressed by what he saw: "gated communities, nice entryways to the gated community, they had roads going in, these roads had been bulldozed." Tr. 10/10/18 at 19. "[T]here were trenches on the sides of the roads, the trenches were dug to lay utility lines, there was some utility boxes in there …. [T]he roads went in … just like [Wragg's] plat lot[s] [were] laid out." Id. at 19-20. It should be noted that McKelvy's report of what he saw is corroborated by both Tisa Dixson, ¶ 24 (below) and Flannery, ¶ 25 (below).

12. Fourth – Although Flannery made an oblique reference to not putting much "stock" in appraisals like Bryant's, his handling of Bryant's appraisals was telling. While Flannery said that he would place "not terribly much stock" in Mantria's appraisals, in that they were

"paid for by the developer," Tr. 10/5/18 at 71, his (Flannery's) endorsement of Mantria's position in the MFL Private Placement Memos ("PPM"), D-4 and D-5, that there was sufficient collateral in the land was telling. Flannery testified that, as a securities lawyer, he had handled approximately 150 private placements, about half of which involved real estate. Tr. 10/4/18 at 4-5. In these private placements, Flannery was presumably representing developers seeking funding, much the same as with Mantria. It stands to reason that, even if Flannery did not place much stock in appraisals provided by the developers, he had to have had some means of getting confidence in the value of the proposed investments. Regarding the PPM for MFL, Flannery acknowledged that he had come up with the idea of creating MFL. After Wragg explained Mantria's difficulty getting mortgage lending for its properties in Tennessee, Flannery said he told Wragg, "[L]et's make our own bank." Id. at 25. Flannery described the law in Tennessee as providing for the creation of a financial institution which would "make loans upon sufficient collateral." Id. at 26. At no time known to the defense did Flannery ever advise any of the investors that their collateral was less than that stated in the appraisals, which were made part of the MFL PPMs that he drafted – D-4 and D-5. Accordingly, by his own description, MFL was designed to make loans backed by "sufficient collateral."

13. Fifth – Likewise, Flannery's support for the sufficiency of the collateral was supported by his approval of Mantria's response to the investor FAQs. As the securities attorney for Mantria, Flannery stated that he was bound by his commitment to make "full and fair disclosure" of any adverse information to the investors, Tr. 10/4/18 at 9, as to the sufficiency of the collateral. On 12/3/09, Flannery sent an email to Wragg and Knorr, D-86, to which he attached Mantria's draft of proposed answers to questions from some of the investors. D-85 ("draft FAQs"). Tr. 10/5/18 at 65. These questions were submitted to Mantria after the investors were notified that the SEC had closed Mantria's bank accounts. Flannery testified that he "played a role in editing" D-85, the draft of FAQs. Id. at 65. As demonstrated below, the two sets of FAQs (discussed further below) and Flannery's testimony all assert that the value of the land was sufficient to make the investors whole. As McKelvy made clear at trial, this is what he expected, based on what he had been told by Wragg, by what he had seen during the site visit in Tennessee, and by what he had seen in the appraisals.

14. The two sets of FAQs. As noted above, there were two documents referred to as the FAQs - the draft FAQs (D-85) and the final FAQs (CM-21).[1] Focusing on the FAQs for Question 29 (Q-29) and for Q 31, which are the most relevant for our point, the questions and answers for Q29 in the final FAQs are identical to the draft FAQs and the questions and answers for Q31 are similar to their counterpoints in the draft FAQs. In Q 29, the question and answer in the draft and final versions of the FAQs state:

> Q 29: "Are there enough assets to cover … all of the investors' principal?"
> Answer: "Based on the value of the real estate alone, Mantria has sufficient assets to repay the investors over time. However, real estate is not liquid and it will take time."
> CM-21 at 3 (emphasis added).

[1] While only CM-21 – the "final FAQs" – has the term "FAQs" in its title, a comparison of the two documents makes clear that the initial FAQs has the same format as the final FAQs.

The second relevant question and answer, as stated in the final version of the FAQs, CM-21, was the version that was circulated to the investors, including Carla Madrid. Madrid testified that this answer was based on "the collateral we talked about." Tr. 10/2/18 at 234.

> Q 31: "Does Mantria actually own the land and have title to the land that is promised as collateral for our investments? Will that cover the value of the total principal of all the investors?"
> Answer: "Yes. On some properties we have a 1st mortgage …; however, we still hold title to it. It is our belief that the asset value will cover the total principal. MantriaCentral.com still has copies of all of the appraisal documents." CM-21 at 3 (emphasis added).

Because Flannery was involved with editing and/or circulating both sets of FAQs, McKelvy submits that he was bound by the language of those documents. The language in the final version of Q31 – answering that, "It is our belief that the asset value will cover the total principal," citing "all of the appraisals" still on Mantria's website, could not be a clearer endorsement of the accuracy of the appraisals. Similarly, Flannery testified that he "had no reason to believe [Mantria] couldn't sell that land to generate revenue to pay back the investors." Tr. 10/5/18 at 62.

15. Sixth – McKelvy, in believing the land had sufficient value, relied partly on Bryant's credentials. Without the appraisals Wragg showed him during their first meeting in Bala Cynwyd, McKelvy never would have gotten involved with Mantria. As he said at trial, "If [Wragg] didn't have those appraisals during that first meeting I would've walked away" from doing business with Mantria. Tr. 10/10/18 at 40. In looking back at Bryant's appraisal of Legacy Ridge, D-137, McKelvy confirms his trial testimony that he "was very impressed" by Bryant's qualifications. Id. at 8-9; 21. On the latter page, Bryant listed his qualifications as: certified appraiser; full-time appraiser for the state of Tennessee from 1976 to the present (8/7/07); and supervisor of 15 appraisers in 11 counties.

16. Seventh – McKelvy admitted at trial that Mantria's 3.0 program provided "free land" to investors; in response to McKelvy's challenge on this position, Wragg said he would end the program. McKelvy maintains that he challenged Wragg in late 2007, when McKelvy received emails (AK-6, AK-8) concerning the 3.0 program, as to the practice of giving "free land" to investors and that, when he did, Wragg said that this program was limited to Indian Trails and agreed that it could not and would not continue. Tr. 10/10/18 at 154.

17. Eighth – McKelvy naively accepted Wragg's "assurance" that the 3.0 program ended. McKelvy, unlike Flannery – who said he (Flannery) served as corporate and securities counsel for about 30 years and handled two dozen public offerings and 300 private placements, of which at least 150 of those offerings involved real estate, Tr. 10/4/18 at 4-5 – agreed on cross that he understood the significance of the Mantria 3.0 program. By this program, Mantria would lose money on each occasion it applied to this program. Tr. 10/1/18 at 147 (Rink). When McKelvy protested this program to Wragg, he (McKelvy) relied on the "assurance" by Wragg that this

program was a very limited one. Tr. 10/10/18 at 153-55.[2] McKelvy maintains that he acted in good faith, but was overly impressionable. McKelvy's understanding that Wragg ended the 3.0 program was somewhat confirmed by the 2008 Year-End Report that provided that Mantria earned revenues of $14.3 million in land sales during 2008. D-101.

18. Ninth - McKelvy's reliance on the sufficiency of the land as collateral for the investments was partly supported by Mantria's Daily Sales Reports (DSRs). McKelvy received in discovery several DSRs including D-168, identified by Dixson. Tr 9/27/18 at 21-22, 81-83. D-168, lists contract sales prices ranging from $9,920 (Indian Trail Estates II) and $178,999 (Legacy Ridge I).[3] Those 51 properties totaled $4,974,284.

19. Tenth – McKelvy was aware of the market downturn at the end of 2007 and agreed with Wragg's and Flannery's idea to form MFL. McKelvy believes that because Flannery helped to set up MFL and because Flannery approved the PPMs which would fund MFL, starting in November 2007, he (Flannery) approved the central concept of MFL, which was that the value of the land was sufficient collateral for MFL to enable buyers to purchase homesites, even at a time of financial distress. One of the tenets of McKelvy's financial "philosophy," as reflected in his book "Moving at the Speed of Wealth" was that investors should create their own "banks," which he thought was happening with MFL.

20. Eleventh – During 2007-09 McKelvy knew there was "[a] bad real estate [market];" he thought that MFL would enable buyers of homesites. McKelvy believed that MFL could serve as a bank to enable Mantria to sell its homesites in Tennessee. See Tr. 10/5/18 at 112 (transcript of the SEC deposition on 10/22/09 read into record). As McKelvy testified, MFL "was right up my alley, [because Wragg] wanted to create his own bank to finance people to buy his land." Id. at 13. Clearly, McKelvy had no idea that MFL was an essential part of Wragg's scheme, as FBI S/A Annette Murphy said in the grand jury, to "gin up" the apparent prices of the properties. 9/2/15 GJ at 21-22.

21. Twelfth – McKelvy accurately testified that Bryant appraised the eight residential communities for a total of "over $30 million" and appraised Mantria Place for $21 million. Cf. Tr. 10/10/18 at 37, 11-12. The appraisals for the eight residential communities, dated 8/7/07, were shown by Wragg to McKelvy during their initial meeting in or about August or September 2007. The appraisal for Mantria Place (D-5 at 87) was dated 6/7/08 shortly after Mantria acquired the land. Tr. 10/10/18 at 37. When added together, the face amounts of the appraisals of the eight communities totaled just over $39 million, D-4 D-5, and the 6/7/08 appraisal for Mantria Place was just over $21 million. As such, these appraisals totaled approximately $60 million. See id. at 39.

22. Thirteenth – Using the appraisals of the appraiser retained by the Court appointed receiver, the value of the eight communities and Mantria Place would be about $46.25 million. Using information provided by local Tennessee appraiser Henry Hale, who found that

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[2] McKelvy admitted receiving AK-6, an email from Wragg to Flannery and McKelvy, dated 11/6/07, to which was attached AK-8, which discussed the 3.0 program. McKelvy said he "called [Wragg] on the carpet" for having initiated a program which would require both no down payment and defer interest payments.

[3] It should be noted that these sales took place before MFL was initiated, in February 2008.

some of the Mantria communities should be valued at $15,000 per lot and others should be valued at $22,000 per lot, provides a useful, rough comparison. Assuming those values would have prevailed in the eight communities and Mantria Place, that would be an average of $18,500 per lot. Assuming that there was a minimum of 50 lots in each of the eight communities and that for Mantria Place, the figure provided by Bryant was a total of 2,153 acres/proposed lots, D-140 at 4, for a grand total of more than 2,500 acres/lots. Taking Hale's average value of $18,500 per acre or lot, that would mean that there was a total value of $46.25 million.

23. Fourteenth – Using Marcum's analysis of sales prices, the "worth" of Mantria's properties would be about $51.3 million. Marcum, McKelvy's forensic accountants, created a chart (Exhibit A), which provides a summary of the sale prices of Mantria's lots during 2006-07; the figures on this chart pre-date Wragg's initial meeting with McKelvy and pre-dates the creation of MFL. This chart shows the average sales prices in 2006 and 2007. This chart shows a total of 34 lot sales in 2006, at an average lot price of $16,586, and a total of 11 lot sales in 2007, at an average lot price of $20,519. Marcum's figures are broadly consistent with those of Dixson, when she spoke of the price range for homesites of $15,000-$75,000 in 2006-07. Tr. 9/27/18 at 56. Using average homesite sales prices for Mantria in 2007 of $20,519, the value for the combined figure of 2,500 lots/acres would total $51.3 million.[4] Although Marcum is not an appraisal firm, their tally shows that the Mantria properties were certainly not "worthless," as the government had claimed. Moreover, Wragg's claim at the time that Volkswagen was planning on building a plant in Chattanooga, Tr. 10/10/12 at 38, although not coming true until 2018, would have also added value to MP, about 2.5 hours away by car. While McKelvy agrees that the government proved that Bryant's figures were inflated, he maintains that his belief that the land had substantial value is corroborated by what Tisa Dixson said, Hale's appraisals, and by what Marcum's research showed were the true figures for Mantria's homesite sales in 2007. Also, there was no evidence that McKelvy was aware that the appraisals had been inflated. To the contrary, the only documentary evidence introduced at trial concerning manipulation of appraisals was D-95, an email dated July 13, 2009, between Gary Wragg, Troy Wragg and Knorr that they needed appraisals which were inflated to $70,000 per lot to cover shortfall in collateral. McKelvy was not listed as a recipient of the email and there was no evidence that McKelvy received a copy of the email or that he was aware of its contents.

24. Fifteenth – Tisa Dixson largely corroborates McKelvy's testimony; salespeople; sales prices; acquisition costs. McKelvy notes that, in some key respects, Dixson refutes the government's "worthless" allegation. Cf. ¶ 2, above. Dixson testified that she managed Mantria's real estate sales office in Tennessee. Tr. 9/27/18 at 54-56. Dixson said that before MFL was started in 2008, homesites were sold for cash or with private financing. Id. at 17-18. She said that during this pre-MFL period, prices for lots ranged between $15,000 and $75,000. Id. at 56. She took potential buyers on tours of the land, where "there were sometimes bulldozers out there working, sometimes dump trucks," "gravel roads," trenches next to the roads, and "electricity installed." Id. at 58. McKelvy confirms his trial testimony that he understood Dixson to say that during 2006-07, Mantria was able to buy land for development at

[4] While it may seem unfair for McKelvy to choose the 2007 figures for actual Mantria sales, Marcum's figures for actual sales of homesites in 2008 were much higher – averaging $94,251 – but these figures were fraudulently inflated by the 3.0 program.

the "going rate" of "[a]nywhere from 500 to $1,000 an acre." Id. at 20. Dixson never told him what she told the jury - that her brother (Troy Wragg) was a "habitual liar." Id. at 52-53.

25. Sixteenth – McKelvy's testimony was corroborated by Flannery, who also contradicts the government's "worthless" allegation. Attorney Christopher Flannery testified that, before he took on Mantria as a client, he did a site visit in Tennessee as a part of his due diligence. Tr. 10/4/18 at 23. Flannery said that Mantria

> had done a fair amount of site work; put in roads, curbs, sewers, conduits for electrical work, …. I also went to their office there; I looked at the site plan, … I talked to the people there about what they were doing.

Id. Flannery further testified that Mantria "had spent a significant amount of money [developing the land in Tennessee]; they had put in a substantial number of roads, that had put in drainage, they had put in an electrical conduit." Id. at 122. Flannery's testimony shows that "site work" had been done which was not reflected in some of Bryant's appraisals.

26. Seventeenth – McKelvy denies the government's fanciful claim that he orchestrated the alleged "plausible deniability" aspect of the scheme. This claim by the government, cf. Tr. 10/12/18 at 25 (closing) – "Make sure you got yourself papered" as a defensive technique – presumably concerning not just to the appraisals, but also to the emails has no foundation in fact. Specifically, as to the appraisals, McKelvy denies that he had anything to do with Bryant, the appraiser. Bryant was someone known to Wragg, but not to McKelvy. There is not even a shred of evidence that McKelvy had anything to do with any aspect of the appraisals, other than to be misled by them and to rely on them. The government's suggestion that Wragg created scores, if not hundreds, of documents to provide protection for McKelvy, which would incriminate himself (Wragg), is non-sensical.[5] Not only is there no evidence of the government's "plausible deniability" claim, but there is documentary evidence which refutes it. As shown by D-95 – the only instance we know of where Wragg openly discusses inflating an appraisal – McKelvy did not receive the emails from July 2009 between Wragg, Gary Wragg and Knorr about the "need" for inflated appraisals: "we need the appraisals to come in at $70,000 per home site" to "cover the $15 million we are short in collateral." Tr. 10/2/18 at 124.

27. Eighteenth – Tisa Dixson: After MFL had started issuing "mortgages" in 2008, interest in the homesites was so brisk she gave tours to visitors coming in "caravans." 9/27/18 at 14-15. Dixson's statement about "caravans" coming to Mantria corroborates McKelvy's statement that Wragg told him that the properties were "selling like hotcakes." See ¶ 8, *supra*. With MFL mortgages, the recorded prices of the homesites ranged from $50,000 to $200,000;[6] from her first-hand knowledge of these homesites, Dixson said that the "prices" were "outrageous,"[7] id. at

[5] As set out at ¶ 7, it is apparent that Wragg obtained inflated appraisals from Bryant well before he met McKelvy.

[6] Marcum's chart shows that after MFL started operating in 2008, Mantria sold 97 lots in 2008, at an average price of $94,251, and sold 221 lots in 2009, at an average price of $16,070.

[7] Although McKelvy did not argue this earlier, Dixson's statement that she was marketing lots at "outrageous" prices begs the question of whether she knew that she was aiding and abetting her brother's fraud scheme.

20, but she admitted that she did tell McKelvy her belief that the appraisals were inflated, id. at 65; likewise, there was no evidence that she asked Wragg to reduce these prices to put them in line with comparable homesites.

28. Nineteenth – McKelvy maintains that, at the end of 2008, he understood that Mantria had sufficient revenue from real estate sales. Wragg and Knorr forwarded Mantria's Year-End 2008 report, showing about $14.3 million in land sale revenues in 2008. D-90, D-101. McKelvy assumed, but did not know that Mantria had made that figure from operating revenue. See Tr. 10/5/18 at 113 (transcript of the SEC deposition on 10/22/09 read into trial record). Based on his understanding from Wragg that Mantria purchased real estate in Tennessee for $2,000 an acre and was "selling it for [$]85,000, there's a lot of money left over to pay extraordinary returns and good commissions." Id. at 276.

29. Before the "tipping point" described in section II below, McKelvy did not believe that Wragg was a habitual liar:

(a) When asked at trial why he believed, when marketing their investments, that Mantria was not a Ponzi scheme, McKelvy stated:

> I believe that still to this day, even though I know it was a scam, you can't have a Ponzi Scheme if you've got collateral.

Tr. 10/10/18 at 147. It must be emphasized that this is McKelvy's personal definition of a Ponzi scheme, but counsel have since advised that, even with sufficient collateral, an investment could be operated as a Ponzi scheme.

(b) Consistent with SEC attorney Kurt Gottschall's definition of a Ponzi scheme, Doc. No. 261 at 12, McKelvy said at trial that he did not think it was such a scheme, because his investors knew that Mantria was a start-up, with operating losses in the beginning, just like Apple Computer. See Tr. 10/10/18 at 73, 144-45, 258. McKelvy now recognizes that, contrary to what he had thought at the time of the trial, there is no evidence that he or Wragg told the investors that they should expect Mantria to lose money in the foreseeable future. For his part, McKelvy had such faith in the green energy technology that he believed, up until the "tipping point," that, eventually, Mantria would make a breakthrough and he and the investors would be rich.

B. Green energy phase – McKelvy's rising expectations – 2008-09.
This section sets out the positive, reinforcing information which Wragg and Knorr gave McKelvy on Mantria's supposed successes with Biochar and with green energy (carbon diversion) systems.

30. Strategy switch to green energy – 12/08 to 9/09. Putting aside the evidence of what Wragg and Knorr told McKelvy about the Mantria homesites, it was Mantria's green energy focus which pumped up McKelvy, before reality set in during the fall of 2009.

31. Visit to Carbon Diversion, Inc. (CDI) in Hawaii, 12/08. In late 2008, Mantria entered into a business relationship with CDI, a green energy technology company. Wragg arranged for McKelvy, Donna, and Knorr to visit CDI, in or about December 2008. There, they saw a

demonstration by Michael Lurvey of a technology which he said converted refuse, such as old tires, into Biochar, which Lurvey claimed to be an advanced form of charcoal. Lurvey also told them that this process would produce green energy, etc., as a bi-product. While in Hawaii, McKelvy told Donna that "the investors are going to get rich." Tr. 10/10/18 at 59-60, 87-88.

32. Email with "Billion Dollar Contract" dated 3/22/09. Knorr testified that Wragg sent an email, D-241, on March 22, 2009, to McKelvy and Donna, which provided a copy of the "Master Agreement" with CDI. D-249; Tr. 10/2/18 at 154-57. In this email, Wragg said he and Knorr wanted to make sure that the McKelvys knew about what "Amanda and I call this our Billion Dollar Contract" with CDI. Id. at 156-58.

33. On or about 3/28/09, McKelvy received Volpe's Biochar Sales forecasts with its projections for Biochar sales in the tens to hundreds of millions of dollars. Knorr said that D-242 was an email, dated 3/28/09, from Wragg to McKelvy and Knorr; Wragg attached Robert Volpe's (enthusiastic) sales and revenue forecasts for Biochar for 2009-13. D-247; Tr. 10/2/18 at 162-65. Volpe's projected revenue was between $14.2 million for 2009 and $267.1 million for 2013. Tr. 10/2/18 at 165-67 (Knorr's trial testimony); D-247.

34. Volpe's 120-page Sales and Marketing Plan, D-100, referencing such usually reliable sources as DOE and the White House. Volpe testified that he included source references – including the Department of Energy (DOE) and the White House – for the information in the Sales and Marketing Plan. Tr. 10/3/18 at 196-97. Volpe's plan stated that: (a) "Mantria Industries is opening the first CDI biorefineries in … Dunlap, Tennessee in May of 2009 and completing a second site in October of 2009 in Hohenwald." Id. at 199-200; (b) "With only partial year production, it has been forecasted for 2009 that 49,140 tons of biochar will be produced at the two Mantria Industries sites." Id. at 200; and (c) "Additional biorefineries will be added that will increase production of 920,010 tons in 2013." Id. at 201. Knorr forwarded Volpe's plan to McKelvy as an attachment to an email, D-92.

35. CNN.com story, seen in light of McKelvy's experience driving trash to a landfill for his dad. Knorr testified that Wragg had sent an email, dated 3/30/09 (D-243), to McKelvy and herself, forwarding an article from CNN.com about Biochar. In the email, Wragg said, "Biochar is no[w] hitting the front page of CNN …. We were ahead of the curve!" Tr. 10/3/18 at 21-23. McKelvy put the CNN.com article in a personal context, which is one of the reasons that he was so enthusiastic about the prospect of success with Biochar. When McKelvy was in his 20s, he worked with his father doing construction and drove a truck to landfills, where he witnessed the ugliness of landfills. McKelvy was excited by the prospect of turning "trash into cash". This was one of the reasons that McKelvy sometimes compared Mantria to a possible Microsoft. Cf. Tr. 10/10/18 (McKelvy).

36. Knorr's PowerPoint for investors on 5/21/09 – converting landfill to Biochar. Knorr said that D-252 was an email, dated 5/14/09, which she sent to McKelvy, attaching a PowerPoint document, D-102, that explained the carbon diversion process. Tr. 10/3/18 at 37-39. Knorr stated that this PowerPoint – which she expected McKelvy to use at the upcoming SOW meeting on 5/21/09 – set out how landfills could be converted to Biochar. The PowerPoint emphasized that Biochar could be employed as a fertilizer, drawing toxins from the soil and also producing electricity. Id. Knorr said she forwarded this information to McKelvy, based on what she had

received from CDI. Knorr used the shorthand phrase "trash to cash" to describe this process. Id. at 40. Knorr stated that when she forwarded this information to McKelvy, Knorr believed it to be true. Id. at 42-45.

37. Dunlap plant ribbon-cutting in August 2009. Knorr testified that construction of the Biochar plant at Dunlap, Tennessee, was Mantria's first effort to produce Biochar. Knorr attended the grand opening of the Dunlap plant on 8/1/09; Wragg, McKelvy, Donna, and a number of investors were also there. Tr. 10/2/18 at 18-19, 29-30. McKelvy said that the Dunlap plant was supposed to be the prototype for manufacturing Biochar and for creating a trash to green energy system. McKelvy said of the plant, "it was pretty impressive … with all the gizmos and gadgets." Tr. 10/10/18 at 114. McKelvy said that, on the day of the opening, he and Donna cried with tears of joy, anticipating the money that the investors and the two of them would make as a result of this plant, saying to each other, "we finally did it." Id. at 115-16. Donna had invested $100,000 of her own money in Mantria. Id. at 116-17.

38. Wragg's purported contacts with Ivory Coast official, August 2009. McKelvy testified that Wragg told him that he had been talking with the president of the Ivory Coast about the possibility of that country purchasing Mantria systems "to produce biochar to produce energy." Tr. 10/10/18 at 114 (unrebutted). On September 21, 2009, Wragg sent an email to McKelvy and Donna about a meeting he had with the President of the Ivory Coast at the Waldorf Hotel in New York. Tr. 10/3/18 at 69-70 (Knorr); D-245. Wragg characterized the meeting as an "incredible success" and said that the President of the Ivory Coast would buy 38 of the carbon diversion systems if the technology worked. Id. at 73-74; D-245. Wragg told McKelvy that Mantria should be in production of the systems units "within two weeks." Id. Knorr testified that she attended the meeting at the Waldorf. Tr. 10/3/18 at 71.

39. As of 9/4/09, despite being aware of negative information in a PPM, McKelvy still satisfied with Wragg. Although McKelvy mentioned that he understood an email, dated 9/4/09, D-267, to say that the attached PPM meant that "Donna and I will not get any revenue [from Mantria's green energy earnings for two years]," Tr. 10/10/18 at 100-02. McKelvy shifted his focus to green energy "system sales," from which he expected revenue by 2010. Id. at 104.

40. McKelvy was relieved that Wragg had followed his advice about changing Mantria's investments from debt to equity. Because he was aware that Wragg's "focus was no longer on real estate sales", but instead was on as-yet unprofitable green energy programs, McKelvy advised Wragg that he needed to shift from debt offerings to equity offerings, so that Mantria could retire its debts and pay back the investors. Tr. 10/10/18 at 101-02.

41. McKelvy received an email from Wragg on 10/10/09 saying that Mantria was negotiating $500 million in potential sales. McKelvy identified D-246, an email from Wragg to Knorr, McKelvy, and Donna, stating, "We now have over a half a billion dollars in potential sales we're negotiating." Tr. 10/10/18 at 119. McKelvy said that, by looking at the prior email in the chain, he could see that this information came from Seaner, who had been hired by Wragg to, *inter alia*, market and sell Mantria's green energy systems. Id. at 119-20. From reading Seaner's email to Wragg, McKelvy said that he understood that Seaner had found about 24 contacts who had sufficient funding to purchase one of Mantria's systems, but did not make any firm commitments in that regard. Id. at 120.

42. Romero: Strong pre-orders from about May to September 2009. McKelvy's enthusiasm for the green energy program was bolstered by what he was told by Taylor Romero and Josh Juhasz about pre-orders. McKelvey testified at trial that he had known Romero "since he was 17" and that Romero had worked for him doing IT work. Romero had "jumped over" to work directly with Wragg on IT work; then Romero and Juhasz began soliciting potential Biochar customers. McKelvy said that Romero was "pumped up" in his enthusiasm for the pre-orders of Biochar, which he (Romero) had obtained in return for Wragg's promise of commissions. Cf. Tr. 10/10/18 at 79-81, 105-06 (unrebutted McKelvy testimony).

II. THE "FALL" OF McKELVY'S IMPRESSION OF MANTRIA INVESTMENTS.

A. Real estate phase. In the summer and the fall of 2009, McKelvy was aware that Wragg's "focus was no longer on real estate sales." Tr. 10/10/18 at 101-02. By the fall of 2009, McKelvy believed that there were dwindling sales of homesites, following a declining real estate market. See id. at 146.

43. McKelvy realized that the "free land" program for investors was not eliminated, as Wragg had promised McKelvy. McKelvy realized, by October 2009, that Wragg's pledge to him – that the program of giving "free land" to investors was for Indian Trials only and otherwise would stop, cf. Tr. 10/10/18 at 154 – had not been fulfilled. Instead, "more and more land was being given away to investors." Id. The only money he thought Mantria was getting from the investors was their down payments, which he later realized was a mistaken assumption. Id. at 154, 258-59.

B. Green energy phase – McKelvy's declining expectations. This section sets out the disconcerting information given to McKelvy on Mantria's supposed successes with Biochar and with green energy systems, starting in the summer of 2009 and continuing into the fall of 2009.

44. Green energy problems – 8/09 to 11/09. In addition to the evidence of what Wragg and Knorr told McKelvy about the decline in sales of Mantria's homesites, McKelvy also learned, in late summer 2009 to November 2009, that there were a number of troubling issues and delays with Mantria's green energy program.

45. McKelvy was aware that CDI did not build a plant for Mantria in 2009, as had been intended. McKelvy acknowledges that he appreciated that Mantria's and CDI's joint failure to build the Dunlap Plant was a possible sign that Lurvey's claims of revolutionary successes were baseless. Cf. Tr. 10/10/18 at 59-60, 87-88. Even though McKelvy did not question the prospects of green energy systems, he knew that Lurvey did not fulfill the agreement to build a Biochar plant.

46. McKelvy never saw any revenue from carbon diversion, whether from the "billion-dollar contract" with CDI or otherwise. McKelvy concedes that, during the period from 3/22/09 onwards, the date of the email (D-241) attaching this purported contract with CDI ("Master Agreement") (D-249), to the date of the SEC deposition on 10/22/09, he was aware of no revenue from the carbon diversion technology. Cf. Tr. 10/2/18 at 154-57. He acknowledges

that, in October/November 2009, he began to question whether the dreams of success he and Donna had in Hawaii in December 2008 would not be fulfilled. Tr. 10/10/18 at 258-59.

47. McKelvy: Biochar not "perfected" or otherwise produced at Dunlap. McKelvy acknowledges, by as early as September 2009, that Wragg's repeated claims that Biochar would be "perfected" at the Dunlap plant "in two weeks," cf. 10/10/18 at 114, 118, were not true. He later learned that the [Dunlap] plant still wasn't producing" any Biochar. Id. at 114. McKelvy was disappointed by the shift from his enthusiasm at the ribbon-cutting in August 2009.

48. McKelvy became aware that the "ahead of the curve" assessment in the CNN.com story was baseless. During the period of September to November 2009, McKelvy became painfully aware that Mantria had made little – if any – progress in its efforts to produce commercially viable Biochar and sell carbon diversion systems.

49. McKelvy reluctantly realized that whatever the theoretical support for converting trash to cash, Mantria was not able to produce it. From the spring of 2009 through August 2009, when he attended the ribbon-cutting at the Biochar plant in Dunlap, McKelvy was enthusiastic about Mantria's green energy program. But his interest diminished in the months of October and November 2009. None of Wragg's promises of successful testing was fulfilled. McKelvy acknowledges that he did not give the investors any contemporaneous information on Mantria's multiple failures or delays.

50. Wragg's purported contacts with an Ivory Coast official led to no system sales. McKelvy acknowledges that, because the Ivory Coast did not purchase any carbon diversion system, Wragg's claims of a big sale to this African country were exposed as meaningless. While production delays are normal in all businesses, especially start-ups, this failure, among others, left McKelvy with the sense that something was drastically wrong.

51. McKelvy heard about EarthMate in October 2009, shortly before he learned of the SEC's investigation. As McKelvy testified, he learned about Wragg's "cozy" relationship with Cary Widener and a new Wragg company, EarthMate, created to sell carbon diversion systems instead of Mantria Industries. Mantria owned 50% of EarthMate while Widener and John Seaner owned the other 50%. Tr. 9/26/18 at 257. This came shortly before he (McKelvy) learned of the SEC investigation, which would have been in mid-October 2009. Tr. 10/10/18 at 108-10. He vividly recalled his phone call, made from a Safeway parking lot in Colorado, to Donna about this development. In that call, McKelvy told her that Wragg was trying to push them out of Mantria Industries and to sell the carbon diversion systems through Earth Mate instead. Id. McKelvy confirms that, as a result of this change in Wragg's plans, McKelvy told Donna, "[W]e'll worry about that later, we've just got to keep an eye on the investors." Id. at 108.

52. After learning that he and Donna were being pushed out of Mantria Industries, McKelvy suspected that Mantria had exhausted its revenues and he "decided [he] was no longer raising money." Shortly after he called Donna from a Safeway parking lot, McKelvy began to suspect that Wragg's decision meant that Mantria had exhausted whatever funds were produced by homesite sales. McKelvy had also then decided that he was going to "shut[] the doors" at SOW and possibly go back into selling insurance. Tr. 10/10/18 at 102-03.

53. Shortly before the SEC froze Mantria's bank accounts, Wragg told McKelvy that he was unable to keep up with repaying debt owed to the investors. As he testified at trial, McKelvy acknowledges that he learned from Wragg "right before" the SEC froze Mantria's money, that the company was not paying the debts it owed to the investors. Tr. 10/10/18 at 146; see also id. at 114-15, 118.

54. When McKelvy testified at trial about Romero and Josh Juhasz, he cited the good news in their reports of "pre-orders." McKelvy acknowledges that, at trial, he stated that he was enthusiastic about the claims made by Romero and Juhasz, during the period May through September 2009, that they had garnered a large number of pre-sales for Mantria. McKelvy also testified that, "To this day I have no reason to believe that what they were telling me was not true, [that there] were pre-sales [of the Biochar]." Tr. 10/10/18 at 80-81.

55. Romero had a heated conversation with McKelvy in October or November 2009. When he was interviewed in Denver by the FBI on 2/9/16, Romero stated that he angrily complained to McKelvy about Wragg. This conversation occurred the day before he (Romero) was contacted about the SEC's investigation, which would seemingly place this conversation sometime in October 2009. Romero recalled that he told McKelvy that Wragg had not paid him the money he was owed for work he did on Mantria's websites and other IT related work. Romero said he also told McKelvy that Wragg was a liar and a cheat, and that he did not trust him.

56. Romero: McKelvy had "a slow realization" about Mantria. Romero told the FBI that he did not consider McKelvy to be a bad person; that McKelvy had told him that he was trying to pay back his investors; and that he (Romero) believed that McKelvy trusted Wragg's representation that Mantria was a genuine opportunity. When asked how McKelvy did not notice anything was wrong with Mantria, Romero said it was his "sunk cost bias" (i.e., you see the problems but keep doing what you had been doing because you have put so much time/effort in already). Romero said that McKelvy did not want to believe that something was wrong with Mantria and that McKelvy had "a slow realization" about Mantria.

57. McKelvy acknowledges that, during the heated conversation with Romero, he believed that Romero's point about Wragg was correct, but he did not want to tell that to Romero. McKelvy acknowledges that, at the time Romero was complaining about Wragg's dishonesty, he believed that Romero was correct, but did not want to tell him that.

58. McKelvy: "From the October deposition [on], a lot of stuff started coming to light." At trial, McKelvy testified that, "in May of 2009 at those [sem]inars, I truly believe [that what I said there] was the truth." Tr. 10/11/18 at 21. But, as McKelvy stated during the 10/22/09 deposition, "a lot of stuff [had] started coming to light …, stuff's starting to get into my mind and now I'm starting to look back and say [to myself] what was going on[?]" Id.

59. By the time of the SEC deposition on 10/22/09, McKelvy was in the midst of reaching his "tipping point." During the period when he received notice of the first SEC deposition (initially set for 10/15/09); during the time he was answering questions at the deposition; and during his heated conversation with Taylor Romero, McKelvy realized that Mantria was built on Wragg's lies, that he (McKelvy) had passed these lies to the investors, and that Mantria was unprofitable. McKelvy acknowledges that he "had his head in the sand" – the colloquial term for

being willfully blind – to Wragg's lies, as well as to the status and repeated failures of the green energy technology. McKelvy did not know of anyone who had advised the investors that their investments were precarious ones. McKelvy acknowledges that he repeated the positive information he received from Wragg and Knorr to the potential investors, emphasized significant returns on their investments, and that he did not inform them of the delays in the green energy technology. McKelvy acknowledges that a key component of a securities fraud scheme, as articulated by SEC attorney Kurt Gottschall, is informing investors in a start-up of actual or potential losses. See Tr. 9/27/18 at 198-99.

60. McKelvy realizes that he had "his head in the sand" or was willfully blind by continuing to market Mantria investments and/or not disclosing adverse information to the investors. McKelvy now understands that information about Mantria's failing business prospects would, under the Court's instructions, "reasonably be expected to be of concern to a reasonable [investor]."[8] McKelvy further understands that, after he reached this point – his "tipping point" – he could not properly encourage any investor to invest more money just because he (McKelvy) hoped, in good faith, that the green energy technology would later prove profitable.

61. Summary of McKelvy's acknowledgements of negative information. McKelvy acknowledges that, as noted above at ¶¶ 43-56, those events, when added together, formed his "tipping point" days before the SEC deposition on 10/22/09 which left him with the realization that Wragg had lied to him about key aspects of Mantria's operations including issues with green energy technology, Mantria's revenues and financial condition.

62. McKelvy acknowledges that, despite his stated plan to reform his marketing practices, he did make the following efforts to market Mantria investments as before:

- Sent a blast email, dated 10/12/09, from SOW to potential investors, including George "Jeff" Anderson regarding an upcoming webinar (10/14/09) about [MI], claiming "[W]e are currently working with Waste Conversion System buyers that total $510 Million … in potential sales demand." (G-GA-19, not admitted during trial).
- Sent a blast email, on 10/15/09, from SOW to potential investors, including Carla Madrid, regarding an upcoming webinar, claiming, "You could earn great returns investing in what we believe is the most revolutionary renewable energy technology in the world …. We are currently working on waste conversion system buyers that total $510 million in potential sales demand and that's not counting the bioproducts buyers we have lined up as well." G-CM-12; Tr. 10/2/18 at 196 (Madrid).
- Sent a blast email, on 10/27/09 (five days after his SEC deposition), to potential investors, including Madrid, in which he said he was looking to find a new direction for SOW and that he did not want to be "under the microscope;" he said that "unpleasant surprises have popped up," without any explanation of what he meant. G-CM-19; Tr. 10/2/18 at 198-99 (Madrid).

[8] The Court instructed the jury that a "false or fraudulent … failure to disclose must relate to a material … matter. A material [matter] is one which would reasonably be expected to be of concern to a reasonable and prudent person in relying upon the representation or statement in making a decision." Instructions, Wire Fraud – "Scheme to Defraud or to Obtain Money or Property" Defined.

- Sent a blast email, on 11/1/09, to potential investors, including Anderson, in which he said that, "No, it is not too late to get involved in the 25% of 'Waste Conversion System Sales' opportunity presented by [MI]," referring to an upcoming webinar on "Tuesday" (11/3/09). G-GA-21.
- Sent a blast email, on 11/3/09, to potential investors, including Madrid, pitching green energy, claiming that Mantria would be able to produce much more energy than first projected. G-CM-6; Tr. 10/2/18 at 199-201.
- Failed to disclose in any of those blast emails that the SEC was investigating Mantria or that he had been deposed by the SEC.
- Sent a blast email 11/18/09[9] to investors, in which McKelvy informed investors that the SEC filed its complaint, but claiming that "we have a fully operational plant in Dunlap, TN." (G-DH-16.
- McKelvy held a telephone conference with investors on 11/19/09 that was recorded by Jerry Lowe of the Colorado Division of Securities, in which he acknowledged that the SEC was investigating Mantria. McKelvy told the investors that the Ponzi scheme allegations were ludicrous because "all the investors had collateral."

III. McKELVY'S RESPONSE TO CLAIMS IN GOVERNMENT CLOSING.

63. <u>McKelvy denies that "This was a scheme cooked up by Wayde McKelvy," as claimed by the government</u>.[10] McKelvy concedes, as set out above, that there was a "tipping point" reached in October/November 2009, when he realized that Wragg was a habitual liar in at least some of his representations about the status of the green energy technology and the Mantria investments. But McKelvy flat-out denies that he "cooked up" the fraudulent investment scheme of which Wragg was convicted. Cf. Tr. 10/12/18 at 8 (government closing).

64. <u>McKelvy acknowledges that Mantria's investors included retirees, but denies that he "target[ed]" those who were "elderly," "unsophisticated" or "naive</u>." Cf. Tr. 10/12/18 at 8 (closing). McKelvy closely observed the testimony of all the investor witnesses. All of the investor witnesses, who testified about events which occurred nine to eleven years earlier, appeared articulate and mentally quick. McKelvy further observes, from what he saw in court, that none of these witnesses appeared to be "elderly," "unsophisticated," or "naïve." While the government presumably could have called a witness who met this description, they did not do so. The investor witnesses who testified during the trial included educated professionals including John Marvin, who sold his business for approximately $800,000; Bruce Kalish, a retired Air Force Lt. Colonel, who worked as a comptroller in the Air Force, and performed financial management work for the Department of Defense and NASA; George "Jeff" Anderson worked in the computer technology industry; and Carla Madrid, who had over 20 years-experience in accounting and worked as an accounting manager for an aerospace company. In addition, the investor witnesses who testified at trial were not "elderly" when they invested in Mantria. The investors who testified at trial were the following ages when they first invested in Mantria: Holl

[9] This email was sent two days after the SEC complaint, charging Wragg, Knorr, McKelvy and Mantria with securities fraud, was filed on 11/16/09.

[10] There is some confusion by the government as to who they allege originated the scheme. Here, the government claims it was McKelvy; elsewhere it was Wragg: "that's why he joined [Wragg]." Tr. 10/12/18 at 87.

59 years old; Marvin 64 years old; Wahl 44 years old; Carty 51 years old; Anderson 62 years old; Kalish 51 years old; and Madrid 42 years old.

65. One of the primary characteristics of the investors McKelvy sought were those who read the Denver Post. Cf. Tr. 10/12/18 at 8 (closing). McKelvy agrees that he had a primary target group – those who read the financial section of the city's leading newspaper. He also wanted to reach those who were flexible enough to listen to someone who had a non-traditional investment approach – an approach which was different than that of Suze Orman.

66. McKelvy's apparently contradictory testimony in his SEC deposition came at the time he reached his "tipping point." McKelvy also stands by every word of his answer to questions raised on cross by the government as to what he said in the 10/22/09 SEC deposition, which answers seemingly contradicted his trial testimony. When he gave this testimony at the deposition, he had started to reach his "tipping point" and he candidly stated that he realized that Wragg was a habitual liar, as Romero had told him. However, McKelvy's understanding of Mantri on 10/22/09 was vastly different from his understanding of Mantria throughout all of 2008 and 2009 up until October when he reached this "tipping point".

67. McKelvy denies any implication by the government that the 3.0 program, which "gave" homesites to investors for free, was his idea. Cf. Tr. 10/12/18 at 8, 11 (closing). McKelvy is not a lawyer but he observed, of course, the testimony at trial. Wragg was not called by the government and neither Knorr nor any other witness said any such thing. McKelvy's testimony on this point was clear – when he received the email that included information on the 3.0 program, he questioned Wragg about the program and Wragg told him that it was only used with Indian Trail Estates and with VIP buyers. The government did not present any evidence to contradict this testimony.

68. McKelvy agrees that, by the time of the SEC deposition on 10/22/09, he realized that "the money in Mantria [was] coming from [h]is people," but he denies that he knew this at the time he actually raised money. Contrary to the government's claim that McKelvy knew at the time he raised the money that Mantria was being operated as a Ponzi scheme, Tr. 10/12/18 at 20 (closing), he denies that he knew this when he was successfully raising money. As detailed above, it was not until October/November 2009 that a combination of circumstances, including the repeated delays with the green energy technology and his conversation with Romero, pushed him to a "tipping point" of realization.

69. McKelvy acknowledges that he made a mis-statement at one of the Speed of Wealth seminars regarding Mantria's "books." McKelvy concedes that he used the term "books" in different ways on different occasions. When he told investors that he looked at Mantria's "books," see Tr. 10/12/18 at 20-21 (closing), he realizes that these words could have been understood as meaning the formal "financial records." See Tr. 10/5/08 at 110-11 (transcript of the SEC deposition on 10/22/09 read into record). If McKelvy had been more precise, he would have said, as he did elsewhere, that he only looked at Mantria's so-called "pro formas." Cf. Tr. 10/12/18 at 20-21 (closing). By the term "pro formas," McKelvy meant the daily real estate sales reports ("DSR"), reports of real estate sales activity such as the 2008 Year-End report, and the revenue projections for the carbon diversion/green energy technology prepared by Volpe.

See Tr. 10/10/18 at 91, 143. McKelvy affirms his testimony at the SEC deposition that he had not looked at the formal financial records since he initially met Wragg, 10/5/18 at 110.

70. Before he reached his "tipping point," McKelvy did not intentionally understate the risks of investing in Mantria. While McKelvy acknowledges that he realized in October/November 2009 that he was then underestimating the risk of investing in Mantria, he denies that he consciously avoided raising this issue with the investors before then. While Flannery did, as the government argued, Tr. 10/12/18 at 22 (closing), emphasize riskiness in the PPMs, McKelvy did much the same thing in the "Very Important Points," D-105, sent out by Donna to all potential investors. Tr. 10/10/18 at 135-36. McKelvy's specific warning was, "You understand the grave risk involved with this investment opportunity." Because this language was on a form which McKelvy created and which the investor had to sign, McKelvy maintains that D-105 showed that his intent was no less honorable than was Flannery's. Also, McKelvy advised potential investors that the only investment where you're guaranteed not to lose any principal is in U.S. Treasuries or Bonds. JL-3 at 46 (Transcript of May 7, 2009 Seminar).

71. McKelvy denies that he ever knew that Wragg paid Bryant to fraudulently pad the appraisals. While he does not dispute the testimony at trial by Tisa Dixon that Wragg requested Bryant to inflate the appraisals on Mantria homesites, cf. Tr. 10/12/18 at 24 (closing), McKelvy did not have any knowledge at the time of the illicit nature of this relationship. If he had thought about it at the time he realized that Romero was correct and that Wragg was a habitual liar, he might have also realized that Wragg may have lied about the appraisals, although he would not have had the extent of knowledge as did Dixson. There was no evidence that McKelvy was aware that the appraisals had been inflated. To the contrary, the only documentary evidence introduced at trial concerning manipulation of appraisals was D-95, an email dated July 13, 2009, between Gary Wragg, Troy Wragg and Knorr that they needed appraisals which were inflated to $70,000 per lot to cover shortfall in collateral. McKelvy was not listed as a recipient of the email and there was no evidence that McKelvy received a copy of the email or that he was aware of its contents.

72. McKelvy recognizes that there were aspects of his sales pitch which were too aggressive. McKelvy acknowledges that, as the government argued, his presentations were "charismatic, full of … circular logic." Tr. 10/12/18 at 8 (closing). For example, when McKelvy used the term "infinite rates of return," Tr. 5/7/09 at 95 (SOW seminar), he was likely the only person in the room who understood what he meant. "Infinite rates of return" can be gained if, but only if, one assumes as McKelvy did, that money obtained by the arbitrage technique was "free" money. Only money which was given to an investor would be "free;" borrowed money is not "free," because the borrowed money and interest would have to be paid.

73. McKelvy admits that he was civilly culpable and that he was, in effect, addicted to selling investments in Mantria. McKelvy wholeheartedly confirms his trial testimony that Wragg and Knorr used him in their fraud scheme. But he denies the government's claim that he pointed his finger at others – "[it's] never his fault." Tr. 10/12/18 at 89 (closing). McKelvy told the jury that he was partly culpable for the net loss to investors of $37 million. Tr. 10/9/18 at 38-39. He did not contest liability as to any aspect of the civil suit brought in by the SEC in the District Court in Colorado. McKelvy agrees that, in all likelihood, the investors in Colorado never would have lost their money if he did not pitch the investment opportunities in Mantria.

McKelvy acknowledged that he introduced the investors to Wragg and Mantria. Id. at 39. As McKelvy said at trial, "The Kool-Aid was tasting good to me, you know, let's keep drinking the Kool-Aid." Id. at 41. "[L]istening to [the] investors" who testified at his trial was (gesturing) a very low point in his life. Id. at 38.

74. McKelvy acknowledges that he was gullible – to a fault – to believe that Wragg and Knorr, with almost no training, could devise a solution to three of the world's biggest problems. McKelvy knew that three of the world's biggest challenges were: (1) finding a pollution-free source of energy, (2) which would have negligible cost, and (3) which would rid the planet of trash and landfills, a threat to our environment. For McKelvy to be taken in by Wragg and Knorr, under the pretense that they and Michael Lurvey rather than any of the big energy companies had solutions to these three global challenges and that Wragg and Knorr would pay him millions of dollars in commissions to market investments in their green energy solutions was, at best naïve, and at worst foolhardy, under the adage "too good to be true." McKelvy acknowledges that he repeatedly got carried away by thinking about how rich he and the investors would be getting. Cf. Tr. 10/10/18 at 68 (McKelvy's and Donna's being very impressed on their trip to CDI in Hawaii).

75. McKelvy denies that Flannery ever asked him if he were being paid a commission. Although the evidence shows that Flannery made numerous attempts to learn from Wragg if any commissions had been paid, McKelvy denies that Flannery ever asked him about any commissions and denies that he was aware of any responsibility of putting commissions into the PPMs. In addition, Flannery never testified that he asked McKelvy whether Mantria was paying him a commission.

76. McKelvy agrees that he told investors that they had not "paid [him] a dime." Tr. 5/21/09 (seminar) at 42. He also agrees that he told investors that they should be concerned about fees charged by mutual funds, even for index funds, which he said averaged 1.75 percent a year. Tr. 5/7/09 (seminar) at 9. As so phrased, he maintains that that language was accurate – as far as he knew, he was being paid by Mantria, not by the investors.

77. McKelvy denies that he was a part of a "criminal partnership" with Wragg and Knorr. Contrary to the government's assertion that "[Wragg] was not alone. Troy had partners in this scheme," Tr. 10/12/18 (closing) at 31, there is no testimony from Wragg or Knorr that would support this claim. McKelvy is keenly aware that the government chose to give a 5K to Knorr and planned to give Wragg a 5K when he agreed to plead guilty. Knorr testified for hours about how she and Wragg had given knowingly false information to McKelvy, over a 2-plus year span. She did not testify that McKelvy knew that the information they provided him was not true.

78. McKelvy denies that Knorr's guilty plea to the ten counts in the indictment are evidence of his guilt. McKelvy observed that, during its closing, the government contended, as stated in the transcript:

> You heard from Amanda Knorr when she took the witness stand. She admitted that she conspired with Troy Wragg and Wayde McKelvy to commit this fraud.[11]

Knorr's guilty plea is the only "evidence," with which McKelvy is familiar, where the government attempted to tie Knorr's testimony to his guilt. Otherwise, by omitting any reference to any other evidence from Knorr, McKelvy believes that the government had nothing to show for Knorr's extended testimony. Accordingly, McKelvy contends that Knorr's testimony was entirely favorable to him.

79. McKelvy acknowledges that he insisted that investors sign certain papers, before enrolling them as investors. Cf. 10/12/18 at 35. He acknowledges that these papers contained both warnings and waivers. And McKelvy acknowledges that investors may have felt rushed by the paperwork process. Cf. id. at 8. But he denies, contrary to the government's assertions, that these were extraordinary requests. McKelvy picked up these techniques from watching other insurance salesmen, such as himself, and watching real estate and automobile salesmen.

80. McKelvy admits that he was not as good at picking investments as he would have liked. The government was correct when it claimed that there were several failed investments in the investment clubs he was involved with before Mantria. Cf. 10/12/18 (closing) at 36. But, McKelvy protests that the implication of the government's argument – that he should have advised the potential Mantria investors that the investment clubs he organized had not done well. In McKelvy's personal experience, he has never known anyone who made a point of disclosing his or her prior recommendations which did not turn out well.

81. McKelvy admits that he was not a good husband to Donna and not as good a role model as he could have been for his twin daughters. McKelvy partly agrees with the government's allegation that he "was not a good family man." Tr. 10/12/18 (closing) at 36. He is not proud that he spent many hundreds of thousands of dollars if not millions, on gambling, boozing, and hookers. But he denies that he was not a good father for his daughters. More to the point, he wonders why the government felt it was necessary to argue this to the jury. Likewise, was it because they realized that they had almost no evidence of McKelvy's criminal intent? Was it because they were worried, in that they did not call Wragg and in that his associate Knorr did not give one sentence of substantive testimony against him? In his opinion, the government's argument about his "audacity" in attempting to distinguish his activity from a Ponzi scheme cannot be based on his sorry choices on a lifestyle, but should be based on evidence, not name-calling.

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[11] Counsel's comment: The quoted passage in the government's closing would seem to be directly contrary to the Court's instruction prohibiting such arguments. The instructions stated, "You must not consider a witness's guilty plea as any evidence of the defendant's guilt. The decision to plead guilty was a personal decision about the witness's own guilt. Such evidence is offered only to allow you to assess the credibility of the witness; to eliminate any concern that the defendant has been singled out for prosecution; and to explain how the witness came to possess detailed first-hand knowledge of the events about which the witness testified. You may consider the witness's guilty plea only for these purposes." [Court's footnote cites CA3 model jury instructions 4.19, citing, inter alia, United States v. Universal Rehabilitation Services, Inc., 205 F.3d 657, 667 (3d Cir. 2000) (en banc).]

82. McKelvy acknowledges that he said numerous things which, to use the government's term, were "misleading." Cf. 10/12/18 at 38. The government argued that McKelvy was not eligible for a "good faith" defense because he had said things which were "misleading." Id. The government also argued – quite differently – that McKelvy was not eligible for a "good faith" defense because he had said things which were "lies." Id. McKelvy's response to these two allegations is also quite different. On the one hand, as to the "misleading" allegation, McKelvy admits that he made many misleading statements. Any time he said something where he was repeating what Wragg or Knorr had told him about Mantria's successes or bright prospects would be "misleading." McKelvy also acknowledges that it was misleading for him not to specify the percentage commission he was paid by Mantria. On the other hand, McKelvy denies – with the exception of passages identified above – that he "knowingly made false statements, representations, or promises to others," as the Court had instructed the jury was necessary.[12]

83. McKelvy denies – as he did at trial – that his refusal to apply for an SEC "license" was for an improper reason. McKelvy maintains, contrary to the government's assertion in closing, cf. Tr. 10/12/18 at 39, he refused to get the necessary "license"[13] for the same reason as do many honest Americans who "avoid" regulations "if you can." Tr. 10/10/18 at 263. Wragg's request that McKelvy take the necessary courses/exams to become a registered broker was to enable Mantria to "go public" and raise more money by so doing. Id. at 279-80. Contrary to the government's suggestion, it had nothing whatsoever to do with doing things "on the up and up." The government's claim that McKelvy's failure to get a "license" was evidence of his bad faith was a total mischaracterization of what he had said.

84. When McKelvy said during the SEC deposition on 10/22/09 that MFL was a financial institution, he was not an expert who could say whether MFL, as a matter of fact or law, was a "financial institution." The government asserted that "the defendant himself told you [MFL] was a financial institution." Tr. 10/12/09 (closing) at 42. The government was making a reference to a passage in its cross-examination of McKelvy in which the government asked whether it was not correct that he had stated in the 10/22/09 SEC deposition, "Mantria 17 [one of the private offerings] is a Tennessee financial institution, a commercial bank." Tr. 10/10/18 at 243. Putting aside the legal question of whether the government's use of this passage from the SEC deposition was in context,[14] McKelvy's testimony that Mantria 17 was a "Tennessee financial institution" was clearly not a legal or expert opinion because McKelvy is neither a lawyer nor an expert on Tennessee banking procedures. Rather, this was mere bootstrapping by the government.

85. McKelvy acknowledges that the government was partly correct when it claimed that he was a "master manipulator." McKelvy understands that his style as a salesman was very aggressive. But he maintains that, unlike Wragg and Knorr, he did not make statements which were knowingly, willfully, and intentionally false. He recalls the testimony using that phrase – it was Cary Widener who said that Wragg was a "master manipulator." Tr. 9/26/18 at 251, 257.

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[12] Court's Instructions at 79.

[13] As McKelvy mentioned below, the government's term "license" is more formally referred to by the SEC as "registration as a broker."

[14] Counsel advises that the question in the SEC deposition was on a totally different point and McKelvy's response was just a passing one. Tr. 10/22/09 (SEC deposition) at 97.

86. McKelvy maintains, as the extensive testimonial and documentary evidence shows, that he was a victim and a dupe. Contrary to the government's claim, cf. Tr. 10/12/18 (closing) at 84, there was hours of testimony and hundreds of documents showing that Wragg and Knorr treated McKelvy much the same way they treated the investors – they provided McKelvy with false information about Mantria, its land sales, including the 2008 Year End report, which stated that Mantria Communities would earn $14.3 million in revenues for 2008 and the capabilities and status of the carbon diversion/green energy technology. McKelvy agrees, as he stated at trial, that he and Wragg were "best friends, confidants, business partners," id., but insists that this did not mean that they were co-schemers, as charged. Although McKelvy did use a false name when he was trying, after the SEC had seized bank accounts of Mantria, Wragg, Knorr, and himself, to attract interest in his approaches to investing, that does not mean that he was a fraud.

87. To borrow the government's apt phrasing, Wragg indeed was a "25-year-old, slick talking kid." Cf. Tr. 10/12/18 (closing) at 84. McKelvy agrees that he was unlikely to be taken advantage of by this "kid," but knows that he was not the only one among the participants in the Mantria investment saga who was duped by Wragg. The others were: Chris Flannery, Dan Rink, Steve Granoff, Robert Volpe, Cary Widener, and John Seaner.

88. McKelvy was embarrassed that he felt he could not use his own name, but used a pseudonym to avoid what he thought was unfairness. Cf. Tr. 10/12/18 at 84. No, McKelvy is not, and had never presented himself, as the government claimed, as "doe-eyed" or as an "altruist." Yes, McKelvy pumped himself up at any opportunity and yes, he has used aliases. He does not have a count, but suspects that hundreds falsely claim – as he did – to be on the NY Times Best Seller list. Id at 86. And he knows that Elton John's birth name was Reginald Kenneth Dwight. And no, he did not solicit investment funds and did not commit any fraud in connection with his post-trial attempts at promoting his book and his theories. McKelvy admits to having a "swelled head," but he could not find a way to get a job at that point.

89. McKelvy denies that he and Wragg "talked on the phone every night," as the government argued. Cf. 10/12/18 at 85. McKelvy recognizes that what the government said about his phone calls with Wragg sounds sinister, but it is simply not true. The government chose not to call Wragg as a witness and Knorr did not testify about the content of any phone calls between Wragg and McKelvy. McKelvy did not discuss any fraud scheme with Wragg in person or on the phone.

90. McKelvy denies the claim that the emails Wragg and Knorr sent him were the product of his (McKelvy's) "papering it." Cf. 10/12/18 at 85. McKelvy denies the implicit claim that he had a "super-human" power to implant in the minds of Wragg and Knorr the scripts for "all these emails with all these projections and all that stuff." Id. McKelvy also denies that there was anything fatalistic about Wragg – from everything he knew and now knows about him (Wragg), McKelvy is not aware of any sign that Wragg wanted to or did (a) concoct paper "projections and all that stuff" to make McKelvy appear to be an innocent victim and (b) ensure that there was ample evidence of fraudulent statements against himself and Knorr. Moreover, McKelvy did not hear one word of evidence from the remaining cooperating witness, Knorr, to support this fantastic gambit.

91. "He had to make [the paperwork] look good." Cf. 10/12/18 at 86. Putting aside the government's implicit argument that McKelvy could perform magic by, among other things, convincing Wragg and Knorr to say things they did not want to say, thereby landing them both in federal prison, McKelvy takes the government's "make [the paperwork] look good" claim is, ironically, an unintended confirmation that he, indeed, had a solid defense. In other words, McKelvy believes that unless he could do the impossible, the government's contention is really a recognition that he has a meritorious one.

92. McKelvy did not "blame Flannery," as the government put it; rather, he states that on some matters, Flannery corroborated his (McKelvy's) testimony, and on other matters, Flannery lied to the SEC and to the jury. As for his corroboration of McKelvy, Flannery, for example, drafted (together with Wragg and Knorr) a document (D-85) a FAQ sheet – responses to questions from investors. A final version of the FAQ document was emailed to Carla Madrid and other Mantria investors. G-CM-21. This FAQ sheet stated, among other things, that Mantria had sufficient collateral in the land to cover the investments. Tr. 10/2/18 at 234-36. Flannery also gave testimony describing the state of Mantria's development of the land when he visited there in the fall of 2007, which description was largely similar with that of McKelvy. See ¶ 25, above. Moreover, although McKelvy did not accuse Flannery of anything at this point, he did note that McKelvy, unlike Flannery, a self-described expert in real estate matters, acknowledged that he understood the Mantria 3.0 program as giving free land to the investors; in addition, unlike Flannery, McKelvy confronted Wragg, who then told him he would curtail the give-away program. Finally, although McKelvy did not attempt to shift any blame on this point to Flannery, counsel demonstrated that, it was Flannery's duty, as Mantria's sole attorney, to file the "Form Ds" as SEC attorney Kurt Gottschall testified. Tr. 9/28/18 at 122, 125-28.

93. McKelvy acknowledges that "he saw Troy lie to other people," but denies the government's suggestion that he knew that Wragg was lying, until he reached the "tipping point." Cf. 10/12/18 at 87 (closing). While McKelvy knows from his experience speaking to the public that repetition can help with any audience, he flat-out denies – and challenges the government to prove – that he knew Wragg was lying, until October/November 2009. During these two months, McKelvy did not make any completed sales but he did, as noted above at ¶ 62 (bullet points), send out several emails in an effort to encourage investors to make additional investments in Mantria.

94. Contrary to the government's contention, there was no lesson McKelvy should have drawn from the 2007-08 SEC investigation which could have helped him keep clear of Mantria's investments. The government argued that McKelvy did not learn his lesson by going through the first SEC investigation into his Retirement TRACS investment club. Cf. Tr. 10/12/18 at 89. But McKelvy believes that the government confused the two SEC investigations. While McKelvy resolved to make several changes in his marketing approach following the 10/22/09 SEC fraud investigation, he is not aware of any lesson(s) he should have learned from the 2007-08 TRACS investigation which would have helped him see through Wragg's and Knorr's many multiple lies regarding Mantria.

95. McKelvy denies that there was "anything to … learn from those mistakes," supposedly exposed during the 2007-08 TRACS investigation. Cf. Tr. 10/12/18 at 89 (closing). McKelvy is not aware that the SEC – unlike the traffic cop in the government's analogy – ever told him

that he had made any "mistakes." Nor did the government identify any such alleged mistakes in connection with the TRACS investigations. As to the government's question, "Did he contact a lawyer?," the answer is yes, he did: "So when I created these clubs, I went to an attorney in Boulder, he kind of told me how to lay it out to create LLCs." Tr. 10/9/18 at 52. McKelvy stated that he followed his lawyer's advice and the government did not even attempt to cross-examine him at this point. Also, the SEC terminated its investigation of McKelvy and TRACs without taking any adverse action against them or advising McKelvy that he was doing anything improper or that he should do anything differently.

96. McKelvy denies the government's allegation that he was let off from the 2007 SEC investigation in "by the skin of his teeth." Cf. 10/12/18 at 90. With all due respect to the government, if the tables had been turned and he had said this as a representative of the government, there is some chance that he would have been accused of making a false statement. McKelvy listened to the testimony of Kurt Gottschall, who was in charge of the "formal" investigation of McKelvy and Retirement TRACS. McKelvy knows, from what he heard in court and from what he read in the transcript, that Gottschall had testified in court that among the SEC's concerns in its investigation were:

- that the investors had "pooled" investor money;
- that one of the investments had "questionable collectability;"
- that McKelvy "was making certain [high-risk] investment recommendations;"
- that he might have been involved in "securities offerings which should have been registered under the federal securities laws," noting that the SEC does not attempt to discipline those who make "foolish investment decision[s];" and
- that McKelvy had not registered as a broker/dealer.

Tr. 9/27/18 at 168, 171-72, 173, 175.

McKelvy maintains that he is not familiar with any characterization by Gottschall that the SEC let him off "by the skin of his teeth." Once again, that was government's wishful thinking.

97. McKelvy also maintains that he did not willingly, knowingly, and/or intentionally fail to learn the appropriate "lessons." (a) Based on Bryant's experience, including 30 years as working as an appraiser for the state of Tennessee, McKelvy relied in good faith on the appraisals prepared by Bryant and believed (similar to Rink and Flannery) there was sufficient collateral to secure the investments; (b) While it is true that the PPMs stated that the investments were high-risk, Flannery, a securities attorney with 30 years' experience, drafted and was responsible for the contents of the PPMs; (c) McKelvy was told by an attorney that because he was seeking investors in LLCs, he was not subject to the laws concerning "securities;" and (d) Just as Flannery had presumably acted legally when he arranged for marketing of Mantria's securities by means of PPMs, rather than by prospectus, he was entirely within his rights to choose to avoid additional regulation by the SEC.

98. McKelvy acknowledges that the government was correct in asserting that, in hindsight, he was captivated by "dreams, not reality." Cf. Tr. 10/12/18 at 90. McKelvy maintains that the world would be a very different place if we all had the opportunity, for example, to have the equivalent of a three-year test drive, where you could turn things back if they did not turn out the

way you thought they would. But, as a "dreamer," he was in the company of apparently honest and intelligent people who were misled the same way he was, including Rink, Flannery, Volpe, Granoff, Widener, and Seaner. McKelvy denies – just as Volpe, Granoff, and Seaner did, that he was making "excuses" – rather, he was identifying the false and fraudulent sources of his information, as coming from confessed criminals Wragg and Knorr. Just as McKelvy did not have the super-powers to concoct the scheme regarding a company he knew nothing about, as noted above, getting falsified information from the two admitted con artists – just as the other six did – was an explanation, not an excuse.